



## REAL AND INTELLECTUAL PROPERTY TRANSACTIONS: REFLECTIONS ON COMMON THREADS

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*"There is no property on earth that does not derive  
pecuniary value from ideas"*<sup>1</sup>

### Introduction

Intellectual property and real property are entirely different in that one is tangible and the other is intangible but they are the same in relation to the benefits that accrue from their exploitation. The aim of this paper is to reflect on some of the issues that are common to real and intellectual property transactions with the aim of showing that commercial exploitation/monetary benefits can be realized from both. In tackling this, the paper seeks to outline major land transactions such as mortgages, leases, assignment, licenses and outright sale and then make a comparative study to show whether or not these form of transactions as it operates in the law of real property can find a place in intellectual property law since the law confers property rights on most things of value that we normally think of as being tangible things, occupying physical space, such as land or movable objects.<sup>2</sup>

### What is Property?

Property means a thing or things that are owned by somebody<sup>3</sup>. The word property has different meanings ascribed to it depending on the context in which it is being used. Nature on one part has provided for the division of property into moveable and immovable property<sup>4</sup> while English law further distinguishes it into real property and personal property<sup>5</sup>. Real property relates to land and those things, such as houses, barns, and office buildings. Personal property on the other hand refers all other things which are subject to individual rights whether they are tangible or intangible<sup>6</sup>.

The basis for the distinction between real property and personal property is rooted in history and rests upon the different remedies available in the event of interference with a person's rights

1 Mark Twain argued in a Statement of Mr. L. Clemens, Hearing on S. 6330 & H.R. 19853 before the Senate and House Comms. On Patents 55th Congress, 1st Sess. (1906).  
2 Marshall Leaffer, *Understanding Copyright Law*, LexisNexis, 3rd Ed. 1999 pp. 19  
3 Oxford Learners Dictionary, Oxford University press, 6th edition 2001.  
4 R. E Megarry and H. W. R. Wade, *The Law of Real Property*, Stevens, 4th Ed 2000 pp. 10  
5 Roger Sexton, *Blackstone's Study Pack, Land Law* Blackstone Press, 2000.  
6 John E. Cribben, *Principles of Law of Property*, University Textbook Series pp. 9

to property<sup>7</sup>. Thus because of the nature of the action, property which could be recovered by an action was termed real property, and other forms of property were categorized as personal property.<sup>8</sup>

The division of property does not stop here but proceeds to distinguish between tangible and intangible property. The former category includes items such as a car or television. The latter category which is also referred to as a chose in action is capable of ownership but is not a physical entity. Examples of this latter form of property include a debt owed by one person to another and copyright in an artistic work or literary work, the essence of such a right being the power of the holder to prevent other people from exploiting that work without permission. Intangible property is however as much property as tangible property in that its ownership can be transferred from one person to another.<sup>9</sup>

Private property has not only evolved from individual ownership to corporate forms, but its main point of reference has also shifted from "real" to "intellectual" property, that is, from material objects to ideas<sup>10</sup>. Intellectual property is the least respected form of property in our society mainly because it jars with some people's traditional sense of what property is. To these set of people, they live in the physical world and the non-physical is counter to the intuitions that life engenders.<sup>11</sup>

Whenever the word "real property" is used, reference is made to land as a type of property owned by a person who is usually in possession or has an immediate right to reversion. Land has been defined as "that which covers the earth surface (the top soil), the sub soil, things attached to it and other incorporeal hereditament enjoyed on land"<sup>12</sup>. It has also been defined as "the earth surface and everything attached to the earth otherwise known as fixtures and all chattels real. It also includes incorporeal rights like a right of way and other easement as well as profits enjoyed by one person over the grounds and buildings belonging to another."<sup>13</sup> As a result of the foregoing, whenever reference is made to property transactions, there is usually the presumption that it involves the sale of tangible property only but this is not always the case.

In modern times, properties classified as intangible property include copyrights, patents, designs, trademarks and trade secrets which are generally known as intellectual property. The concept of intellectual property is one that treats certain intangible products like physical things. Thus, intellectual property rights give rise to a form of property that can either be assigned, mortgaged or licensed.<sup>14</sup> David Bainbridge in his *Intellectual Property* text showed a classification scheme for property and how intellectual property fits within this scheme. He divided real property into tangible and intangible, and regarded tangible properties as those which are immovable such as land, and intangible as easements. He further divided personal property also into tangible and intangible properties as well with tangible property as movable

7 Mark P. Thompson, *Modern Land Law*, 2nd Ed. pp. 5  
8 Ibid. Mark P Thompson  
9 Ibid. Mark P Thompson, pp. 5  
10 <http://www.thememorybank.co.uk/papers/intellectual-property/> (assessed on 7/02/08)  
11 Brad Templeton, *A Radical Theory of Property* available at <http://www.templetons.com/brad/> (accessed 10/10/2007)  
12 I. O. Smith: *Practical Approach to Law of Real Property in Nigeria*, Ecowatch Publications (Nig) Limited 1999, pp. 5  
13 Section 2, Property and Conveyancing Law, 1959, which is applicable in the Western states.  
14 David Bainbridge, *Intellectual Property*, Harlow, Eng: Longman 2002, 5th ed, pp. 9

properties like a car, a desk, and a book, while intangible properties include cheques, shares, and intellectual property.<sup>15</sup>

Intellectual property is a property in the legal sense: it is something that can be owned and dealt with. Statutory forms of intellectual property are declared to be property rights, but even common law forms have been recognized as producing a form of property right. In the passing off case of *Leather Cloth Co. Ltd v. American Leather Cloth Co. Ltd*<sup>16</sup> the Court of Chancery recognized that the claimant had acquired a property in a trademark which was valid in equity.<sup>17</sup> The basic reason for intellectual property and the right afforded to its owners is that a man should own what he produces, i.e. what he brings into being. If what he produces can be taken from him, he is no better than a slave. As a result of the foregoing, intellectual property is the most basic form of property that can be owned or acquired because a man uses nothing to produce it other than his mind.<sup>18</sup>

Accordingly, the purpose of intellectual property is to grant creators or inventors certain kinds of exclusive rights on intangibles based on the analogy of property rights. Of course there is a general belief that there is no reason to extend real property rights to intellectual property rights.<sup>19</sup>

The term 'intellectual property' refers to a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia.<sup>20</sup> The law of copyright protects various "original forms of expression," including novels, movies, musical compositions, artistic expressions and computer software programs.<sup>21</sup> Patent law protects inventions and some kinds of discoveries.<sup>22</sup> Trademark law protects words and symbols that identify for consumers, the goods and services manufactured or supplied by particular persons or firms.<sup>23</sup> Trade-secret law on its part protects commercially valuable information (soft-drink formulas, confidential marketing strategies, etc.) that companies attempt to conceal from their competitors. The 'right of publicity' protects celebrities' interests in their images and identities.<sup>24</sup>

In England, the Trade Mark Act 1994 provides that a registered trade mark is a property right obtained by registration of the trademark.<sup>25</sup> The Act further provides that once a mark is registered, it becomes a personal property.<sup>26</sup> In Scotland, registered trademarks are regarded as incorporeal movable property. The Nigeria Copyright Act also makes reference to copyright as movable property that can be transmitted.<sup>27</sup>

15 Ibid. David Bainbridge.

16 (1863) 4 De GI & S 137

17 David Bainbridge, *Intellectual Property*, Harlow, Eng: Longman 2002, 5th ed, pp. 10

18 Ibid. David Bainbridge pp. 17

19 *Real v Intellectual Property*, Progress and Freedom Foundation. Center for the study of Digital Property available at [weblog.ipcentral.info/archives/2005/02/real\\_vs\\_intelle.html](http://weblog.ipcentral.info/archives/2005/02/real_vs_intelle.html) (accessed on 7/11/2007)

20 William Fisher. *Theories of Intellectual Property* available at [www.law.harvard.edu/faculty/fisher/iptheory.html](http://www.law.harvard.edu/faculty/fisher/iptheory.html) accessed on 7/11/2007

21 Section 1 of the Copyright Act 1988 provides for the categories of work which are eligible for copyright protection.

22 See Section 1(1) and (2) of the Patents and Designs Act 1971

23 See generally Sections 3, 4, 5, 10 etc of the Trademarks Act.

24 William Fisher. *Theories of Intellectual Property* available at [www.law.harvard.edu/faculty/fisher/iptheory.html](http://www.law.harvard.edu/faculty/fisher/iptheory.html) (accessed on 7/11/2007)

25 Section 2(1) of the Trade Marks Act 1994

26 Section 22 Trade Marks Act 1994

27 Section 11(1) Copyright Act, Cap 28, Laws of the Federation of Nigeria 2004.

Real estate or immovable property is a legal term (in some jurisdictions) that encompasses land along with anything permanently affixed to the land, such as buildings. It is often considered synonymous with real property, which is also sometimes called realty. This is in contrast with personal property that is sometimes called chattel or personalty.<sup>28</sup> However, for technical purposes, some people prefer to distinguish real estate, referring to the land and fixtures themselves, from real property, referring to ownership rights over real estate. The terms real estate and real property are used primarily in common law countries, while in civil law jurisdictions, preference is for the term immovable property.<sup>29</sup>

Ownership of property in most cases goes hand in hand with possession of property. Many people tie up the concept of property with possession. This causes confusion because property and even intellectual property is really about control. You want to own something so you can control it and in many cases, you still want to control it even when it is not in your possession.<sup>30</sup> Intellectual property is really about control. Yes, once put in tangible form you have something you can actually hold in your hand, but nobody pretends that the particular bits on a floppy disk or tape, or ink patterns on a page are what is valuable. The real value is in the intangible.<sup>31</sup>

In addition to the above, under the various Acts<sup>32</sup>, once an application for intellectual property is made, property rights immediately attach and the property becomes alienable and can be transferred either by assignment, testamentary disposition or operation of the law just like any other personal property.

The ownership of a property such as a land or a house connotes a situation whereby a person has an absolute right on such property. It is the totality or bundle of rights which a person has over and above every other person on the property.<sup>33</sup> When the right of a person to possess, use and dispose of a land is not subject to the superior rights of another, the right of ownership is said to be vested in him.<sup>34</sup>

Where a person is regarded as the owner of a property, be it a real property as in land or a personal property as in intellectual property, he has the right to dispose of it either by way of an assignment or give it away either conditionally through a lease/license or unconditionally by way of a deed of gift. He can even destroy it without facing any legal consequences.

In Nigeria, before the promulgation of the Land Use Act<sup>35</sup> a person could have an estate in real property either as a freehold<sup>36</sup> or as a leasehold estate<sup>37</sup>. However, with the coming into force of

28 Available at [www.wikipedia.com](http://www.wikipedia.com) (accessed on 7/11/2007)

29 Available at [www.wikipedia.com](http://www.wikipedia.com) (accessed on 7/11/2007)

30 Brad Templeton A Radical Theory of Property available at <http://www.templetons.com/brad/> (accessed 10/10/2007)

31 Ibid. Brad Templeton

32 Section 11, Copy Right Act 1990, Cap 28, Laws of the Federation 2004; Section 10, 11, 23 and 24 of the Patents Act and Section 26 of the Trademarks Act.

33 I.O. Smith: *Practical Approach to Law of Real Property in Nigeria*, Ecowatch Publications (Nig) Limited 1999, pp. 14

34 See *Abraham v Olorunfemi* (1991) 1 NWLR (pt 165) pp. 53

35 Cap 202, Laws of the Federation of Nigeria 2004.

36 This is also known as the fee simple. It is the largest estate possible in land and its owner can grant a lease to another out of his own freehold land. See *Alli v Ihusahiala* (1985) 1 NWLR (pt 4) 630 at 640; Osimiri J. Uche, *Modern Law of Landlord and Tenant in Nigeria*, Pam Unique Publishers, 1994, pp. 1

37 Second largest estate known in law. Osimiri J. Uche, *Modern Law of Landlord and Tenant in Nigeria*, Pam Unique Publishers, 1994, pp. 1

the Act, ownership of freehold estate ceased to exist as the Act vested ownership of all land in the State.<sup>38</sup> It should be noted that there exist under the provisions of the law a 'deemed right of occupancy' which is the right held by former land owners who had freehold interest or title to land or property by 1978. There is also the express right of occupancy which is given to individuals who acquire property after the promulgation. The right of occupancy is evidenced by a 'certificate of occupancy'.<sup>39</sup> The occupation and use of real property can also be in two ways, either as an owner or as a tenant.<sup>40</sup>

Intellectual Property Rights (IPR) are the rights of the owners of Intellectual Property to the exclusive use of that Intellectual Property,<sup>41</sup> so any person who generates intellectual property owns the rights in it. The status of ownership of an Intellectual Property right is the legal recognition a person (i.e. the author, inventor or trademark owner) receives for his creative efforts. Such right of ownership gives the individual involved, the right to fully exploit his Intellectual Property, since it evolved as a result of his creative and inventive efforts and so he has a right to own, sell, license or bequeath the intellectual property in much the same way as a real estate can be treated.<sup>42</sup>

## Transactions on Property

### Assignments

An assignment is a transfer or marking over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.<sup>43</sup> In Real Property, an assignment occurs when the owner of a property, also known as the assignor grants to another, called the purchaser or assignee, the whole of his interest or the residual of his interest in land without retaining a right of reversion.<sup>44</sup> In this instance, the person is deemed to have assigned his property totally to the purchaser, who becomes the legal owner of the estate in land and who can subsequently exercise acts of ownership. Once an assignment occurs, the owner can maintain an action against all, who trespasses or does any act that is inconsistent with his right of ownership including the former owner.

In Intellectual Property, an assignment involves the transfer of the title in a chose in action e.g the ownership of copyright is transferred to another (the Assignee) by means of a deed which is signed by or on behalf of the previous owner of copyright (the Assignor). It is a transfer of ownership of intellectual property rights from one entity to another and it is often required to be in writing and signed. In this instance, an assignment must be distinguished from an exclusive license, which is similar in many practical respects, but which does not involve the transfer of title.<sup>45</sup>

38 The authority to grant ownership of land is vested in the State Governor, who has to give the consent to assign any property within the state.  
 39 Section 9 of the Land Use Act, Cap 202, Laws of the Federation of Nigeria, 2004.  
 40 The laws which regulate landlord and tenant relationship in Nigeria varies depending on each particular State. See for instance, The Rent Control and Recovery of Residential Premises Law of Lagos State 1997, Landlord and Tenant Edict of Kaduna State 1990, Landlord and Tenant Edict no 4 of Rivers State 1988.  
 41 Section 9 of the Copyright Act, Section 2 and 14 of the Patent and Design Act, Section 5 of the Trade Mark Act.  
 42 IP Australia Business Strategies, *Ownership of IP rights*, [www.ipaustralia.gov.au/strategies/assignment.html](http://www.ipaustralia.gov.au/strategies/assignment.html) (accessed on 7/11/2007)  
 43 Black's Law Dictionary 119 6th ed. 1990  
 44 In Nigeria, before the Land Use Act, a person could assign the whole of his freehold or leasehold interest in land. The position is different under the Land Use Act as no absolute title to land exists under the Act. See I. O. Smith: *Practical Approach to Law of Real Property in Nigeria*, Ecovatch Publications (Nig) Limited 1999; pp. 113. All a person now has is 99 years and he can only assign this or the residual of 99 years.  
 45 David Bainbridge, *Intellectual Property*, Harlow, Eng. Longman 2002, 5th ed pp xivi. In case of Assignment, the Assignor transfers the ownership rights which he has over the property to another while in the case of a license, he only allows another person to use the property for some time subject to the fulfillment of certain conditions.

Assignable intellectual property rights include, among other things: copyright, patent or trademark registration or a pending patent or trademark application, unpatented inventions and designs, unregistered trademarks, trade secrets, certain asexually created plants, semiconductor mask works, commercial publicity rights of a person's name or likeness, and the rights to pursue protection or enforcement of any of those rights domestically or in other jurisdictions.<sup>46</sup>

There are however some important legal technicalities that go along with certain types of assignments. For instance, an assignment of a trademark without the transfer of associated 'business goodwill' can be fatal to enjoyment and enforcement of the trademark. Similarly, imperfect assignment of inventions by all the involved inventors may undermine future rights to enforce a patent.<sup>47</sup>

Thus, in the context of trademark law, assignment is where the rights to a trademark are sold by its owner to some third party. A trademark can be assigned from its owner to any third party as long as the goodwill (the value and name recognition) associated with that mark is also transferred. Most courts have interpreted this as a requirement that the assignor sells its related underlying assets, to ensure that the standards of quality remain the same (for example, a valid assignment might include the assignor selling the equipment it uses for making the related goods that are sold with the trademark, or the details of how to make those goods).<sup>48</sup> Where a trademark is assigned without the underlying goodwill, this is known as an 'assignment in gross' and is not considered enforceable or valid. In fact, if an assignment is in gross, the trademark will be deemed abandoned and neither party will have any rights in the mark.

Within the context of patent law, an assignment is when the rightful owner of a patent, often the inventor of the invention protected by the patent, transfers all of his rights in the invention to another person. That other person then has all of the legal rights granted by owning a patent, meaning he can prevent others from making, selling and using the invention. An assignment in this instance is done by having the patent holder prepare a formal assignment which is filed at the Patent and Trademark Office. The formal paperwork for the patent will then be altered to indicate that the patent has been assigned to a new person or entity.<sup>49</sup>

Assignment in the context of Copyright can be thought of as a disposal of the copyright by way of sale, hire, or by will.<sup>50</sup> The present owner or assignor can assign the copyright to another and, such assignment must be in writing signed by or on behalf of the assignor. However the assignment and other transmission of copyright need not be total or absolute, it can be partial. The assignment or transmission of copyright can be limited either in terms of the things the copyright owner can do, or in terms of the period of subsistence of copyright.<sup>51</sup>

46 What is an assignment of intellectual property [http://wiki.answers.com/Q/What\\_is\\_an\\_assignment\\_of\\_intellectual\\_property](http://wiki.answers.com/Q/What_is_an_assignment_of_intellectual_property) (accessed on the 9/11/2007).  
 47 Section 26(1) Trademarks Act; Cap 436, Laws of the Federation of Nigeria, 2004.  
 48 [http://www.quizlaw.com/trademarks/what\\_is\\_assignment.php](http://www.quizlaw.com/trademarks/what_is_assignment.php) (accessed on the 9/11/2007)  
 49 Ibid.  
 50 Section 11 of the Copyright Act Cap 28 Laws of the Federation of Nigeria 2004.  
 51 David Bainbridge, *Intellectual Property*, Harlow, Eng. Longman 2002, 5th ed pp. 84

**Licenses and Leases**

The word 'License' is gotten from the Latin word "Licentia" which means "freedom" or "liberty."<sup>52</sup> It is a personal privilege in the form of authority or permission granted a person to enter and use premises or perform some acts therein which would otherwise be wrongful or amount to trespass.<sup>53</sup> Thus a "license" in land law is ordinarily a permission given by a person known as the licensor to another (licensee) merely to do something on the land as it creates a privilege in favour of the licensee.<sup>54</sup> Similarly, in the field of municipal law, a license has been described as "a permit to do that which otherwise will be unlawful,"<sup>55</sup> or "a formal permission from the proper authorities to do or perform an act."

Under Intellectual property, licensing agreements are distinct from other business agreements in the sense that while the later generally deals with tangible products and services or finance, license agreements convey rights to intangible property created and defined by statute and technology and deriving value solely from proprietary possession to the exclusion of others.<sup>56</sup>

License agreements are contracts. As with all contracts, license agreements may be express or implied. The traditional license agreement is a document carefully drafted and signed by both parties, but a license agreement may be oral.<sup>57</sup>

In real property, the licensee does not acquire any proprietary interest whatsoever as he is only allowed to enter into or remain on the property of the licensor based on the licensor's permission and where such permission is absent; the licensee is nothing but a trespasser.<sup>58</sup> All that he has is a mere privilege and nothing more. He however has a right to possession against the whole world except the licensor and so can successfully maintain an action against any person except a person with a better title.<sup>59</sup> Licences can be created for a fee or gratuitously but even if it is created for a fee, legal estate is not passed to the licensee. However in cases of revocation, the licensee must be given reasonable notice and reasonable time to enable him remove his properties from the land.<sup>60</sup> What constitutes reasonable notice is however a question of fact that depends on the circumstances of each case.<sup>61</sup> It should however be noted that even in situations whereby the notice given to a lessee is shorter than what is provided for under the agreement, what he is entitled to is damages for loss of earnings as he cannot restrain the licensor from entering into possession or sue him for trespass.<sup>62</sup> Where however the license is a gratuitous one, it can be revoked at any time and the licensee would have no option but to remove his possessions immediately.

52 Brian G. Brunsvold and Dennis P. O'Reilly, *Drafting Patent License Agreements* BNA Books, USA 4th ed 2001 pp. 4.

53 I.O. Smith, *Practical Approach to Law of Real Property in Nigeria*, Ecowatch Publications (Nig) Limited 1999, pp. 233.

54 Herbert T. Tiffany, *The Law of Real Property* §829 (3rd ed 1939)

55 *La Plante v. State Bd. of Pub. Rds.*, 131 A. 641, 642 (R.11 1926).

56 Brian G. Brunsvold and Dennis P. O'Reilly, *Drafting Patent License Agreements* BNA Books, USA 4th ed 2001

57 *Ibid.* Brian G. Brunsvold and Dennis P. O'Reilly, pp. 13.

58 *Mobil Oil Nigeria Ltd v Johnson* (1961) 1 ALL NLR, pp. 93

59 *Harper v Charlesworth* [07 ER 1174, 1181]; *Ahioye v Ajalabi* (1998) 4 NWLR (pt 545) 296; *Chukwumah v Shell Petroleum Development Company* (1993) 4 NWLR (pt 289) 512; Chianu E., *Law of Trespass to Land and Nuisance*, Ambik, 2001, Chapters 1 and 3.

60 *Oyekoya v C.B. Oilwain Ltd* (1969) 1 ALL NLR pp. 80

61 See *Johnson J in Smith v West African Pictures Ltd* (1976) 6 CCHCJ at pp. 937.

62 *Ahu v Okusedun* (1975) 4 CCHCJ pp. 517

As for Intellectual Property transactions, a licensing agreement is done in the form of a partnership which exist between an intellectual property rights owner (licensor) and another (licensee), who is authorized to use such rights in exchange for an agreed amount (fee or royalty). A variety of licensing agreements are available and they may be broadly categorized as follows: Technology License Agreement, Trademark Licensing and Franchising Agreement, and Copyright License Agreement

In the instance of patent law, a license is an agreement between the owner of a patent and another person or corporation, where the owner allows the other person to make, use or sell the protected invention. However, for licenses under Copyright law, the copyright owner transfers something less than all of his exclusive rights in a protected work to another party. This can be through the transfer of just some of the rights (for example, the right to distribute but not the right to display) or a transfer of nonexclusive rights (for example, the new party can distribute the work, but the copyright owner can also continue to distribute the work). Unlike an assignment, a license does not need to be written or signed by the copyright owner, although it should be. The provision of the Copyright Act concerning licensing is set out under Section 10.<sup>63</sup>

It should be noted that in intellectual property generally, there can be exclusive and non-exclusive license. In an exclusive license, the seller retains ownership of the intellectual property rights, but licenses a set of rights over the intellectual property rights to a single party for their exclusive exploitation while in a non-exclusive license, the seller retains ownership of the intellectual property rights, but licenses a set of rights over the intellectual property rights to one or more parties.<sup>64</sup> Where a third party performs certain acts without the permission of the intellectual property owner, such act would be illegal.<sup>65</sup>

A practical distinction between real property transactions and intellectual property transactions is in the area of leases. A lease is the right to use or occupy property given by the lessor to another person, who is called the lessee for a fixed or indefinite period of time. In a lease, the lessee obtains exclusive possession of the property in return for paying the lessor a fixed or determinable consideration (rent). From the above, it can be deduced that because intellectual property is intangible, the permission that is granted to the person who wants to use the property is a licence and not a lease since in most cases, the Intellectual property owner still retains some control over the property granted to the other party and to create a leasehold, exclusive possession is important.<sup>66</sup>

In real property transactions, a lease which is otherwise known as a term of years is the second largest estate that can exist in law.<sup>67</sup> It is the grant of a right of exclusive possession of land to a person called the grantee/lessee for a determinable term or a fixed period which is usually less than the term that the grantor/lessor has on the land.<sup>68</sup> The lessor or landlord usually has a right

63 Copyright Act 1988, Cap. 68, Laws of the Federation of Nigeria 2004.

64 Nigel Atkinson, *Ownership in Outsourced Software Development Projects* Neoworks available at [www.neoworks.com/articles/html](http://www.neoworks.com/articles/html) (assessed on 7/1/07)

65 *City of Shreveport v. Brister*, 194 La. 615, 620, 194, 566, 567 (1939) (quoting 3 word & Phrases 987 (5th series)

66 Smith I.O, *The Law of Real Property in Nigeria*, LASU, 1st ed. 1995 at pp. 114

67 Section 3(1) (b) Property and Conveyancing Law. The first estate recognised in land law is the fee simple, which is also known as a freehold estate. Osimiri J. Uche, *Modern Law of Landlord and Tenant in Nigeria*, Pam Unique Publishers, 1994, pp. 1.

68 *Pan Asia Co. Ltd v Nicon Limited* (1982) 9 Scpp.1.

of reversion as he does not convey his whole interest in the property when the lease is being created. A lease may be created either orally or by deed. Where a lease is for less than three years, it may be created orally but once it is for more than three years, it is usually created by deed so that the lessee can acquire a legal estate in law.<sup>69</sup> The lessee in this instance can even sub lease part of his own lease to another, who is known as the sub-lessee. The right to sublet is however subject to the covenants that are contained in the lease agreement entered into by the parties.<sup>70</sup>

### Mortgages

A mortgage is a legal or equitable conveyance of title as security for the payment of debt or the discharge of some other obligation for which it is given subject to a condition that the title shall be reconveyed if the mortgage debt is liquidated.<sup>71</sup> A mortgage has also been defined as a device used in creating a lien on real estate by way of contract. In this instance, the mortgage is the instrument that the borrower (called the mortgagor) uses to pledge real property to the lender (called the mortgagee) as security for debt (hypothecation).<sup>72</sup> In mortgage transactions relating to real properties, physical possession or conveyance of the mortgaged property is not necessary<sup>73</sup> as the mortgagee through the immovability of the mortgage property has a firm grip on his investment. The mortgagee is in some situations allowed to collect rents and profits which accrue on the property apart from exercising his right of sale to satisfy the debt owed by the mortgagor in case of default of settlement of the mortgage debt.

In the realm of intellectual property, a trademark can be used as security for a loan. Where trademark is used as security, the mortgagor has a legal right to the trade mark until the loan is repaid. In this situation however, the mortgagee or the mortgagor will need to register the mortgage at the Trademarks Office and notice of the registration would be recorded in the register of trademarks.<sup>74</sup> As with other forms of intellectual property, patents may be mortgaged or vest by operation of law as other personal property.<sup>75</sup> A mortgage of patent property passes ownership thereof to the mortgagee or lender and when the mortgage debt has been satisfied, a retransfer of the property is made from the mortgagee back to the mortgagor.<sup>76</sup>

### Outright Sale

The sale of a property is usually accompanied by the transfer of title to that property from the seller to the buyer. In sales transactions, the sale is recorded by a sales receipt. For some types of personal property, such as automobiles and original works of art, ownership is memorialized by a title. In landed property, assignment is the usual way of transfer of property.

Outright sales is the most straightforward of all intellectual property rights transaction, in which the unrestricted ownership of the intellectual property rights is assigned for an agreed consideration.

### Conclusion

In the course of this essay, we have tried to establish that property law, both as it exists and as it ought to exist, may be interpreted as either real or intellectual property as long as the parties adapt to the legal rules involved in creating, defending, and exchanging property under the various transactions possible in law. A common ground for both types of property (i.e whether real or intellectual) is that the different kinds of commercial transactions which was hitherto felt to be in the preserve of real property also exist and can be carried out under intellectual property. The fortunes of many businesses now depend heavily on intellectual property rights and a growing percentage of the legal profession specializes in intellectual-property disputes while lawmakers throughout the world are revising their intellectual property laws.<sup>77</sup>

69 See *Containers (Nig) Ltd v Niglasco Ltd* (1979) 4-6 CCHCI 290

70 Where the lease agreement is silent on the right of the lessee to sub let, the lessee can sub let and the sub lessee will not be a trespasser but a tenant of the head lessor. Hill & Redman, *Law of Landlord and Tenant*, 16th Edition, p 557. Where a covenant not to sub let is inserted in the lease agreement, and the lessee sublets to another, then the lessor can bring an action for forfeiture of his interest in the property as a result of the breach.

71 *Lord Lindley M. R. in Santley v Wilde* (1899) 2 Ch. P.474 (quoting Smith I.O. *The Law of Real Property in Nigeria* LASU, 1st ed. 1995 pp. 147.

72 Mortgages available at [www.bambooweb.com/article/m/f/html](http://www.bambooweb.com/article/m/f/html) (assessed on 7/11/07)

73 Before the fifteenth century, mortgages were usually created by way of a pledge whereby the property was usually physically conveyed to the mortgagee, who held the property unless the mortgage debt was satisfied.

74 A trademark can be used as security because it is an indefinite form of intellectual property if it is not abandoned.

75 Op. cit David Bainbridge pp. 381.

76 *Assignment and Licenses*, available at <http://www.uspto.gov/web/offices/pac/dops/general/assign.htm> (assessed on 23/02/08)

77 The history of these doctrines in the United States -- and possible reasons for their growing importance considered in William Fisher, "Geistiges Eigentum ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten," in *Eigentum im internationalen Vergleich* (Göttingen: Vandenhoeck & Ruprecht, 1999, (available in English at <http://www.law.harvard.edu/AcademicAffairs/coursepages/fisher/iphistory.htm>), (assessed on 23/02/08).