

An Examination of Extraterritorial Legislation on Pledge Financing of New Plant Variety Rights

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Abstract

With the continuous development of the world's intellectual property rights economy, the pledge of new plant variety rights has become a common focus of attention in various countries. As a large agricultural country in the world, China is lagging behind in the development of the guarantee financing system of plant new variety rights compared with developed countries. While the domestic loan practice of plant new variety rights pledge financing is growing year by year, the gap of relevant plant legal system and supporting measures has been exposed. Therefore, it is of great significance to construct and improve the relevant laws and regulations on the pledge financing of new plant variety rights to regulate the pledge financing behavior of new plant variety rights and improve the problems of difficult value assessment, risk control and pledge disposal in the process of pledge financing of new plant variety rights.

Keywords

New Plant Variety Rights; Pledge Financing; Extraterritorial Legislation.

1. Introduction

In this paper, we discuss in depth the legislative characteristics and specific provisions of the capital system of foreign intellectual property rights guarantee financing, especially the guarantee financing system of new plant variety rights, compare the current situation of relevant legislation in China, and propose laws and regulations for reference. In order to promote the improvement of the relevant legal system of plant new variety rights pledge financing in China; accelerate the establishment of plant new variety rights pledge financing for various types of seed industry enterprises in China and alleviate the problem of capital shortage of enterprises; increase the investment in scientific research funds, improve the ability of seed industry enterprises in China to carry out regional economic and trade cooperation and promote the sustainable development of China's economy.

2. U.S. Plant Variety Rights Pledge Financing Regulations

In the U.S. Uniform Commercial Code Title IX security system, there is a clear provision that "general intangible property rights, including patents, copyrights, trademarks and intellectual property rights such as trade secrets and new plant varieties, may be used as collateral." This is the authoritative provision on the pledge of new plant variety rights in the U.S. law. In addition, in view of the differences in the social system and legal development of each country, there are two points in the U.S. intellectual property pledge system that must be stated in advance: First, the U.S. movable property security system, including the security pledge system, is uniformly referred to as the mortgage system in the legal system, and differs from ours in the use of categories. Second, intellectual property rights in the United States are intangible property, and the movable property in the "movable collateral transactions" in the U.S. law also includes intangible property, therefore, the provisions of movable pledges and other aspects of intellectual property pledges are also applicable. Thus, there is no doubt that new plant variety

rights can be pledged as intellectual property rights for financing in the United States, and the specific practice procedure is divided into three steps: preparation, establishment and realization.

2.1. Preparation for Pledge Financing of New Plant Variety Rights in the United States

The preparation of plant variety rights pledge financing in the U.S. refers to the comprehensive evaluation of the value of plant variety rights to determine whether they can be secured and the amount of claims that can be secured before establishing a pledge security for plant variety rights. The three main methods of evaluating intellectual property pledge financing in the United States are the cost method, the market method and the revenue method. Generally speaking, the valuation of patents and trade secrets is generally based on the income method, i.e., the net income that will be obtained during the period of use is used as a reference for valuation; while the valuation of trademarks is generally based on the market method, in which the latest transactions under similar circumstances are used to obtain the value of this intellectual property right; the valuation of copyrights is generally based on the cost method, in which the research and development expenses are counted to determine its value. There are no special specific regulations for the valuation of new plant variety rights, but a single method is rarely adopted in the process of specific valuation practice, but a comprehensive approach is adopted.[1]

2.2. The Establishment of Pledge Financing of New Plant Variety Rights in the United States

The establishment of a plant variety right pledge financing means that the secured parties agree on their respective rights and obligations and enter into a valid security agreement. For the security agreement the U.S. Security Law provides that the pledged property must have a certain value, the debtor has the right to pledge this collateral, and it must be confirmed that the description of the pledged property in the security agreement is true and valid.[2]In addition to the signing of the security agreement, the security of intellectual property rights under the U.S. Chattel Mortgage Act requires registration and uses registration adversarialism, which is different from the registration effective doctrine adopted in China.

2.3. The Realization of Pledge Financing of New Plant Variety Rights in the United States

In the realization of the pledge financing of new plant variety rights in the United States, the creditor can obtain the pledge itself by peaceful means, and also request the court to intervene, and if the pledgee fails to fully satisfy its claim in the lawsuit, it can continue to recover from the collateral until its claim is realized.[3]In terms of realization methods, each market player maximizes the value of intellectual property through public auctions and networks.[4]In addition, the UCC provides the debtor with a "right of redemption", i.e., when the debtor's pledge is taken by the pledgee due to default, the debtor reacquires the pledged property after paying off the remaining loan and the pledgee's expenses to satisfy the claim, but the debtor's right of redemption must be exercised before the pledgee disposes of the pledged property.

2.4. A Evaluation of the New Plant Variety Rights System in the United States

Firstly, in the U.S. intellectual property pledge system, new plant variety rights can be jointly pledged with other properties, and the pledge mode is flexible. Secondly, the U.S. intellectual property pledge system is based on market orientation. Under this market background, major seed companies, especially small and medium-sized seed companies, can flexibly choose financing channels according to their actual situation to increase their R&D and operation income. Again, in terms of realization methods, the U.S. has given full play to the role of two

platforms, namely, auction and network traders, to expand the market for financing transactions of new plant variety rights. Finally, the U.S. government is a strong backing for the development of pledge financing of new plant variety rights. The active guiding role of the government has provided legal and financial support for the pledge financing of new plant variety rights.

3. EU Plant Variety Rights Pledge Financing Regulations

3.1. EU Related Regulations

The European Union promulgated the European Commission Regulation on Plant Variety Rights in 1995, which has made systematic provisions on the protection of plant variety rights in the EU and become the basic regulation for the protection of plant variety rights in the EU. This regulation is of great significance to the preparation stage of pledge financing of new plant variety rights, and there are also more detailed descriptions on the confirmation and value provisions of new plant variety rights and transfer permission. At the same time, the regulation shows systematic and specific features on the restrictions of new plant variety rights, not only stipulating specific institutional rules such as compulsory license, exhaustion of rights, reasonable use and farmers' rights.

3.2. Provisions of the Member States

In the past, Germany, France and Italy used new plant varieties in the field of patent protection, while after the signing of the European Patent Convention, the French Intellectual Property Code explicitly provides in the issue of pledge of new plant variety rights that "the issuance of a certificate, transfer of ownership, license for use or pledge of the right to a new variety, without the law in accordance with the administrative court conditions, it shall not be counteracted with the third party." It is thus clear that the adversarialism of registration for the financing of pledge of new plant variety rights is recognized and adopted by most countries.

4. Japanese Plant Variety Rights Pledge Financing Regulations

The Civil Code of Japan stipulates that semiconductor integrated circuit layout designs, new plant varieties, and commodity packaging forms can be the subject of intellectual property pledge financing. New plant variety rights can be the subject of pledge financing alone or in combination with other intellectual property rights.[5] This provision shows that in Japanese legislation, new plant variety rights are clearly listed as pledges, which has the same effect as the U.S. provisions. In addition, the combination of multiple pledges is also similar to the U.S. pledge method, which can increase the possibility of pledging new plant variety rights, and at the same time, the combination of multiple pledges can reduce the security risk and protect the rights of pledgees, which is what our legal system needs to improve and learn.

4.1. Value Assessment of Pledge Financing of New Plant Variety Rights in Japan

First of all, the valuation methods of general intellectual property rights in Japan usually include costing method, market transaction price, revenue reduction method, etc. However, in the practice of pledge of new plant variety rights, Japanese policy investment banks, as the main body to carry out pledge financing, generally do not limit themselves to a certain method, but use different methods for evaluation according to their own characteristics. Secondly, the security method used by the Japanese policy investment banks is mainly based on the assets of the pledgee's intellectual property and the value of income and expenses of the assets. This includes the entire intellectual property rights of this institution, rather than considering the value of only one or a few new plant variety rights.

4.2. A Evaluation of Japanese Plant Variety Right Pledge Financing System

The role and position of the Japanese Policy Investment Bank is very important in the pledge financing activities of new plant variety rights in Japan. Japanese policy investment banks attach great importance to the role of new plant variety rights. While general banks passively accept pledges, policy investment banks actively conduct the business of pledging new plant variety rights, actively develop customers who own new plant variety rights, acquire target new plant variety rights, and make profits from the cash flow generated by their asset nature. The entire Japanese system for financing plant variety pledges is very advanced, with specific evaluation legislation and open and transparent information, and also focuses on the international exchange of evaluation institutions, seeking to explore a more complete, scientific and characteristic financing system.

5. International Convention on Plant Variety Rights Pledge Financing Provisions

China implemented the Regulations of the People's Republic of China on the Protection of New Varieties of Plants (hereinafter referred to as the Regulations) on October 1, 1997, and formally acceded to the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as UPOV) on April 23, 1999. The new plant varieties stipulated in the Regulations lay the foundation for the creation and establishment of new plant variety rights, and the restrictions on new plant varieties also restrict the socio-economic value of new plant variety rights. Article 27 of the TRIPS Agreement stipulates that new varieties of plants shall be protected by a patent system or an effective specialized system, or by any combination of systems. UPOV, on the other hand, facilitates the international exchange and cooperation of China's new plant varieties, provides a broader world for the expansion of China's plant varieties, and also provides a strong legal guarantee for the pledge financing of new plant variety rights in various countries. The accession of UPOV and the implementation of TRIPS Agreement have brought China's plant new variety rights protection system into line with the international standard and incorporated into the world.

6. Insights on China from the Provisions of Pledge Financing of New Plant Variety Rights in Foreign Countries

6.1. Clarify the Relevant Laws and Regulations

First, to clarify the legal status of the pledge financing of new plant variety rights. Intellectual property rights are both property and transferable, and are suitable for pledging. However, not all intellectual property rights can be pledged in concrete practice, and all countries have restricted the transfer of intellectual property rights by means of legislation according to their own development needs. However, the pledge financing of new plant variety rights has an irreplaceable role for the development of agriculture, the progress of intellectual property rights and even the growth of economy in China, therefore, I think it is necessary to list new plant variety rights as pledges in Article 440 of the Civil Code. Article 440 of the Civil Code is necessary.

Secondly, the relevant legal regulations on the pledge financing of new plant variety rights should be legislated separately so that the new plant variety rights in pledge financing can be based on the law. Special laws to regulate the financing activities of new plant variety rights can make the protection of new plant variety rights more compulsory and better promote the R&D and growth of new plant varieties. The special legislation should allow plant new variety rights to be jointly pledged with other properties, which can reduce the pledge pressure of the pledgee and also better reduce the risk degree of plant new variety rights pledge financing, so as to

promote the better establishment of guarantees for plant new variety rights, provide financial support for small and medium-sized seed enterprises, promote them to increase scientific research investment and maximize economic benefits.

6.2. Improve the Relevant Supporting Measures

First, establish a sound appraisal system. A complete value assessment system should include an authoritative value assessment organization, scientific assessment standards and excellent and outstanding assessment personnel. In Korea, the "Technology Finance Support Group" (a collective name for KIBO, KIST, KIS-TI, KTTC, KIPA, KDB and ETRI) was established to evaluate the value of patent technology and other intellectual property. The U.S. and Japan do this by establishing specialized encumbered asset valuation companies. The U.S., Japan and Korea have authoritative IPR value appraisal agencies, which can make the appraisal more authoritative and reduce disputes. In terms of appraisal norms, in addition to using traditional intellectual property appraisal methods, it is also a more scientific approach to use multiple methods of comprehensive appraisal as in the U.S. and Japan. For the selection of evaluation talents, they should be composed of experts in the field to which the technology of new plant variety rights belongs, lawyers, examiners of new plant variety rights, accountants, asset appraisers and other professional and technical personnel. These personnel are either more familiar with variety technology or have professional skills in appraisal, which is conducive to a more accurate assessment of the value of new plant variety rights.

Second, to establish a unified registration and publicity system. Today, when the system of new plant variety rights is not yet sound, the establishment and registration of new plant variety rights have special significance to protect the rights and interests of both parties, so it is very necessary to establish a unified registration and publicity system. Both the United States[6] and Canada[7] have established a unified and effective registration system. First of all, we can consider the adoption of network registration. Nowadays, the network technology is developed to register and publicize the new plant variety rights so that the potential pledge subjects and the public can check it at any time, which provides more opportunities for the establishment of the pledge financing of new plant variety rights. Secondly, some people think that in terms of the pledge of new plant variety rights, the pledge should be registered as the condition against the third party, rather than the element of the establishment of the pledge.[8] China adopts a strict registration effective doctrine for intellectual property pledges. Some scholars believe that the adoption of registration effective doctrine for the pledge contract of new plant variety rights is in line with China's national conditions, which can strengthen the government's management of the pledge contract of new plant variety rights and maintain the security of transactions, especially it can effectively protect the interests of the pledgee.[9] It has also been argued that, in light of Chinese judicial practice, security law should adopt registration adversarialism. This paper argues that the implementation of pledge of new plant variety rights in China is still in the initial stage, and the existing relevant laws and regulations are not yet sound, and it is necessary to supervise its implementation. However, in today's rapidly developing and perfecting market economy, many laws and regulations can no longer meet the requirements of social development. To make the pledge of new plant variety rights play its proper role better and speed up the circulation of commodities, it is necessary to eliminate various constraints, reduce transaction costs and improve transaction efficiency. The adoption of registration effective doctrine is not conducive to the utilization of the pledge system of new plant variety rights in today's society, especially when the current pledge of new plant variety rights is so backward, it is more important to provide for a flexible and pragmatic registration method, i.e. registration adversarialism, from laws and regulations to promote the activities of pledge of new plant variety rights.

Third, improve the disposal and realization system. The mobility of new plant variety rights is relatively weak, and the public awareness of new plant variety rights in China is relatively weak, the market scale is small, the evaluation and transfer process is cumbersome, and the disposal cost is high and difficult to realize, which are all factors affecting the efficiency of the intellectual property pledge system. At the same time, the traditional pledge of intellectual property rights is not fully applicable to the realization of the pledge of new plant variety rights, so it is the need of the moment to explore the pledge of new plant variety rights specifically applicable to the realization of new plant variety rights. The author believes that the implementation of the pledge can be set by others for their own claims. If the liquidation period of the claim is earlier than the liquidation period of the mortgage claim, and the subject of the claim and the secured claim are both in money, the pledge can be assumed by way of offset. If the set-off is not possible, the pledge may apply to the debtor for payment. If the subject matter of the claim is not monetary, it can be realized by auction or sale. If the mortgage claim and the secured claim have the same period of time for satisfaction, the pledgee may apply to the debtor for payment of the claim to secure the satisfaction of its principal claim.

Fourth, sound risk prevention mechanism. First, the risk management system in the process of pledge guarantee should be improved. Establish a national dynamic database of intellectual property rights to monitor the changes in the rights of the pledgee, and if the value of the pledged intellectual property rights decreases, the pledgee has the right to request additional security to reduce the security risk by monitoring the changes in the value of the pledged items in real time. Second, establish a multi-level risk prevention system. Give full play to the functions of the government, venture capitalists, insurance companies, guarantee institutions, and other parties to build a comprehensive risk protection model.

Fifth, to form a pledge environment with the joint role of government and market. Through the above analysis of the pledge system of new plant variety rights in the United States and Japan, we can see that the financing mode of pledge of new plant variety rights in the United States is obviously different from that in Japan. The U.S. adopts a "market-oriented" financing model of new plant variety rights, which emphasizes the automatic regulation of the market in terms of the participants of new plant variety rights guarantee, the establishment process and the realization mode. The Japanese Policy Investment Bank is the shadow of the government and is the main body of plant variety pledge financing, while other private commercial banks are less involved. The government and the market both play an important role in the pledge of new plant variety rights, just like the basic economic system of China, which requires both the government and the market, we should also give full play to the favorable factors of both the government and the market in the pledge of new plant variety rights, with the government providing legal and financial support and promoting the transformation and reproduction of economic benefits of new plant varieties with the market as the guide.

7. Conclusion

The emergence and development of the pledge of new plant variety rights provides a new way for the realization of the value of new plant variety rights, while providing a new financing channel for knowledge-based small and medium-sized enterprises, alleviating the problem of financing difficulties of seed industry enterprises and enriching the loan business of banks and trust institutions. The improvement of the legislation related to the pledge financing of new plant variety rights has an irreplaceable role in promoting the development of new plant varieties and the development of the whole intellectual property rights economy, and we should pay more attention to the utilization of such intellectual property rights in order to obtain better social and economic benefits.

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