

Feasibility Analysis on Pledge of Income Right of New Plant Variety License

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Abstract

With the continuous development of intellectual property pledge financing, the economic value of the proceeds from the licensing of new varieties of plants has been gradually excavated. But the relevant laws of our country have not made clear provisions on it, there are also many disputes in academic circles, which makes the pledge financing of the proceeds from the trading of new cultivars of plants have many obstacles. In the financing of intellectual property pledge, the object problem is the foundation. As a transferable property right, the right of proceeds from the licensing of new plant varieties should be analyzed on the basis of different licensing methods. The right of proceeds from the licensing of new plant varieties under exclusive licensing is transferable, while the right under ordinary licensing and compulsory licensing is not transferable.

Keywords

Pledge Financing; Object of Pledge; New Varieties of Plants Licensing Proceeds.

1. Foreword

The research on the pledge of proceeds from the license of new plant varieties is actually forward-looking, because whether based on theory or practice, the research on the pledge of atypical rights such as the right of new plant varieties is still in the exploratory stage. Let alone more detailed and in-depth study on the right of proceeds from the license of new plant variety. Whether there is the possibility of pledge, the research on the pledge of proceeds from the license of new plant varieties in China is still in the blank stage, but the research on the pledge of proceeds from the license of intellectual property rights mostly focuses on patent rights. In foreign countries, the development of the pledge of intellectual property licensing proceeds is relatively mature, which is embodied in the licensing based on patents, trademarks or a variety of intellectual property aggregates, and the pledge of the obligee based on the proceeds of the licensing contract. So as to give full play to the guarantee function of intellectual property licensing proceeds. Therefore, it is of great theoretical value and practical significance to explore the feasibility of the pledge of the proceeds from the license of new plant varieties.

2. Clarification of the Right of Income from the License of New Varieties of Plants and the Right of License of New Varieties of Plants

2.1. The Concept of the Right to Profit from the Licensing of New Varieties of Plants and the Right to License New Varieties of Plants

To discuss the issue of whether the proceeds from the license of new plant varieties can be pledged, the essential premise is to identify the concept of the proceeds from the license and its difference with the license in detail. The so-called proceeds right of new plant variety license refers to a property right which is independent of the new plant variety transaction through the implementation of the license contract of new plant variety. The precondition of its

existence is that the owner of new plant variety concludes a license contract with others, so it can also be regarded as a contractual right owned by the owner of new plant variety. The license right of new plant variety means that the owner of new plant variety has the right to license others to use his new plant variety and obtain royalties, which represents the power of the owner of new plant varieties to use and benefit from new plant varieties stipulated in the Regulations on the Protection of New Plant Varieties, and it does not point to specific objects.

2.2. The Difference between the Right of Profit from the License of New Plant Varieties and the Right of License of New Plant Varieties

The remarkable difference between the two rights lies in the nature of the rights. The profit right of new plant variety license is a property right based on the license contract of new plant variety, and the new plant variety license right is a property right obtained by the owner of new plant varieties from government agencies, according to the Regulations on the Protection of New Plant Varieties. The former is a property right formed by contract between market participants, while the latter is a concession granted by the government according to law. As a pledge of rights, whether it is the pledge of the right to new plant varieties or the pledge of the right to license income from new plant varieties, it must be implemented in accordance with the relevant provisions of the Civil Code. However, due to the different conditions for the formation and acquisition of property rights, the pledge of new plant varieties rights is mainly regulated by the Regulations on the Protection of New Plant Varieties; The right of proceeds from the license of new plant varieties is based on the contractual rights and interests formed by the implementation of the license contract of new plant varieties, which is adjusted by the Regulations on the Protection of New Plant Varieties, and also needs to be implemented in accordance with the relevant provisions of the Contract Law. The analysis of the concepts and differences between them provides theoretical support for our in-depth study of the pledge of license proceeds.

3. The Theoretical Controversy and Analysis on the Feasibility of the Pledge of the Right of Proceeds from the Licensing of New Varieties of Plant

3.1. Theoretical Disputes on the Feasibility of Pledge of Proceeds from New Plant Variety Licensing

Although there are few literatures about the proceeds from the licensing of new varieties of plants as the subject of pledge in practice in China, there are some discussions about the pledge financing of the proceeds from the patent licensing and the pledge financing of the right to use the copyright licensing. From the commonness that they all belong to intellectual property rights and are discussed from the relevant provisions of the pledge of rights, we can find out some controversial points in the pledge of proceeds right of new plant varieties license. Some scholars believe that the license proceeds have property value and can be transferred in accordance with the law. Theoretically speaking, it can be agreed that only the license proceeds can be pledged. However, in practice, it is difficult to assess the royalty when the evaluation system of new plant variety rights is not perfect. Therefore, in the current market environment and related institutional facilities are not perfect, it is not appropriate to use the right of license proceeds as the subject matter of pledge[1].

Some scholars believe that the financing of intellectual property licensing reflects the law's most extensive direct service to economic interests[2], and whether the right of licensing proceeds should be allowed as the subject matter of pledge of new plant varieties can not be generalized. One of the reasons is that different licensing methods correspond to different benefits, in the exclusive licensing of new plant varieties, the licensor enjoys the benefits based

on the licensing of new plant varieties, the licensee enjoys the right to use the new plant varieties within the scope of the contract, and the licensor or any third party shall not have the right to use the new plant variety within the scope at the same time. So for such an exclusive license proceeds, based on its property and exclusive attributes, it should be allowed to be the subject of pledge financing[3]. Some scholars believe that the pledge of proceeds from the license of new plant varieties is equivalent to the pledge of accounts receivable stipulated in the Civil Code of China, which belongs to the pledge of intellectual property rights, so it has the possibility of pledge[4]. Other scholars believe that the proceeds right of new plant varieties license is a future creditor's right[5], but when the exercise period and the amount of proceeds involved in the license contract can be determined, it belongs to the deterministic property rights, which can be included in the scope of accounts receivable and pledged according to law.

3.2. Theoretical Controversy on the Feasibility of the Pledge of the Proceeds from the New Plant Variety License

From the former scholar's point of view, we can find that the idea of determining that the right of license proceeds can be used as the object of pledge is basically the same as that of the right of application, which is theoretically that the right has the attribute of property right, transferable and then pledgable. However, it ignores the characteristics of the new plant variety right itself, which is not only subject to the provisions of the Civil Code on the pledge of rights, but also to the provisions of the Seed Law on licensing, one of its loopholes is that it does not further consider whether there is a right flaw in the licensing contract carried by the right of licensing proceeds. If it exists, for the pledgee, even if the right itself meets the conditions of the pledge, but there are potential risks because it does not enjoy complete power and can not be controlled, it is not a more rational choice to take the right of license proceeds as the object of the pledge.

The second view limits the scope of the right to use the license to the exclusive license, which is innovative to some extent, but it lacks a relatively clear legal basis at present. We can only infer that the exclusive license proceeds can be used as the subject matter of the pledge from a number of provisions on the license, including the Contract Law, the Seed Law and the pledge of rights in the Civil Code. The common ground of the latter two views lies in the nature of the proceeds from the licensing of new varieties of plants, which belongs to accounts receivable and should be pledgable, but from the relevant provisions of our country, the pledged intellectual property rights belong to absolute real rights or similar real rights, while accounts receivable are relative and do not belong to absolute rights[6].

Based on the right characteristics of a little difference and affect the realization of the pledge, so on the right of new plant varieties license proceeds attribute whether it belongs to accounts receivable or belongs to a property right in intellectual property rights and not clearly identified, the lack of relevant legal and theoretical basis. Generally speaking, the relevant legal basis is relatively weak, does not have a certain support, whether the proceeds of new plant varieties license can be used as the subject of the pledge is still a problem to be solved.

4. The Income Right of New Plant Variety License has the Feasibility of Pledge

Compared with the recognition of the right to apply for new plant varieties as the subject of pledge, the recognition of the right to license proceeds as the subject of pledge is more complex, because the situation of considering whether to pledge is different based on the particularity of the new plant varieties and the influence of licensing methods. Generally speaking, to affirm that the proceeds right of new plant variety license can be pledged, theoretically, we should start from the pledge right itself to prove that the proceeds right of new plant variety license

conforms to the relevant provisions of Article 440 of the Civil Code of China on the pledge of rights, that is to say, it is enough to discuss that the right is a transferable property right.

However, the right of proceeds from the licensing of new plant varieties is derived from the right of use, when discussing the pledge of this right. We should follow some provisions of the Regulations on the Protection of New Plant Varieties and the Seed Law on licensing, especially pay attention to the situation of repeated pledge and double licensing. Then on the compulsory license of new varieties of plants, the proceeds of the license can be pledged, if it can be pledged, whether it will aggravate the instability of the value of the proceeds of the license.

Generally speaking, the relationship between rights is complex, whether the right of proceeds from the license of new plant varieties can be used as the subject of pledge can not be generalized, it should be considered from multiple perspectives.

4.1. The Right of Proceeds from the License of New Varieties of Plants is a Transferable Property Right

According to the relevant provisions of the pledge of rights in the Civil Code of China, it should be considered that the right of proceeds from the licensing of new plant varieties is a transferable property right.

First of all, the license income right of new plant varieties has property nature. Because the income right of new plant variety license is based on the agreement of the license contract for the implementation of the new plant variety right, it can receive the license fee of the new plant variety right from the licensee according to law. In addition, Article 28 of the Seed Law of China stipulates that the units and individuals who have completed breeding have exclusive rights to their authorized varieties. Any unit or individual shall not use the authorized variety for commercial purposes without the permission of the owner of the new plant variety right. Article 31 stipulates that those engaged in seed production and operation activities shall obtain a seed production and operation license from a designated institution. From the relevant provisions, we can conclude that the income right of new plant varieties license based on the new plant varieties license contract has property because the licensee pays the license fee[7].

Secondly, the license income right of new plant varieties is transferable. This should start from the nature of the right of proceeds from the licensing of new varieties of plants, which is transferable when most scholars believe that the right pledge belongs to the pledge of accounts receivable. If the pledge of the license income right of new plant varieties is attributed to it, although the relevant laws and regulations do not clearly stipulate the transferability and conditions of the right, from the point of view of its creditor's rights attribute, the right of license income of new plant variety can be independent of it. Based on the license contract of the new plant variety right, the transfer is carried out, which meets the requirements of transferability. Therefore, in theory, it can be concluded that the pledge of the proceeds of the license of new varieties of plants is feasible.

4.2. Pledge of the Right of Proceeds from the License of New Varieties of Plants Shall be Subject to Specific Circumstance

In practice, based on the general mode of pledge of proceeds right of new plant variety license, the pledge of proceeds right of new plant variety license mainly involves three subjects, including the owner of new plant varieties, the licensee and the commercial bank that can provide funds. Usually, the owner of new plant varieties guarantees his right to benefit to commercial banks by signing a license contract with the licensee to obtain funds. In the operation of this mode, for different types of license, the expected cash flow of the license income right of new plant varieties is different. Under the same conditions, the license income right protection obtained by exclusive license is the largest, while the license profit right protection obtained by ordinary license is the smallest. Therefore, we should proceed from

different licensing methods, close to the practice to refine the impact of different licensing methods on the licensing revenue rights of new plant varieties.

Firstly, as far as ordinary license is concerned, it should be recognized that the right of license proceeds can not be pledged. The reason is that the remarkable feature of general license is that the right to use new plant varieties can belong to many people at the same time, including the owner of the ownership of new plant varieties himself, as long as he negotiates with the owner of new plant varieties and pays the license fee, he can obtain the right to use the varieties. That is to say, there can be many subjects licensed for new plant varieties in the same area at the same time. Then based on this characteristic of the general license, it is inevitable that there will be multiple licenses, so if the general license proceeds of new varieties of plants are pledged at this time. On the one hand, although the right has property, but for creditors such as commercial banks, it is likely that they will not accept the pledge of general license proceeds because they can not enjoy complete power and power, and the risk of realizing the pledge is too large.

On the other hand, compared with exclusive license and exclusive license, ordinary license itself can not play a high value, so from the effectiveness of pledge, it should be recognized that it does not have pledge. On the contrary, if it is assumed that the license income right can be pledged, then according to the fact that the owner of the new plant variety right can license others to use the new plant variety for many times, it means that it is feasible to establish several pledge rights on the same new plant variety right, at this time, the situation of repeated pledge appears. Although the Civil Code of our country does not explicitly prohibit the act of repeated pledge. However, in practice, considering the uncertainty of the value of the new plant variety right itself and the low effectiveness of the ordinary license proceeds right pledge, as well as the risks faced by creditors, it is not allowed to pledge the ordinary license proceeds right in the new plant variety right, which is based on the comprehensive consideration of legal provisions and practical system construction.

As for the exclusive license, it only requires the licensee to enjoy the exclusive right to use the new plant variety within a certain period of time, which excludes the right to use the new plant variety within a certain period of time. Compared with the ordinary license, most scholars support the pledge of the exclusive license proceeds of the licensee. We also agree with this view.

First of all, the new plant variety right in the exclusive license, the license fee is the highest, that is to say, the licensee through the payment of consideration to obtain the implementation of the right is a greater reality and future earnings value of economic rights, the right has the characteristics of pledge, the law should allow the licensee to agree in the license contract to pledge its exclusive license proceeds.

Secondly, under the exclusive license, the licensee enjoys the exclusive right to use the right of new plant varieties within the agreed scope, and no other person, including the licensor, can use the right in the same scope at the same time. Therefore, based on the property and exclusive characteristics of the exclusive right to implement, it should be allowed to be the subject of the right pledge financing[8].

As far as compulsory license is concerned, it should not be recognized that it can be pledged. First of all, compulsory licensing is often for the needs of social and public interests, forcing the owner of new plant varieties to implement licensing, and the intervention of national public power is mandatory. Specifically reflected in the provisions of Article 30 of the Seed Law and Article 11 of the Regulations on the Protection of New Varieties of Plants, it is stated that, based on the needs of national and public interests, the examination and approval authority may make a decision to implement the compulsory license of new varieties of plants, and register and announce it. The entity or individual that is granted a compulsory license for exploitation shall

pay the right holder of the variety a reasonable royalty. The reason for denying the pledge of this right is that compulsory license has a strong color of public rights, when personal private rights and public rights conflict, for the public interest, private rights will give way to public rights at this time. Although in reality, compulsory license usually has government financial or other policy subsidies, it is not controlled by the obligee, including the time and scope of implementation. Mapping to the case of the proceeds pledge of compulsory license, the guarantee function of the right is not stable and controllable, therefore, the law should not give the proceeds pledge of new plant varieties under compulsory license.

In a word, whether ordinary license, exclusive license or compulsory license, the license of new plant varieties is a kind of authorization, not ownership. However, the exercise and control of the right of license proceeds should be restricted by the original right. If the original obligee suddenly revokes the license contract during the pledge period of the income right of new plant varieties, it will cause the impossibility of the pledge of the income right of license. Therefore, the primary premise of the pledge of the proceeds from the license of new varieties of plants is to clearly define the rights and obligations of both parties with the owner new varieties of plants in advance to ensure the effective implementation of the license contract, and then make a comprehensive analysis from both theoretical and practical aspects based on the particularity of various license types and the rights of new plant varieties.

5. Conclusion

To sum up, the basic idea of discussing the pledgeability of the right of license proceeds of new plant varieties is to use the pledge of the right of license proceeds and the right to use the license right of patent and copyright for reference. Through the conclusion and analysis of the controversial focus of this issue, and combined with the nature of the right of intellectual property licensing proceeds and the particularity of the right of new plant varieties, this paper makes a comprehensive judgment on the possible impact of the pledge of licensing proceeds, so as to determine that the pledge of licensing proceeds of new plant varieties is not only feasible, but also has potential development potential.

However, from the practical point of view, China's pledge of the right of new plant varieties is still in the exploratory stage, so the pledge of the right of proceeds from the license of new plant varieties does not have a realistic possibility at present. But with the gradual development and maturity of the protection and utilization of the new plant variety rights, and the improvement of related supporting institutional facilities, the pledge of right of proceeds from the license of new plant variety will certainly be realized. What we should do now is to build a more complete theoretical system for the feasibility of the pledge of the right of proceeds from the license of new varieties of plants from a theoretical point of view, combined with the problems that may exist in practice.

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