

## On the Suitability of Patent Application Right Pledge

Linqi Li<sup>1, a</sup>, Beibei Ning<sup>1, b</sup>

<sup>1</sup>School of Law, Henan Normal University, Xinxiang, 453007, China

<sup>a</sup>lilinqi726@126.com, <sup>b</sup>2841013645@qq.com

### Abstract

**With the development of science and technology, the traditional chattel pledge mode has been greatly innovated, and the emergence of new property rights pledge has been promoted. Although China's legislation does not stipulate that the patent application right can be used as the object of pledge, it does not explicitly prohibit that the patent application right cannot be used as the object of pledge. In intellectual property pledge financing, pledge object is the basic problem. The patent application right as the object of intellectual property pledge conforms to the constituent elements of the right pledge. It has the elements of transferability, property and the nature of the right pledge according to law. It is feasible to pledge the patent application right as the pledge object.**

### Keywords

**Patent application right pledge; Character of property; Nature of the right to pledge.**

### 1. Introduction

With the development of China's economy entering a new normal, the emphasis on intellectual property rights has become increasingly prominent. As an important intangible property, the use value of intellectual property is gradually increasing. Intellectual property pledge financing can effectively promote the renewal and development of invention technology, and is also an important embodiment of building an innovative country and promoting the strategic development of intellectual property rights. Then, whether the patent application right in the patent right can be used as the pledge object can be pledged. Throughout our country's legislation, theory and practice, the research on the pledge of patent application right is not deep, and there is no systematic research, let alone a unified view. With the development of science and technology, protecting intellectual property rights means protecting innovation. The pledge of patent application right is one of the objects of intellectual property pledge. According to Article 440 of Civil Code of China, patents and other intellectual property rights can be pledged. As the pre-right to obtain patent right, the right to apply for patent has its existence value. As the pledge object, the right to apply for a patent not only meets the constitutive requirements of the right pledge, but also can further meet the financing needs of small and medium-sized science and technology enterprises in China, encourage innovation of niche inventors, and thus drive economic development. Based on the existing laws and regulations, and on the basis of summarizing the pledge of rights, this paper explains the feasibility of pledge of patent application right, so as to give full play to the value of pledge of patent application right.

### 2. Legal Provisions on Pledge of Patent Application Right

Whether the right to apply for a patent can be pledged as the subject matter of pledge is different in different regions. Some local legislatures deny that the right to apply for a patent is the subject of pledge; for example, Taiwan Province, China. There are also some countries whose laws expressly allow the right to apply for a patent to be pledged as a pledge object, such

as Sweden. In other countries, although the legislation does not explicitly stipulate that the right to apply for a patent can be pledged, it is not prohibited in practice, and the pledge contract of the right to apply for a patent is valid as long as it meets the autonomy of the parties, such as the United States. In China, although our legislation does not expressly stipulate that the right to apply for a patent can be pledged, the legal level does not explicitly prohibit that the right to apply for a patent cannot be the object of pledge.

### **2.1. The Legislative Provisions of Pledge of Patent Application Right in China**

China does not clearly stipulate whether the right to apply for a patent can be pledged as the pledge object in legislation. Article 10 of the Patent Law clearly stipulates that the right to apply for a patent and the patent right can be transferred. From this article, we can conclude that the Patent Law affirms that the right to apply for a patent can be transferred, but it does not stipulate whether it can be pledged or not. In addition, Article 89 of the Detailed Rules for the Implementation of the Patent Law sets up a patent register for the patent administrative department, which stipulates that the right to apply for a patent can be registered. On the contrary, in Article 12 of the Patent Pledge Registration Method, it explicitly prohibits the right to apply for a patent from being registered as pledge. From the above legal provisions, it can be concluded that different legislatures have not made uniform provisions on whether the right to apply for a patent can be pledged. From the perspective of legal effectiveness, we find that the Registration Method of Patent Pledge was issued by the State Intellectual Property Office, which belongs to departmental regulations and has low effectiveness. Judging from the types of pledge of rights in Guarantee Law, Property Law and Civil Code, it is not clearly stipulated that the right to apply for a patent cannot be pledged. According to the property rights of transferable patents and other intellectual property rights stipulated in Item 5 of Article 440 of the Civil Code, it can be seen that the legislature of our country adopts a general way to pledge the objects of intellectual property rights that can be transferred according to law. Whether the right to apply for a patent can be pledged or not is not explicitly prohibited. [1] In addition, according to Article 440, Item 7, and other property rights that can be pledged as stipulated by laws and administrative regulations, the legislative body provides for pledge of rights in the form of "positive list", unlike Article 395, Item 7, mortgage right, which provides for pledge of rights in the form of "negative list". As a private law, the core value of civil law lies in the autonomy of will. Although Item 7 of Article 440 stipulates the object of pledge of rights in the form of "positive list", it does not explicitly prohibit the right to apply for a patent from being pledged. Therefore, judging from the implementation of the current law, the legislature has left enough room for development in terms of the types of pledge of rights.

### **2.2. Legal Provisions on Pledge of Extraterritorial Patent Application Right**

First of all, in Taiwan Province, China, the right to apply for a patent is forbidden to be the subject of pledge. Article 6 of the Patent Law of Taiwan Province in China stipulates that "the right to apply for a patent shall not be the object of pledge." The reason for this regulation in Taiwan Province is that the right to apply for a patent is uncertain and its liquidity is unclear, that is, whether the guarantee value can be realized is unknown. Therefore, the Patent Law of Taiwan Province clearly stipulates that the right to apply for a patent cannot be used as the subject matter of guarantee. Secondly, the country that allows the pledge of patent application right is Sweden, and allowing the pledge of patent application right is one of the characteristics of Swedish patent system, mainly because the Swedish Legislative Council thinks that the pledge of patent application right can meet the financing needs of small and medium-sized high-tech enterprises, and can also drive innovation and development. In addition, the Swedish Legislative Council has set up a complete framework for patent application in terms of procedure, and realized the perfect combination of patent application right from entity to procedure. [2] According to the provisions of the Uniform Commercial Code of the United States,

American law does not clearly stipulate whether the right to apply for a patent can be secured by mortgage. Functionalism is adopted in the legislation of real right for security in the United States. As long as things or rights have the function of security, security can be established. As to whether the right to apply for a patent can be pledged, it is considered that as long as the pledge contract of the right to apply for a patent conforms to the wishes of the parties, the contract will be valid. Then, the law does not prohibit the pledge of patent application right.

### **3. The Pledge of Patent Application Right Conforms to the Constitutive Requirements of Pledge of Right**

#### **3.1. Transferability According to Law**

Article 440 of the Civil Code stipulates that the pledge of rights includes intellectual property rights that can be transferred according to law and have property. It can be concluded that the object of intellectual property also belongs to the pledge of rights, and the right to apply for a patent, as one of the objects of intellectual property, should have the constituent elements of the pledge of rights. In the modification of the real right for security in the Civil Code, the legislation criterion of functionalism was adopted, which changed the formalism of the real right for security in the Property Law. The Civil Code adopts the functional concept of guarantee, which is more conducive to respecting the wishes of the parties and the laws of market economy. As long as chattels or rights with guarantee function can be pledged, the right to apply for a patent, as a right that can be expected in the future, also has guarantee function, which meets the requirements of pledge of rights. The purpose of establishing pledge of rights is that when the debtor fails to perform the debt, the creditor can be paid off by realizing the real right for security. One of the biggest characteristics of pledge, which is different from mortgage, is the transfer and possession of movable property or rights. From this feature, we can draw the conclusion that whether it is chattel pledge or right pledge, the debtor or the third party is required to transfer the chattel or right to the creditor for possession. [3] As one of the objects of pledge, the right to apply for a patent should be transferable. According to Article 10 of the Patent Law of China, the right to apply for a patent can be transferred according to law. The right to apply for a patent conforms to the constitutive requirements of transferability of pledge of rights stipulated by law. In addition, although Article 440 of the Civil Code does not stipulate that the right to apply for a patent can be used as the object of pledge, according to the legislative purposes of Item 5 and Item 7 of Article 440, it is concluded that the right to apply for a patent can be pledged as the right to expect in the future, which meets the requirements of pledge of rights. Our country's law stipulates that the right to pledge should be transferable. The right to apply for a patent, as the lower concept of the pledge of rights, certainly has the property of transferability.

#### **3.2. Belonging to Property Rights According to Law**

Guarantee system not only has the function of ensuring the realization of creditor's rights, but also has the function of promoting the use of funds. [4] The efficient operation of funds reflects the property of collateral or rights. The biggest feature of real right for security, which is different from usufructuary right, is the exchange value. It is the exchange value that makes the property of collateral or right more prominent. The main body obtains the exchange value from things, which embodies the interest of things as its essential attribute. Any market must have commodities as objects, that is, objects or property, intellectual achievements, rights and so on. Exchange collateral or rights to maximize their value for financing and consumption. However, debt is a legal form to promote the circulation of funds, which is naturally risky. Whether it is the borrowing of funds or the trading of commodities, only when the creditor's rights can be guaranteed reliably will the creditors exchange, and accordingly, the exchange value of the real

right for security will play a huge role. The purpose of exchange value lies in the property of things or rights. The pledge of rights is property, which can ensure the smooth realization of creditor's rights. As the object of pledge of rights, it should be the valuable property right with property as its content, valued with money. Patent right is personal and property, while patent right as pledge object is limited to the property right in patent right, that is, the right to apply for patent, the right to transfer patent and the right to use patent license. The right to apply for a patent is uncertain in terms of conversion value and law, which poses a high risk to the pledgee. [5] However, with the development of science and technology, people's awareness of intellectual property protection is enhanced, and the pledge of patent application rights will also become an important way of financing. Patent technology development and technological innovation will bring huge returns to investors. The patentee needs to pay a certain fee during the period from application to publication in the National Patent Office. In addition, the transfer fee can be charged when transferring the right to apply for a patent. From this, it can be seen that the property of the right to apply for a patent will become more important, and only when it has property can it be realized. The pledgee is willing to accept the pledge of patent application right only when his creditor's rights can be fully guaranteed. The pledgee can transform the property of patent application right into real economic value, which is beneficial to enterprise financing and promotes the rapid development of market economy.

### **3.3. It has the Nature of Pledge of Rights According to Law**

Pledge includes chattel pledge and right pledge. Accordingly, right pledge is of course applicable to the provisions of pledge, which has the characteristics of right pledge. The pledge of rights and chattel pledge are security interests aiming at the exchange and acquisition of their objects, which are not different in nature because the objects are chattel or rights. The difference between the two lies in their establishment. The pledge of movable property is publicized by delivery, and the pledge of movable property is established at the time of delivery. [6] The pledge of rights is publicized by registration. After the right is registered, the pledge of rights is established. The pledge of rights, which takes registration as the establishment requirement, has no substantial difference from the mortgage of rights, and is paid first in the order of settlement. The establishment of right pledge registration is to protect the pledgee and avoid damaging the pledgee's rights due to bona fide acquisition. As one of the objects of the pledge of rights, the right to apply for a patent should have the requirements for the registration of the pledge of rights. The right to apply for a patent is registered and publicized, which meets the requirements of pledge establishment. Paragraph 3 of Article 10 of China's Patent Law stipulates that the transfer of patent application right or patent right shall be registered with the patent administration department under the State Council and publicized by the patent administration department under the State Council. The law stipulates that the transfer of patent application right shall be publicized by means of registration. Where the right to apply for a patent can be pledged, its pledge registration can be registered in accordance with the transfer registration procedure. Because of the intangibility and uncertainty of patent application right, it is necessary to examine the contents of the registration more strictly and give a clear explanation of the registered patent application right. Although there are no provisions on the pledge registration of patent application right in China's Civil Code and Patent Law at present, according to the adoption of functionalist legislative guidelines, the pledge of future expectability right is not prohibited by law. The registration and establishment of the pledge of patent application right is not only beneficial to protect the rights and interests of the pledgee, but also to further clarify the repayment order of creditor's rights. Therefore, the transfer and pledge of the right to apply for a patent is completely in line with the nature of the registration and establishment of the right pledge. [7]

## 4. Conclusion

Keeping pace with the times is an inevitable law of legal progress. As a superstructure, it should develop with the constant changes of economy, so as to realize the justice value of standardizing itself. Intellectual property, as the embodiment of human intellectual labor, plays an extremely important role in inventing and creating people, and the pledge of patent application right also reflects the best use of everything. The pledge of rights pays more attention to the realization of secured creditor's rights, and pays less attention to the function of promoting capital flow and commodity trading, which leads to the strict limitation of the scope of the object of rights that can be pledged, and the valuable object of rights is left idle, resulting in the constant reduction of value. Therefore, the legislative value of pledge of rights should be functionalism, closely follow the development of market economy in China, and pay attention to the use efficiency of pledge object. The real right for security should not only be limited to the pledge of traditional collateral, but also enter the scope of pledge of new rights to ensure the legality of pledge of patent application right. The legal status of pledge of patent application right is conducive to the trend of modern market development, and conforms to the legislative criterion of Civil Code that the scope of real right for security tends to functionalism. It is hoped that by expanding the scope of the object of pledge, the function of pledge to guarantee economic development will be brought into full play.

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