

# Kluwer Patent Blog

## Some thoughts on security interests over patents from Finnish perspective and modest proposals

Jan Lindberg (Attorneys-at-Law TRUST) · Friday, August 5th, 2016

As the European Commission has recently asked organizations to submit comments to the Commission consultation on an effective insolvency framework within the EU (“Consultation”) and the issue is also discussed in the forthcoming AIPPI conference to be held in Milan, I thought that it would be interesting to write a few words on the security interests over patents under Finnish law and some modest proposals for improvement.

According to the Consultation “an appropriate insolvency framework is important for investors, creditors, and debtors” and it continues that “the lack of a harmonized approach to insolvency prevents the proper functioning and development of capital markets, and therefore it is necessary to address the issue at EU level”. But should we reserve patents a special treatment in this context? Currently Finnish written law recognizes two forms of security interests over IPRs, namely a pledge over IPR and a floating charge covering all assets of an enterprise, including its IPR assets. In addition to the security interests stipulated in law, there are also other forms of security interests that are mainly based on contractual arrangements, but are rarely used. While Finnish law recognizes the above security interests, it does not specifically stipulate them from the IPR perspective, but general rules apply to them as to other assets of a company provided as security. This leads to some uncertainty, since the general rules fail to take into consideration the special characteristics of IPR when provided as security (in comparison to tangible assets). As IPRs cannot be physically transferred to the security taker when provided as security, their owner remains more free to control them than tangible assets, even if provided as security.

What could then be improved? Well, there are several things of which I focus on a few main patent-related points: First, there should be more provisions/case law on patent valuations in insolvency situations. As an example, in a Finnish statutory corporate restructuring, the creditor (security taker) may lose (write-off) its claim, if the IPR is not valued correctly, as the value of the IPR determines the priority of the votes of the creditor. Valuation of IPRs is inherently subjective, and their commercialization requires specific legal and commercial expertise, which has perhaps not been widely available in Finland, with the exception of certain specific sectors and entities.

Second, generally speaking the following point is more pure insolvency matter but I consider that a floating charge should have priority to 100 percent of the proceeds of the company’s assets, and the system should be simplified in general as currently the Finnish floating charge entitles in only up to 50 percent in case of bankruptcy. In this context a possibility to establish a separate pledge over a patent in addition to an existing floating charge would clearly facilitate the use of patents as

security, and should in my view be enabled. It can be argued that the current regime may not fully support exploiting the security potential of IPRs as these rights become part of the floating charge without any separate consideration as to their independent value as a security.

While, it is likely that the current legislation already limits the rights of the security provider to assign or freely limit or waive the IPR subject to the security without contribution of the security taker, this matter is currently not absolutely clear. It should in my view be stipulated clearly in law that the security taker is at least to be notified in these situations as well as when the encumbered IPR is deregistered or expired due to non-payment of the applicable maintenance fees.

There are many other points to be considered but to conclude with one final point I strongly think that to the extent that harmonization takes place, I see that it would be beneficial if a registration of a pledge over IPR was available in an identical form and subject to the same prerequisites. Also, at least an EU wide register for pledged IPRs could facilitate the use of IPR as security. Let's continue discussion in Milan!

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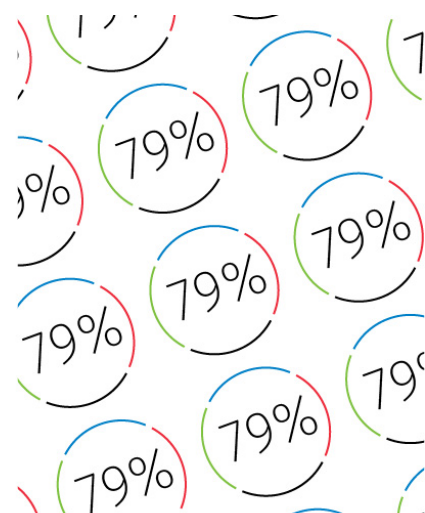
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