ISSN: 2472-3703 DOI: 10.6911/WSRJ.202206_8(6).0116

Study on the Feasibility of Pledge of New Plant Variety Application Right

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Abstract

The right to apply for new varieties of plants is a right enjoyed by the breeder or the assignee of the right to apply for new varieties with novelty, specificity, consistency and stability. This right has both the property content in the field of private law and the procedural content in the field of public law. China 's legislation does not clearly stipulate that the right to apply for new varieties of plants can be pledged, but the property, transferability and particularity of the right does not affect its pledge is beyond doubt.

Keywords

Application right; Property and transferability of new plant varieties.

1. PREFACE

With the rapid development of social economy, the types of property rights are increasingly rich. Compared with the provisions of the Civil Code on the scope of the object of the pledge of rights, there is a trend of continuous expansion. Although the research on the legal problem of the pledge of the right to apply for new varieties of plants is currently based on practical factors such as weak feasibility in practice, few scholars have discussed this problem in detail. However, this does not mean that there is no research value on this issue. On the contrary, it is forward-looking, and it is also a problem that is always discussed with the improvement of China' s protection and application of intellectual property rights.

In terms of the research on the legal issues of pledge of application right of new plant varieties, there is a big controversy. First, there is no unified academic recognition of the concept and relationship of the right to apply for new plant varieties and the right to apply for new plant varieties. Second, there is a great theoretical controversy over whether the application right of new plant varieties is pledged according to the characteristics of the application right of new plant varieties, which is the reason why there are few studies on the pledge of the application right of new plant varieties. Legal theory can guide practice, and its feasibility can provide the basis for practice. Therefore, the focus of this paper is to discuss the feasibility of the pledge of the application right of new plant varieties from the perspective of theory, so as to try to make the application right of new plant varieties play its pledge value in theory.

2. CONCEPTS OF APPLICATION RIGHT FOR NEW VARIETIES OF PLANTS AND APPLICATION RIGHT FOR NEW VARIETIES OF PLANTS

Application for new plant varieties is the only way to obtain the right of new plant varieties, but application for new plant varieties and application for new plant varieties are two different

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concepts. Specifically, the term ' right to apply for new varieties of plants ' referred to in Article 9 of the Regulations on the Protection of New Varieties of Plants ' means the right of the applicant to apply for new varieties of plants during the period when the application is accepted but not granted to the Ministry of Agriculture or the Ministry of Forestry. Its rights include the right of the applicant to request the approval authority to specify the application date and give the application number; it has the right to decide to further fulfill the application procedures, modify or withdraw its application for the right to new varieties of plants; the right to decide whether to retain the new plant variety application or transfer it to others. Among them, because the approval process of the new plant varieties has been started, so the transfer of the new plant varieties application right at this time needs to perform the approval and registration announcement procedures stipulated in Article 9 of the ' new plant varieties protection regulations ', in order to make the agreed legal act effective, in other words, the behavior of obtaining the new plant varieties application right is the essential behavior.

The right to apply for new varieties of plants refers to the right of breeders to decide whether to apply for the protection of new varieties of plants, when to apply for the protection of new varieties of plants, which Convention member country to apply for the protection of new varieties of plants, and who to apply for the protection of new varieties of plants in the name of new varieties of plants before applying for new varieties of plants[1]. Since no application was filed with the approval authority at this stage, it was not subject to the relevant legal procedures. At this time, the breeder' s right to apply for the right to new varieties of plants was not an essential legal act. Therefore, it can be seen that the application for the right of new varieties of plants seems to be the pre-procedure of the application for the right of new varieties of plants, and the corresponding rights of the two are different in the legal provisions. Therefore, it is particularly necessary to define the relationship between the two for the study of the pledge of the application for the right of new varieties of plants.

3. DISPUTES AND DCOMMENTS ON APPLLICATION RIGHT PLEDGEE OF NEW PLANT VARIETIES

3.1. Disputes on the Pledge Theory of New Plant Varieties Application Right

Whether the application right of new varieties of plants can be included in the scope of the pledge of rights will be a controversial issue in academic research in the near future with the continuous development of the pledge of new varieties of plants. In the current research, there are positive and negative views on the pledge of the right to apply for new varieties of plants, and the negative theory occupies a large number. The key to solving this denial problem is to understand whether the nature of the right to apply for new varieties of plants and the possible risks in the dynamic operation of rights in the pledge procedure have an impact on the effectiveness of the pledge contract.

Scholars who support the right to apply for new varieties of plants into the scope of the pledge object believe that the right to apply for new varieties of plants belongs to transferable property rights, has exchange value, conforms to the substantive elements of the pledge of rights, and has the same function as the right to new varieties of plants [2]. Some scholars believe that the application right does not belong to the subject matter of the pledge of the right of new varieties of plants, but can be used as the subject matter of a pledge of rights, that is, other property rights that can be pledged under laws and administrative regulations [3]. Some scholars, starting from the characteristics of the right to apply for new varieties of plants, believe that the so-called " uncertainty " of the right to apply should not become an obstacle to the pledge of the right to apply for new varieties of plants, and allowing the pledge of the right to apply for new varieties of plants also conforms to the principle of market economy autonomy. In other words, whether the application right of new varieties of plants can lead to the emergence of new varieties of

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plants is a question of value judgment, and does not affect the nature of the right itself; for example, some accounts receivable will also be uncertain, but our ' Civil Code ' clearly stipulates that some accounts receivable will be subject to pledge. Therefore, uncertainty should not be the standard to judge whether the application right of new plant varieties can be used for pledge.

Scholars who hold opposing views believe that the right to apply for new varieties of plants is a temporary right, and there are some differences between the right to apply for new varieties of plants and the right to enjoy the right does not necessarily mean that the right to obtain new varieties of plants, the right itself contains uncertainty. In addition, after the State Intellectual Property Office granted the applicant of new varieties of plants the value of the application right is zero. If the right is allowed to be pledged, it will produce more adverse risks to the pledgee that it cannot become an effective property right [4]. Some scholars believe that the pledge of new plant varieties application right is rare, and has the obstacles of registration and implementation. Even if the pledge contract is signed, once the dispute occurs, the value of the pledge is difficult to assess and the risk is large. Therefore, from the perspective of cost and benefit, it is reasonable not to confirm the effectiveness of pledge of application right for new plant varieties [5]. In short, whether the application right of new plant varieties will eventually be transformed into the right of new plant varieties is uncertain, just an expectation, not suitable for quality; under the legal doctrine of property rights, the right to apply for new varieties of plants is difficult to obtain the support of interpretation theory.

3.2. Review on Pledge Theory of New Varieties of Plants

From the affirmative theory, we found that although scholars believe that the right to apply for new plant varieties can be used as the subject of pledge, but the reasons for support are different. One holds that the right to apply for new varieties of plants conforms to the provisions of Article 440 (5) of the Civil Code of China on the pledge of rights, namely, it is a property right and transferable. According to Article 440 (7) of the Civil Code, the other view holds that the right to apply for new varieties of plants is one of the other properties that can be pledged under laws and administrative regulations. Compared with some differences between the two, it still failed to reach a consensus on whether the application right can become the subject of pledge, or there are theoretical differences.

From the perspective of the negation theory, the theoretical commonness is that the right to apply is recognized as an expectant right and a temporary right, and it is believed that the uncertainty of this right itself and the obstacles such as registration and evaluation in practice will increase the risk of the pledgee. However, the reason for this denial is not very convincing, because as an application right, it is uncertain and there is a risk that it cannot be authorized. This is its own particularity, and it cannot deny its own property and transferability. In addition, the registration, evaluation and other obstacles in the process of pledge of application right are not the performance of the application right of new varieties of plants itself. It is the result of the lack of relevant institutional facilities in the process of legal construction. Therefore, the identification of negation still needs further consideration.

Therefore, whether it is based on the positive or negative theory, because it has not reached a more unified understanding in the property of the right to apply for new varieties of plants, whether the pledge of the right to apply for new varieties of plants meets the property and transferable elements of the right pledge, and how to register and evaluate the value of the right to apply for new varieties of plants and other related theories, whether the right to apply for new varieties of plants can be pledged has been controversial. Similarly, this is also the issue discussed in this paper.

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4. FEAIBILITY OF PLEDGE OF APPLICATION RIGHT FOR NEW PLANT VARIETIES

4.1. Property of the Right to Apply for New Plant Varieties That Meets the Requirements of the Pledge of Rights

Incorporeal theory is one of the most important theoretical foundations of intellectual property rights. Roman jurist Gaius believes that ' incorporeal system is the relationship of legal fiction, which means that there is no entity, but only the legal fiction of things (rights). ' The theory of incorporeal objects regards rights as abstract objects, which are some kind of interests subjectively formulated by people, and can be evaluated by money [6]. The right to apply for new plant varieties, as a right derived from the right to new plant varieties, naturally has its right value. According to this theory, the right to apply for new varieties of plants, as an abstract, is a new form of property rights based on the needs of social reality. Property is a relatively general concept from the point of view of China ' s legal system. There are various forms of property and great differences in rights, but the commonness is that the obligee can control property, exclude others from infringement and dispose of their property, and transfer them to others. That is, the property in law should meet the three characteristics of controllability, disposeability and value, and the right to apply for new varieties of plants meets the requirements of property.

First, the right to apply for new plant varieties can be controlled by the holder. Property control is closely related to property form. For the tangible property, the owner has the right to dominate and control mainly in the form of actual possession, and other property owners can enjoy the interests by agreement with the obligee without actual possession. In view of other property, such as intellectual property rights, creditor ' s rights and other rights, China ' s civil law theory uses Germany ' s " quasi-possession theory " to solve the problem of right control. Further understanding is that quasi-possession does not involve specific physical objects, does not have a certain appearance known by outsiders [7]. Its main significance lies in the control of the right as an object without tangible control. That is to say, in the case of intangible rights such as intellectual property, the subject does not need to actually control possession. Its possession is manifested in the understanding and feelings of certain knowledge and experience and through external means shows that there is a specific subject 's will on something, which is currently mainly legal rights or legal interests. Then the right to apply for new varieties of plants as a right to control its possession is naturally not strictly the actual possession, but through the abstract expression of the object to obtain similar control as the object.

How does the holder achieve invisible control over the right to apply for new plant varieties ? This problem should be studied from the ' new plant varieties protection regulations '.The content of the right to apply for new plant varieties can be summarized as the applicant ’s right to request the approval authority to specify the application date and give the application number. It has the right to decide to further fulfill the application procedures, modify or withdraw its application for the right to new varieties of plants; the right to decide whether to retain the new plant variety application or transfer it to others. From the above-mentioned applicants ’rights, we can find that during the period when the approval of new plant varieties has not been determined, the applicant for new plant varieties has the right to make decisions on a series of issues such as the continuation, interruption and transfer of this process[8]. In addition, the applicant for new plant varieties during this period also enjoy the right of temporary protection granted by law. In summary, at this stage, the applicant for new varieties of plants has fully realized the intangible control of the application right for new varieties of plants.

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Secondly, the application right of new plant varieties can be transferred. The obligee disposes of property within the scope of the right, the goal is to transfer property rights to others, and gain benefits. Property can be disposed of and transferred. There are various ways in fact and legal form, which can transfer physical control and change the ownership of rights and interests. It is closely related to the property control mode. The right to apply for new varieties of plants as a right, the obligee can change the ownership of their rights to dispose of transfer of their rights. The specific way is to transfer the right to apply to others in accordance with the law. Others enjoy the right to apply for new varieties of plants based on the transfer contract, and the original obligee enjoys the right to benefit based on the transfer contract. It should be emphasized that the disposition transfer behavior must follow the conditions of the legal act, only agreed in the contract transfer, not to the relevant institutions to change the application registration does not occur the actual effect of the transfer of the right to apply for new varieties of plants.

Generally speaking, the claim of the person who enjoys the disposal and transfer of intangible rights is the right holder of the specific right, rather than investigating whether the right holder is the original right holder or the successor right holder. As long as the application is submitted and accepted by the relevant institution, the applicant contained in the acceptance certificate is the right holder of the right to apply for new varieties of plants. Article 9 of China ' s ' Regulations on the Protection of New Varieties of Plants ' provides that the obligee is allowed to transfer the right to apply for new varieties of plants, which has legal basis. In addition, in practice, the court ruled that if the new plant variety failed to be granted the new plant variety right in the future, the assignee has no right to claim that the original application for new plant variety right transfer contract is invalid or should be revoked. Unless the two parties clearly agree on the transfer contract of the application right for new varieties of plants or the assignor has obvious malice, this reflects a protection for the transfer of the application right for new varieties of plants in practice. Then, Article 38 of China 's Regulations on the Protection of New Varieties of Plants also clearly stipulates that after the declaration of the right to varieties is invalid, although it is determined that the right to varieties does not exist from the beginning, it also stipulates that before the declaration of the right to varieties is invalid, ' the judgment and ruling of the people 's court, the agricultural and forestry administrative departments of the people 's governments at or above the provincial level on the infringement of new varieties of plants and the contract for the transfer of the right to new varieties of plants that has been performed shall not have retroactivity[9]. In other words, although the ultimate purpose of the existence of the right to apply for new plant varieties is to obtain new plant varieties, the right to apply for new plant varieties and the right to apply for new plant varieties are two independent rights that do not conflict with each other. The invalidity of one right does not necessarily lead to the invalidity of the other right, because the nature of the right to apply for new plant varieties determines its instability, which may eventually be transformed into the right to apply for new plant varieties, or may eventually be regarded as non-existent because it is not authorized. Such provisions of the law not only realize the value function of the application right of new varieties of plants to play the property, but also maintain the order of the transfer and transaction of the application right of new varieties of plants in practice, and also prove that the application right of new varieties of plants can be disposed of and transferred by the obligee.

4.2. The Particularity of the Right to Apply for New Plant Varieties Does Not Affect Its Pledgeability

Firstly, the uncertainty of the application right of new plant varieties does not affect its pledgeability. The right to apply for new plant varieties is a right that can be transformed into the right to new plant varieties. It is the predecessor of the right to new plant varieties. The right to apply for new plant varieties can attract people to transfer or its value is ultimately reflected

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in the right to new plant varieties. Then some scholars believe that one of the characteristics of the right to apply for new varieties of plants is hypothetical, that is, the right to apply for new varieties of plants is based on hypothetical facts. Specifically, according to the law, if the application for new plant varieties is approved by the relevant departments, it will be directly converted into a new plant variety owner. However, whether the application right can eventually be transformed into the right of new varieties of plants is not a certain fact[10]. Logically speaking, before the new plant variety is granted the new plant variety right, the application right of new plant variety is also uncertain or non-existent. However, the law must give the obligee the procedural right to initiate the application for protection of new plant varieties, otherwise no one can obtain the right to new plant varieties. Therefore, it is necessary to assume that the new plant variety right exists or will inevitably exist in the future when the new plant variety right is uncertain or does not exist, and on this basis, the right holder shall be given the right to start the protection of the new plant variety right. This is why most scholars believe that the application right of new plant varieties is uncertain and thus not pledged.

However, the above uncertainty is only the conclusion derived from the reverse derivation in theory. The objective legal fact is that the law stipulates the existence of the right to apply for new plant varieties, and has formulated a judicial interpretation to protect the transfer of the right to apply for new plant varieties, which confirms that the right to apply for new plant varieties is a certain right. It is uncertain that the application right of new plant varieties is transformed into the application right of new plant varieties, but this does not affect the value of the application right of new plant varieties. Moreover, this legal uncertainty is not only a characteristic that may be manifested as an application right when pledged, but any right including the right to new varieties of plants may be declared invalid. If the pledge of the right to apply for new plant varieties is limited based on this uncertainty, it will not be conducive to the improvement and development of the system of new plant varieties.

Secondly, the deadline of the application right of new plant varieties does not affect its pledgeability. Time limit is a characteristic of intellectual property. Generally speaking, the ' time limit system ' of intellectual property refers to a system that the law clearly stipulates the intellectual achievement as a property and its property rights have a certain period of existence. That is to say, within this established statutory period, the intellectual achievement is a property, to which all persons have property rights, and once the period has expired, it is no longer a legal property. Therefore, all of them no longer enjoy exclusive rights, and this intellectual achievement will enter the public domain [11].

In fact, the term of the right to apply for new plant varieties should be different from the general term of intellectual property rights. Compared with the typical intellectual property rights, although it is a right derived from the right of new varieties of plants, but whether the right to apply for new varieties of plants belongs to the intellectual property rights or belongs to the rights prescribed by laws and administrative regulations has not been clearly identified at present. In addition, the application right of new varieties of plants is similar to a procedural right. Although its right has certain independence, it is considered from the original intention of the establishment of the right that the purpose of the application right of new varieties of plants is to obtain the right of new varieties of plants. The subjects of the two rights are consistent in the approval stage. Therefore, although in practice, the substantive review of the application of new varieties of plants in China needs 2-3 years, regardless of the situation that it cannot be authorized. In view of the fact that the rights of the two are ultimately directed to the same obligee, the calculation of the term of their rights should not be limited to the period of review by the audit organ. It should be added that the 15 - or 20 - year survival period of the authorized new plant variety right is more appropriate, which is also feasible in theory, and the pledge of the application right for new plant variety can also reduce the risk.

ISSN: 2472-3703 DOI: 10.6911/WSRJ.202206_8(6).0116

On the contrary, the application right for new plant varieties has a short duration. From the invention point of view, from the application to authorization about three years, and now there are many patent application rights pledge point of view. Similar to the application right of new varieties of plants, if the application right of new varieties of plants is allowed as the pledge object, many enterprises will obtain financing due to the pledge of the application right of new varieties of plants, thereby expanding production. Therefore, it is not necessary to exaggerate the risk of the application right of new plant varieties as the subject matter of pledge and deny the guarantee effect of the application right of new plant varieties. Instead, we should fully understand and predict the market risk brought by the application right of new plant varieties as the subject matter of pledge, and actively take reasonable measures to deal with it.

5. CONCLUSION

In summary, although the pledge of new varieties of plants in China is still in the exploratory stage, there is no realistic possibility for the pledge of new varieties of plants application right at present. However, with the gradual development and maturity of the protection and utilization of new varieties of plants, the pledge of new varieties of plants application right will be realized. Therefore, to discuss the pledgeability of the right to apply for new varieties of plants, we should theoretically draw lessons from the pledge of patent application rights, summarize and analyze the controversial focus in this issue, and combine the particularity of the right to apply for new varieties of plants to make a comprehensive judgment on the possible impact of the pledge of the right to apply for new varieties of plants, so as to identify the pledge of the right to apply for new varieties of plants is not only feasible, but also has potential development potential.

ACKNOWLEDGMENTS

This paper was supported by Henan Province Law Research Project in 2022 (Project No. HNLS(2022)A46)，Research Project of the Civil Law Research Association of Henan Law Society in 2022 (Project No. HNCLS(2022)27)， The 2021 Scientific Research Project for Postgraduates of Henan Normal University (Approved Document Number: [2021]12).

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