SECURITY INTERESTS OVER INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights – *i.e.* patents, trademarks, designs, copyrights and perhaps even domain names (“IPRs”) – can be a company’s most valuable assets. A lender often insists on an agreement granting it a security interest in the company’s existing IPRs as collateral to secure the repayment. If there is a default or a bankruptcy, a properly secured party will likely get paid before the unsecured creditors. But the security interest must have been properly “perfected”. How to perfect a security interest in the different types of IPRs is tricky, because the requirements are not clear, nor are they uniform.

Until recently, it was debatable whether registered intellectual property rights could be pledged according to Belgian common legislation. This uncertainty arose from former Article 2076 of the Belgian Civil Code, which required dispossession of the encumbered goods. With respect to immovable assets such as IPRs, this condition was problematic. Indeed, it is not possible to simply hand over IPRs to a creditor. Some legal scholars suggested that the registration of a pledge in the relevant intellectual property registries was to be considered as a kind of dispossession, as it can be argued that when a certain formality can meet the objectives of the requirement to hand over the encumbered good, such formality should suffice and there is no further need to hand over the concerned good to the creditor. Nevertheless, there is no certainty in this respect, in particular because nothing prevents the right holder to continue exploiting – and thus possessing – its IPRs following such registration.

However, the provisions of the Belgian Civil Code on pledges were recently reworked by the Belgian Act of 11 July 2013 regarding security interests over movables (as published in the Belgian Official Gazette on 2 August 2013). These new provisions are contained in a new Title XVII of Book III of the Belgian Civil Code (“New Pledge Act”). Article 7 of the New Pledge Act now expressly provides the right to grant pledges over IPRs. More generally, dispossession is not anymore a validity requirement; it is only an alternative way of rendering the pledge enforceable towards third parties. However such *erga omnes* effect will also be created by registering the pledge in the new Belgian general registry for pledges on movables. This registry is still to be created. The entry into force of the New Pledge Act has been postponed several times and it is now foreseen on 1 January 2017.

Nevertheless, we do have specific (current) legislation providing a system of registration for pledges relating to Belgian patents, trademarks or designs, in particular: the Code of Economic Law (on patents), the Benelux Convention for Intellectual Property of 25 February 2005 and the Regulation No 207/2009 of 26 February 2009 on the EU trademark. Therefore, this current legislation and the aforementioned future legislation (as from 1 January 2017) will have to be analyzed both.

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