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Security Rights in Intellectual Property in Finland

Teemu Juutilainen

Faculty of Law, University of Turku, Turku, Finland

teemu.juutilainen@utu.fi

1 Introduction.....	1
2 Types of IPR.....	2
3 Types of IPR Security.....	3
4 Structure of Secured Transactions: Specific IPRs Individually as Security.....	4
4.1 Pledge of a Patent.....	4
4.2 Pledge of a Trademark.....	5
4.3 Security over a Copyright.....	6
5 Priority of IPR Pledges.....	8
6 Enterprise Mortgages.....	9
7 Rights and Duties Before Default.....	10
8 Enforcement.....	11
8.1 Enforcement Outside Insolvency.....	11
8.2 Effects of Insolvency Proceedings.....	12
9 Use of IPR Security in the Light of Statistics.....	13
10 Conclusion.....	15

Abstract

Finnish law provides for the registrable pledges of patents, trademarks and other registrable intellectual property rights. This part of the legal framework is, by and large, adequate, so that one can reliably obtain fully effective security rights over these types of intellectual property rights. However, statistical data from the Finnish Patent and Registration Office shows that this opportunity is quite rarely used. In turn, copyright and other intellectual property rights that are not registrable under Finnish law are problematic in terms of achieving third-party effectiveness. Solutions proposed in legal literature, such as accepting security transfers of copyright as effective against third parties without any form of publicity, remain disputed and uncertain. Indeed, the most common way of using intellectual property rights as security under Finnish law is through the enterprise mortgage. Enterprise mortgages are frequently used (although often as a supplementary security, due to their limited priority) and they cover all types of intellectual property rights.

1 Introduction

This chapter presents an overview of Finnish law on security over intellectual property rights (IPRs), with the main focus on patents, trademarks and copyright.¹ At the same time, it critically examines this legal

¹ References to Finnish statutes in the chapter are given with their respective numbers in the Statutes of Finland – e.g., “Patents Act (550/1967)”. The latter part of the number indicates the year when the statute was published, which is

framework, identifying its shortcomings and observing how and to what extent IPR security is actually used in Finland.

The chapter proceeds as follows. The relevant types of IPRs and security rights are introduced in Sections 2 and 3, respectively. Section 4 discusses the structure of secured transactions involving specific IPRs individually, while Section 5 deals with questions of priority related to them. Section 6 moves on to enterprise mortgages, which cover all types of IPRs. Section 7 outlines the rights and duties of the parties to an IPR security agreement before debtor default. Section 8 discusses the enforcement of IPR security both outside and in insolvency. For a quantitative perspective on the use of IPRs as security, Section 9 looks at statistical data provided by the Finnish Patent and Registration Office. Section 10 concludes the chapter.

2 Types of IPR

In Finland, IPRs have traditionally been divided into two broad categories: copyright on the one hand and so-called “industrial rights” on the other. A leading textbook in the field,² sticking with this division, classifies IPRs as follows:

Copyright: a) copyright (“copyright proper” – that is, rights in literary and artistic works by, for example, a writer, a painter, a composer, an architect, or an author of a computer program), b) rights related to copyright (“neighbouring rights” – that is, rights of a performing artist, a producer of a sound recording, a producer of a video recording, a radio or television organisation, a producer of a catalogue or database, a photographer, or a press agency or correspondent).

Industrial rights: a) patent, b) utility model (“minor patent”), c) protection of industrial designs, d) exclusive right in the layout design of an integrated circuit, e) plant variety right (that is, plant breeder’s right), f) trademark, g) protection of geographical indications, h) trade name and i) protection against unfair trade practices.

The main focus of this chapter is on patents, trademarks and copyright (“copyright proper”).

The procedure for obtaining a (national) patent is laid down in Chapter 2 of the Patents Act (550/1967). The patent authority, which processes patent applications and grants patents, is the Finnish Patent and Registration Office. According to Section 20(2) of the Patents Act, “[a] granted patent shall be recorded in the Patent Register kept by the Patent Authority”. For patent protection beyond (but including) Finland, the options consist of applying for a European patent under the European Patent Convention (EPC) or filing an

usually also the year of enactment. All statutes referred to have been amended on several occasions, but the numbers do not reveal amendments. The statutes can be found in their original form, as well as in their amended and consolidated form with the dates of amendment indicated, in the Finlex database: <https://www.finlex.fi/en>. While Finnish statutes are official only in the Finnish and Swedish languages, the database provides some unofficial translations in other languages (mostly in English). English translations, where available and to the extent that they are up to date, have been used in the chapter. The author thanks Professor Taina Pihlajarinne for helpful comments and the staff of the Finnish Patent and Registration Office for making available statistical data on IPR security and enterprise mortgage registrations.

² Haarmann (2014), pp. 3–4. Haarmann notes that the division between copyright and industrial rights is based on international conventions and that it is still maintained in Finland although its relevance can be questioned in the light of the current industrial and commercial significance of copyright. This division is also visible in the division of labour between Finnish ministries: copyright matters belong to the Ministry of Education and Culture, while most industrial rights matters belong to the Ministry of Economic Affairs and Employment.

international patent application under the World Intellectual Property Organization (WIPO) Patent Convention Treaty (PCT).³ Neither of these options creates a supranational IPR.⁴

According to Section 4 of the Trademarks Act (7/1964),⁵ one can obtain an exclusive right to a trademark by recording it in the Register of Trademarks. This register, too, is kept by the Finnish Patent and Registration Office (Section 12). Even without registration, an exclusive right to a trademark can be obtained once the trademark has been established, meaning that it has become commonly known in Finland in the relevant business or consumer circles as a distinct mark for the proprietor's goods (Section 4a). For trademark protection beyond (but including) Finland, the options consist of applying for an EU trademark or for international trademark registration under the WIPO Madrid Protocol. Out of these trademarks, only the EU trademark is a supranational IPR.⁶ An EU trademark can "be given as security or be the subject of rights *in rem*",⁷ but this chapter only discusses security over national trademarks.

Section 1 of the Copyright Act (404/1961) provides that "[a] person who has created a literary or artistic work shall have copyright therein". Unlike patents and trademarks, copyright is not registrable under Finnish law.

3 Types of IPR Security

The Finnish Patent and Registration Office keeps registers for most industrial right-type IPRs, including patents and trademarks, as noted above.⁸ A registered IPR can be encumbered by a registrable pledge.⁹ This is the primary way of using specific IPRs individually to secure an obligation under Finnish law.¹⁰ While a pledge of this kind generally comes into existence by virtue of an agreement between a pledgor and a pledgee (or through disposition by a pledgor, as the creation of a pledge may alternatively be explained), the pledge has to be recorded in the relevant IPR register in order to achieve (full) effectiveness against third

³ See Patents Act, Chapters 3 (international patent applications) and 9b (European patent applications).

⁴ On the European patent with unitary effect ("unitary patent"), which has not yet become operational, see the European Patent Office website: <https://www.epo.org/law-practice/unitary/unitary-patent.html>. Accessed 10 Jan 2019. Finland has recently enacted a legislative package enabling its participation in the new European patent system – i.e., the unitary patent and the Unitary Patent Court. This legislation is meant to be put into force by a separate State Council decree, which has not yet been enacted. See Patents Act, Chapter 9c; Government proposal HE 45/2015.

⁵ The Finnish Parliament is currently processing a proposal for a new Trademarks Act. See Sect. 4.2 below.

⁶ See the European Union Intellectual Property Office website: <https://euipo.europa.eu/ohimportal/en/trade-marks>. Accessed 10 Jan 2019.

⁷ See Articles 22, 26 and 27 of the Parliament and Council Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L154/1 (EU Trademark Regulation). According to Article 28, the same applies to applications for an EU trademark.

⁸ See the Finnish Patent and Registration Office website: <https://www.prh.fi/en>. Accessed 10 Jan 2019. The division between copyright and industrial rights was explained at the beginning of Sect. 2 above.

⁹ Patents Act, Section 44; Act on Utility Model Rights (800/1991), Section 28; Registered Designs Act (221/1971), Section 27; Act on Exclusive Rights to Layout-Designs (Topographies) of Integrated Circuits (32/1991), Section 23; Plant Breeder's Right Act (1279/2009), Section 22; Trademarks Act, Section 33(3). This chapter follows the majority of the translations of IPR acts in the Finlex database, using "pledge" for the Finnish term *panttioikeus* and the Swedish term *panträtt*. *Panttioikeus* and *panträtt* denote both possessory and non-possessory security rights alike. To translate them as "pledge" risks confusion, though, because "pledge" may be associated with possessory security rights. In that light, "charge" might be preferable. See, e.g., Recital 26 of the EU Trademark Regulation (cited in note 7 above), according to which an EU trademark "should be capable of ... being *charged* as security in favour of a third party" (emphasis added).

¹⁰ Trade names cannot be used as security. See Haarmann and Mansala (2012), pp. 148–149.

parties, notably the pledgor's other creditors. Put differently, registration of a pledge strengthens (or "perfects") the pledgee's agreement-based legal position in relation to third parties.¹¹

In contrast, non-registrable IPRs, such as copyright, are problematic in terms of achieving third-party effectiveness. Indeed, the effectiveness of a security arrangement against the security provider's creditors and certain other third parties generally requires some form of publicity (this refers to registration, possession or notification), but no suitable publicity measure seems to exist in the case of non-registrable IPRs. Some commentators have argued that security transfers of copyright should be accepted as effective against third parties without any form of publicity, although under Finnish law, security transfers (and security assignments) are generally thought to be subject to the same publicity requirements as pledges, in order to avoid security transfers being used to circumvent rules on pledges.¹² However, these arguments are disputed and uncertain in that no binding source of law confirms them.¹³

As discussed in Sect. 6 below, the Finnish enterprise mortgage covers all types of IPRs. In addition, an IPR can be subject to a retention of title clause (or a functionally similar clause not resorting to the terms "title" or "ownership" – that is, a clause on recovery of the sales object or cancellation of the sales contract). Retention of title is effective against third parties without any form of publicity, but this is subject to conditions. For example, the secured obligations must be based on the sales contract in question.¹⁴

Finally, it should be noted that IPRs can be used to secure an obligation in indirect ways (that is, other than using an IPR, as such, as an encumbered asset). One such way is to use a pledge or security assignment of a stream of income (that is, receivables) generated by an IPR. Another way involves establishing a company to own an IPR, and then pledging the value of the IPR in the shape of the shares of that company.

4 Structure of Secured Transactions: Specific IPRs Individually as Security

4.1 Pledge of a Patent

A pledge of a patent is created by an agreement between a pledgor and a pledgee. This agreement is not subject to form requirements, but a written form is often a practical necessity due to the many details that have to be agreed upon; in addition, it may be necessary for evidential purposes (to facilitate registration, etc.).¹⁵ For effectiveness against the pledgor's creditors and certain other third parties, a pledge of a patent has to be registered – that is, recorded in the Patent Register kept by the Finnish Patent and Registration Office. Section 44(1) of the Patents Act provides as follows: "The transfer of patents and the grant of licences shall be recorded, on request, in the Patent Register. The same shall apply to the pledging of a patent."¹⁶ The ineffectiveness of an unregistered pledge of a patent against the pledgor's creditors in enforcement (that is, debt collection and distraint proceedings) as well as in bankruptcy (that is, collective

¹¹ Tepora (2008), p. 112. See Tepora et al. (2016), pp. 68–70, 373–374. Cf. Sect. 4.2 below on the pledge of a trademark.

¹² See, e.g., Havansi (1992), pp. 513–514.

¹³ Tepora et al. (2016), pp. 483–484.

¹⁴ Tuomisto (2007), pp. 191–194. In Tuomisto's view, as a starting point, retention of title clauses over IPRs or other intangibles should be subject to the same rules as retention of title clauses over tangible movables. See the Bankruptcy Act (120/2004), Chapter 5, Section 7(2).

¹⁵ Tuominen (2001), pp. 158–160.

¹⁶ Registration can be requested by the pledgor or the pledgee. If the pledgee does this, it is probably necessary to present a written agreement or other written evidence of the pledging. See Tepora et al. (2016), pp. 69–70; Tuominen (2001), p. 179. Cf. Tammi-Salminen (2015), p. 285.

liquidation proceedings) is confirmed by the Finnish Supreme Court in the judgment KKO 1988:31. This precedent is very clear because the part of the case that is relevant here concerned two pledges of a patent, one of which was recorded in the Patent Register and the other of which was not.¹⁷

As regards evaluating the security value of a patent, one commentator suggests that the most reliable methods consist of estimating the future net cash flow generated by the patent. However, these methods are also laborious and time-consuming. Other possible methods may be based on the cost of creating or recreating the patented invention, the market price of the patent, or licence payment cash flows. All of these methods come in different variants and can be combined with one another. The time of patent protection is limited to a maximum of 20 years from the application date (Patents Act, Section 40). As a result, the value of a patent, be it for security or other purposes, will generally be declining towards the end of that time.¹⁸

4.2 Pledge of a Trademark

Section 33(3) of the Trademarks Act provides: “If any person wishes to pledge his trademark rights, a written agreement shall be made and entered in the register. No right of pledge shall be valid until such an entry has been made.” On the face of it, this wording appears to suggest two differences as compared to the creation of a pledge of a patent: (1) a form requirement of agreement in writing and (2) registration as a condition for validity (in fact, the official Finnish and Swedish texts even speak of “coming into existence” rather than “validity”).

However, commentators in legal literature tend to take Section 33(3) less than literally. Some commentators argue that the creation of a pledge of a trademark occurs similarly to the creation of a pledge of a patent, meaning that a pledge of a trademark comes into existence and becomes effective between a pledgor and a pledgee by virtue of their agreement. Recording the pledge in the Register of Trademarks, so the argument goes, is required for third-party effectiveness, particularly against the pledgor’s creditors.¹⁹ It is also a common view that an earlier pledgee’s first-in-time priority (“first in time, first in right”) based on an unregistered agreement of pledge should be upheld against later transferees and pledgees, although only as a starting point – that is to say, subject to the possibility that a later pledgee or transferee takes priority by registering first in good faith.²⁰ In addition, it has been suggested that even an oral agreement of pledge is valid and suffices for registration, provided that the agreement is evidenced in writing (for example, through a document signed by the pledgor) or confirmed by a court of law.²¹

As noted in Sect. 2 above, other than by way of registration, an exclusive right to a trademark can be obtained once the trademark has been established (Trademarks Act, Section 4a). However, an established

¹⁷ The Supreme Court based its judgment in part on the earlier, repealed Patents Act (387/1943), which was clearer in terms of third-party effectiveness, especially in enforcement proceedings. The Supreme Court found no reason to assume that the legislator had intended the current Patents Act to change the legal norms in this respect. On the significance of registration, see also the judgment KKO 1993:49.

¹⁸ Tuominen (2001), pp. 91–92, 111–133. According to Tuominen, three questions must be answered in the positive for the evaluation of the value of an industrial right (e.g., a patent or a trademark) to be worthwhile in the first place. First, is the industrial right capable of distinguishing the products or services subject to it from other assets of the enterprise? Second, is the industrial right relevant to a third party (e.g., would a third party be willing to buy or licence the right)? And, third, would a third party be willing to pay licence fees in exchange for a right to use the industrial right?

¹⁹ Tepora (2008), p. 112; Tepora (2004), p. 191. See Tuomisto (1993), p. 119.

²⁰ Tepora et al. (2016), p. 187; Havansi (1992), p. 298.

²¹ Tepora et al. (2016), p. 70.

trademark cannot be used as security, unless this trademark is also registered.²² Unlike applications for EU trademarks, applications for national trademarks cannot be used as security.²³

The methods of evaluating the security value of a patent discussed in Sect. 4.1 above apply to all industrial right-type IPRs, including trademarks. A significant difference between patents and trademarks here is that trademark registrations can be kept effective for an indefinite time through successive renewals (Trademarks Act, Section 22).²⁴

At the time of writing, the Finnish Parliament is processing a proposal for a new Trademarks Act.²⁵ In terms of pledges of a trademark, the proposed Act involves both autonomous reform of national law and implementation of the EU Trademark Directive.²⁶ If the Act is adopted, the law on pledges of a trademark will change as described below.

The wording of the relevant provisions will no longer include agreement in writing and registration as conditions for the validity of a pledge.²⁷ The idea behind this change follows the above-cited legal literature, according to which a pledge is created by agreement between the parties, while the recording of the pledge in the Register of Trademarks is required for third-party effectiveness.²⁸ Moreover, it will be possible to create a pledge not only with respect to a registered trademark, but also with respect to an established trademark or a trademark application.²⁹

However, it will only be possible to register a pledge with respect to a registered trademark or a trademark application, and not with respect to an established trademark.³⁰ Registration of a pledge will not be mandatory, but it will be a condition for effectiveness of the pledge against third parties. Indeed, an unregistered pledge will be ineffective (“will not bind”) against the pledgor’s other creditors and, for example, good faith transferees of the trademark or trademark application (that is, transferees who were not aware and had no reason to be aware of the earlier pledge at the time of the transfer). To be exact, third-party effectiveness will begin at the moment that a request to register a pledge is recorded in the Register of Trademarks and the relevant information becomes available in the Trademark Database. The actual registration of the pledge may occur later.³¹

4.3 Security over a Copyright

²² *Ibid.*, p. 69; Haarmann and Mansala (2012), pp. 149–150; Salmi et al. (2008), p. 584.

²³ See Salmi et al. (2008), p. 584.

²⁴ See Tuominen (2001), pp. 91–93. See Haarmann and Mansala (2012), p. 149. Haarmann and Mansala refer to the brand valuation standard SFS-ISO 10668 as helpful in this context. The standard comprises economic, behavioural and legal analysis.

²⁵ Government proposal HE 201/2018; Economic Committee report TaVM 38/2018.

²⁶ Parliament and Council Directive (EU) 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast) [2015] OJ L336/1.

²⁷ Section 39(1) of the proposed Act.

²⁸ Government proposal HE 201/2018, p. 138.

²⁹ *Ibid.*

³⁰ Section 40 of the proposed Act; Government proposal HE 201/2018, p. 138.

³¹ Government proposal HE 201/2018, p. 139.

In Finland, copyright is not recorded in a register. This makes copyright problematic as a security object in comparison to patents and trademarks.³² As a rule, under Finnish law, the effectiveness of a security arrangement against the security provider's creditors and certain other third parties requires some publicity measure.³³ Generally speaking, the options are: (1) registering the security right (or some aspect of the security arrangement), (2) establishing the creditor's possession of the security object (or at least dispossessing the security provider of the security object, or preventing the security provider from independently exercising control over it) and (3) notifying a certain person of the security arrangement (most typically, the debtor of a pledged or security assigned claim). However, as regards copyright, none of these options seem to be available.³⁴

Views presented in legal literature vary on the consequences of the absence of a suitable publicity measure. According to one commentator, a copyright is altogether incapable of being pledged.³⁵ Another commentator argues that a pledge can be created (by agreement) with effects between the parties, but effectiveness against third parties cannot be achieved.³⁶ In contrast, a third commentator considers third-party effectiveness achievable if the agreement of pledge effectively prevents the pledgor from utilising the pledged copyright without the pledgee's consent. The proposed stipulation in this regard is that, without the pledgee's consent, the pledgor cannot reproduce the copyright-protected work, distribute copies of it, or independently prohibit others from reproducing or distributing copies of it.³⁷

In case it is accepted that a pledge can be validly created, with or without effects against third parties, Sections 28 and 42 of the Copyright Act may complicate matters further. Section 28 provides that "[u]nless otherwise agreed, the person to whom a copyright has been transferred may not ... transfer the copyright to others".³⁸ This entails that the author (the original proprietor of the copyright) and a transferee of the copyright may be in different positions in terms of competence to pledge the copyright.³⁹ In turn, according to Section 42, "[c]opyright shall not be subject to foreclosure [distrain] as long as the copyright remains with the author or with a person to whom the copyright has been transferred by virtue of marital right to property, inheritance or will".⁴⁰ If interpreted literally, this provision seems to limit the enforceability (realisability) of a pledge in cases where the pledgor is the author or one of the close persons referred to in the provision. That being said, distraint is not the only available method for realising a pledged IPR.⁴¹ Moreover, the provision should probably not be interpreted literally. Indeed, it has been argued that the purpose of the provision is to protect the author and close persons from premature publication of the work – that is, publication earlier than the author had meant the work to be published. Therefore, so the argument

³² If feasible in the first place, any security rights over a copyright are limited to the "economic rights" in Section 2 of the Copyright Act, whereas the "moral rights" in Section 3 (and Sections 36, 52a and 53(1)) cannot be validly disposed of and contain no security value. See Tepora (2004), pp. 184, 187.

³³ Retention of title is an exception.

³⁴ Tepora (2004), pp. 190–192.

³⁵ Havansi (1992), p. 86. However, Havansi may have made his comments with a fully effective right of pledge in mind, i.e., including effectiveness against third parties. See *ibid.*, pp. 30–32.

³⁶ Tepora (2004), pp. 192–193.

³⁷ Rahnasto (1997), pp. 557–561.

³⁸ Yet, according to the same section, "[w]hen copyright is held by a business, it may be transferred in conjunction with the business or a part thereof; however, the transferor shall remain liable for the fulfilment of the agreement".

³⁹ Tepora (2004), pp. 185–186. See Rahnasto (1997), p. 555. Rahnasto stresses the importance of ascertaining, at the time of pledging, that the pledgor has got a right to transfer the copyright and consents to a further transfer. Cf. Tepora, et al. (2016), p. 375.

⁴⁰ The unofficial translation of the Copyright Act uses the term "foreclosure" instead of "distrain". This chapter uses "distrain", which is also used on the Finnish Enforcement Authority website: <https://oikeus.fi/ulosotto/en/index/velkojanaulosotossa.html>. Accessed 10 Jan 2019.

⁴¹ See Sect. 8.1 below.

goes, an author who voluntarily pledges a work agrees (tacitly, if not explicitly) that in the case of default, the work can be commercially utilised and, to that end, published.⁴²

Unfortunately, no case law or other binding legal source confirms or disproves any of the above three views on the consequences of the absence of a suitable publicity measure. Still, the prevailing view in legal literature appears to be that one cannot obtain a pledge of a copyright with (full) effectiveness against third parties. Most notably, according to this view, a pledge of a copyright would not be effective against the pledgor's creditors.⁴³

In this light, it has been repeatedly argued that third-party effectiveness should be achievable in an alternate way, without any form of publicity – namely, through the security transfer of a copyright.⁴⁴ This would be exceptional because under Finnish law, security transfers (and security assignments) and pledges are generally thought to be subject to the same publicity requirements, with pledges invariably requiring some form of publicity.⁴⁵ Again, no binding source of law confirms or disproves these arguments.⁴⁶

All in all, the use of copyright as a security object involves a great deal of uncertainty in Finland. What is certain, though, is that copyright is covered by the Finnish enterprise mortgage and that a copyright can be used as security if one establishes a company to own the copyright and then pledges the value of the copyright in the shape of the shares of that company.⁴⁷

5 Priority of IPR Pledges

A registered pledge of an IPR is a “right of pledge” in the sense of Section 3 of the Act on the Ranking of Claims (1578/1992), which applies in bankruptcy (that is, collective liquidation proceedings) and in enforcement (that is, debt collection and distraint proceedings). This entails a top ranking for the secured claim.

As for other questions of priority, the relevant provisions include:

⁴² Tepora (2004), pp. 188–189. See Rahnasto (1997), pp. 555–556. According to Rahnasto, it is typical of “copyright industry” that the rights in a copyright protected work are transferred away from the author. As examples, he names newspapers, advertising, computer programming and, in some cases, film and music industry.

⁴³ Tepora et al. (2016), pp. 373–376. Tepora et al. note that a pledge of a copyright would not be entirely without third-party effects. Indeed, Section 42 may prevent distraint of the copyright by other creditors. If this is the case, then the copyright also falls outside the author's or close person's bankruptcy estate as provided by the Bankruptcy Act, Chapter 5, Section 3(1). In addition, a pledge of a copyright might remain in force against a subsequent transferee of the copyright, at least if the transferee were aware of the pledge.

⁴⁴ Tepora (2004), pp. 196–198; Havansi (1992), pp. 513–514. Cf. Kaisto (2006), pp. 62–63. Kaisto suggests that the requirement of a publicity measure in connection with pledging has too lightly been accepted as a dogma when it comes to security objects, such as copyright, for which no suitable publicity measure exists. He calls for discussion on whether a pledge of a copyright could be effective against the pledgor's creditors even without a publicity measure. See Kaisto (2002), pp. 26–28; Tammi-Salminen (2015), pp. 517–518.

⁴⁵ In legal literature, this dogma is being increasingly questioned in situations where no suitable publicity measure is available. See Tammi-Salminen (2015), p. 163.

⁴⁶ See Tepora et al. (2016), pp. 483–484. As regards IPRs the pledge of which is registrable (i.e., industrial rights), Tepora et al. consider security transfers effective against the transferor's creditors on the basis of registration of the transfer.

⁴⁷ Tepora et al. (2016), p. 69. See Tepora (2004), pp. 199–200. As for the company option, Tepora emphasises the role of covenants in monitoring the value of the company and as a risk management tool.

Patents Act, Section 44(5): “If a person acting in good faith has requested the Patent Authority to record in the Register that a patent has been assigned to him or that he has obtained a licence under a patent or a pledge of a patent, prior assignment of the patent or rights therein shall not be enforceable against him if the other party has not previously requested registration as the assignee or proprietor of rights in the patent.”⁴⁸

Trademarks Act, Section 33(2): “A transfer not recorded in the register shall not affect a third party who has obtained the trademark in good faith.”

Trademarks Act, Section 33(3): “If any person wishes to pledge his trademark rights, a written agreement shall be made and entered in the register. No right of pledge shall be valid until such an entry has been made.”

The Trademarks Act provisions in particular are rather unclear and open to interpretation.⁴⁹

As noted in Sect. 4.2 above, notwithstanding Section 33(3) of the Trademarks Act, it is a common view among commentators that an earlier pledgee’s first-in-time priority based on an unregistered agreement of pledge should be upheld against later transferees and pledgees as a starting point – that is to say, subject to the possibility that a later pledgee or transferee takes priority by registering first in good faith.

The proposed new Trademarks Act, discussed in Sect. 4.2 above, would clarify the situation by separating effectiveness against third parties from the creation of a pledge and effectiveness between the parties.

6 Enterprise Mortgages

With certain exceptions, the entire movable property of an enterprise (that is, a trader recorded in the Trade Register), including both tangibles and intangibles alike, can be used as a “floating” security by an enterprise mortgage. All IPRs are included, as can be read in Section 3(1) of the Enterprise Mortgage Act (634/1984), which explicitly mentions that an enterprise mortgage covers trademarks, trade names, industrial designs, patents and other IPRs.

Enterprise mortgages must be applied for from the register authority: the Finnish Patent and Registration Office. Perhaps curiously from a comparative perspective, a mortgage application must be appended with a negotiable promissory note (on a designated form), which will be used as the mortgage instrument. The promissory note expresses the maximum amount of money that the mortgage being applied for is intended to cover, but it does not express any actual debt owed by the mortgagor, nor does it relate to any specific debt relation. Once the mortgage application has been made, the register authority makes an entry concerning the mortgage in the Register of Enterprise Mortgages and, importantly, on the promissory note.⁵⁰ After these preparations, in order to give rise to a third-party effective security right (“pledge” in the terminology of the

⁴⁸ This provision has been slightly amended and moved to Section 44(6) by Act 23/2016. The amending Act will be put into force by a separate State Council decree, yet to be enacted.

⁴⁹ Tepora et al. (2016), pp. 189–194, 202–203. Some priority questions concerning pledges of copyright were mentioned in note 43 above.

⁵⁰ Enterprise Mortgage Act, Sections 16–18. The applicable handling fee is currently EUR 170. See the Finnish Patent and Registration Office website, price list: https://www.prh.fi/en/yrityskiinnitykset/palvelut_ja_hinnat.html. Accessed 10 Jan 2019.

Enterprise Mortgage Act), the mortgagor must still conclude a security agreement with a creditor, and the creditor, in addition, has to receive possession of the promissory note containing the register authority's entry concerning the mortgage.⁵¹

According to Section 8 of the Enterprise Mortgage Act, the priority of enterprise mortgages is determined by application date: the enterprise mortgage that was applied for earliest takes priority. Meanwhile, enterprise mortgages that were applied for on the same date share the same priority position, unless it is decided otherwise based on the application. Section 4(3) deals with questions of priority between an enterprise mortgage and a competing pledge of a specific object. An earlier pledge of a patent or trademark takes priority over a later enterprise mortgage, whereas a later such pledge is ineffective ("does not bind") against the holder of an earlier enterprise mortgage. The wording of Section 4(3) and its preparatory works is unclear, but according to the prevailing view, the applicable "priority determinant" is the time of the relevant publicity measure (that is, registration of the pledge vs. possession of the promissory note containing the register authority's entry concerning the mortgage).⁵²

On insolvency, the priority afforded to claims secured by an enterprise mortgage is limited, as provided by Section 5 of the Act on the Ranking of Claims. First, certain other claims rank higher. These include claims secured by a right of pledge (or charge) or a right of retention, claims arisen in connection with enterprise restructuring proceedings, and child maintenance claims. Second, in bankruptcy (that is, collective liquidation proceedings), claims secured by an enterprise mortgage are entitled to payment with priority over other claims only with respect to 50 per cent of the value of the mortgaged assets. As noted in comparative legal literature, the 50 per cent rule reduces the commercial significance of enterprise mortgages.⁵³ Because of the limited priority, enterprise mortgages are often used as supplementary security.⁵⁴

7 Rights and Duties Before Default

No IPR security-specific provisions exist in Finnish law on parties' mutual rights and duties before debtor default. All relevant stipulations should be included in the security agreement between the parties. These stipulations may be divided into general content requirements for the security agreement, which concern any IPRs (industrial rights) as security, and specific content requirements for the security agreement, which concern particular types of IPR as security. The general content requirements may concern, for example, income generated by the security object, surrogates to the security object, the course of action if the value of the security object should deteriorate, and the security provider's information duties. In turn, the specific content requirements may concern, for example, the maintenance of the security object (including renewals and related payments) and the defence of the security object (including reactions to infringements).⁵⁵

⁵¹ Enterprise Mortgage Act, Section 7. See Tuomisto (2007), pp. 9–13.

⁵² Tuomisto (2007), pp. 143–51. See Lindberg et al. (2016), pp. 12–13. Lindberg et al. argue that a possibility should be introduced to create a separate pledge of an IPR in addition to an existing enterprise mortgage ("floating charge"). In their view, this could more fully "support exploiting the security potential of IPRs".

⁵³ Kieninger (2004), p. 650. However, this rule is based on a deliberate policy choice. The rule was introduced as part of a general reform of priority rules in 1993, with the explicit aim of promoting creditor equality by reserving assets to be distributed among unsecured creditors. At the same time, most statutory privileges, including those for tax and wage claims, were abolished. The role of the 50 per cent rule was to keep the priority position of enterprise mortgages similar to what it was when the abolished statutory privileges still existed. See Government proposal HE 181/1992, pp. 17–19. See also Juutilainen (2018), pp. 146–147; Bergström et al. (2004), pp. 276–277.

⁵⁴ Tepora (2013), p. 25; Tuomisto (2007), pp. 14–15.

⁵⁵ Tuominen (2001), pp. 160–213.

The proposed new Trademarks Act, discussed in Sect. 4.2 above, would introduce a new provision on the defence of the security object. The provision would allow the pledgee of a trademark to take legal action against trademark infringement if the proprietor of the trademark does not do so within a reasonable period of time after having been informed of the infringement by the pledgee. The exception to this would be a case where the pledgee and the proprietor have agreed that the pledgee has the right to take legal action even without informing the proprietor.⁵⁶

In addition, general principles may play a role, especially in the absence of agreed stipulations. For example, the principle of loyalty and duty of care as regards the security object may require the pledgor to refrain from using the pledged IPR in value-diluting ways, such as “providing a global royalty-free license to everyone, or executing a perpetual and irrevocable exclusive license”.⁵⁷

The above discussion focuses on security over specific IPRs, individually. In contrast, IPRs forming part of enterprise mortgaged property are subject to the Enterprise Mortgage Act. For example, according to Section 9(1), an enterprise mortgage does not prevent the enterprise mortgaged property from being transferred and used in ways required for the regular exchange of goods, the necessary replacement of enterprise property, or other normal conduct of business.

8 Enforcement

8.1 Enforcement Outside Insolvency

In the event of debtor default, Section 2 of Chapter 10 of the Trade Code (3/1734) affords pledgees of an ordinary tangible object or negotiable document an independent power of realisation (that is, private enforcement) directly by operation of law. This section is usually understood to cover pledgees of an IPR as well, although its interpretation is not clear.⁵⁸ The section sets out some detailed provisions on the realisation process, including a notification period of at least one month before liquidation by sale, but the parties can contract out of most of these provisions. In any case, the pledgee of an IPR can acquire an independent power of realisation through agreement with the pledgor.

The parties’ freedom of agreement is the main rule when it comes to alternatives to simple liquidation. Options include assigning licence payments generated by the pledged IPR to the pledgee or vesting the pledged IPR in the pledgee.⁵⁹ As regards vesting the IPR in the pledgee, Section 37 of the Contracts Act (228/1929) may cause complications. It provides as follows: “A term under which property pledged as security for an obligation is forfeited if the obligation is not discharged shall be void.” This so-called *lex commissoria* prohibition does not mean that a forfeiture term is never possible. In legal literature, Section 37 is generally interpreted as meaning that a pledgee is only entitled to receive the amount of the secured obligation out of the value of the pledged asset, while any surplus belongs to the owner of the asset. Accordingly, vesting ownership in a pledgee through a forfeiture term is considered possible if that vesting is made conditional upon the value surplus (if there is any) being returned to the owner.⁶⁰ It has even been

⁵⁶ Section 39(2) of the proposed Act; Government proposal HE 201/2018, p. 138. See Section 68(2) of the proposed Act.

⁵⁷ Lindberg et al. (2016), p. 7.

⁵⁸ Tepora et al. (2016), pp. 230–231, 375; Lindberg et al. (2016), p. 4; Tuomisto (2010), pp. 55–56; Tuominen (2001), p. 220.

⁵⁹ Tuominen (2001), pp. 221, 224–225.

⁶⁰ Tepora et al. (2016), pp. 359–360.

suggested that Section 37 may not apply to situations in which forfeiture has been agreed after the security arrangement has been initiated and credit extended. In such situations, the creditor's bargaining power may have weakened to the extent that the pledgor-debtor no longer needs the special protection that Section 37 is supposed to provide.⁶¹

As an alternative to independent realisation (that is, private enforcement), a pledgee may choose court proceedings. After a final judgment where the court orders the pledgor to pay a certain amount of money out of the value of the pledged IPR, the pledgee still needs to turn to the enforcement authority, which will take care of enforcement in accordance with the Enforcement Code (705/2007).

An enterprise mortgage does not entitle the mortgagee to independent realisation of the mortgaged assets. Instead, a court judgment and enforcement through the enforcement authority (or realisation in bankruptcy proceedings) are required.⁶²

8.2 Effects of Insolvency Proceedings

The relevant types of insolvency proceedings are: (1) enforcement (that is, debt collection and distraint proceedings), (2) bankruptcy (that is, collective liquidation proceedings), (3) restructuring of an enterprise and (4) adjustment of the debts of a private individual. Security rights over an IPR as discussed in this section are presumed to be “fully developed” as regards protection against the security-provider debtor's other creditors. For example, a pledge of a patent is presumed to be validly created between the parties and registered in the Patent Register. Accordingly, pledges of or other types of security right over a copyright are not discussed, due to uncertainty in terms of achieving third-party effectiveness.⁶³ It should also be noted that, due to the complexity and detailedness of the insolvency legislation, only a broad outline can be discussed here.

Even if it is subject to a security right, an IPR can be subject to distraint as a part of enforcement proceedings initiated by another creditor; however, the security right will be taken into account in the realisation and distribution of proceeds (Enforcement Code, Chapter 4, Section 44).⁶⁴ The secured creditor's priority position is laid down in the Act on the Ranking of Claims.⁶⁵ However, an enterprise mortgagee has no right to be paid out of the proceeds if the remaining (that is, non-realised) mortgaged property clearly suffices to cover the mortgagee's secured claim (Enterprise Mortgage Act, Section 14(3)). Before realisation takes place, the enforcement authority must find out whether registered pledges or mortgages exist (Enforcement Code, Chapter 5, Section 29). Depending on the object of distraint, this may require searching the relevant IPR register and the Register of Enterprise Mortgages kept by the Finnish Patent and Registration Office.⁶⁶

⁶¹ Tepora (2008), pp. 23–24. Tepora makes this argument in discussion of security transfer of ownership (sale and lease-back with a security purpose).

⁶² Tepora et al. (2016), pp. 225, 230; Lindberg et al. (2016), p. 5.

⁶³ See Sect. 4.3 above, especially note 43.

⁶⁴ According to the Trademarks Act, Section 35(1), a trademark cannot be distrained unless it is subject to a right of pledge. Section 41(1) of the proposed new Trademarks Act, discussed in Sect. 4.2 above, is a similar provision, but with application for a trademark added in the wording. Government proposal HE 201/2018 clarifies (at p. 140) that “right of pledge” in the provision also covers enterprise mortgage.

⁶⁵ See Sects. 5 and 6 above. Importantly, the “50 per cent rule” on enterprise mortgages (discussed in Sect. 6) only applies in bankruptcy, not in enforcement.

⁶⁶ Linna and Leppänen (2015), p. 532.

According to Section 9(1) of Chapter 3 of the Bankruptcy Act (120/2004), when bankruptcy proceedings begin, claims that have not yet fallen due are generally considered due between the creditor and debtor. Industrial rights, including patents and trademarks, are part of the proprietor's bankruptcy estate. As regards trademarks, this is explicitly stated in Section 35(2) of the Trademarks Act.⁶⁷ To begin with, the pledgee of a patent or trademark (but not an enterprise mortgagee) has a "separatist position" in relation to the bankruptcy estate (Bankruptcy Act, Chapter 17, Section 11). This means that the pledgee is entitled to realise the security object (that is, use the powers of realisation that the right of pledge entails) and to satisfy the secured claim.⁶⁸ However, under Chapter 17 of the Bankruptcy Act, the bankruptcy estate can temporarily prevent the realisation to scrutinise the pledgee's rights or to protect the interests of the estate, and, in certain situations, can realise pledged assets (or apply for realisation under the Enforcement Code). Again, the secured creditor's (that is, pledgee's or enterprise mortgagee's) priority position is laid down in the Act on the Ranking of Claims.

Starting to restructure an enterprise or adjust the debts of a private individual (that is, opening rehabilitation proceedings) causes a stay on realisation efforts, including the realisation of security objects. Indeed, realisation falls within the scope of "interdiction of debt collection". The provisions on this interdiction and the grounds on which exceptions can be granted to it are found in Chapter 4 of the Restructuring of Enterprise Act (47/1993) and Chapter 4 of the Act on the Adjustment of the Debts of a Private Individual (57/1993). In the restructuring of an enterprise or adjustment of the debts of a private individual, a claim secured by one or more IPRs (individually or as part of enterprise mortgaged property) may count as a "secured debt", which has a special position. In these proceedings, the court is allowed to alter the content of existing debt relations. Generally, the payment schedule can be altered; it can be decided that payments will primarily amortise the principal amount and only go towards credit costs after that; costs concerning the rest of the credit period can be lowered; and the outstanding principal amount can be lowered. However, the special position of a secured debt entails (in a somewhat simplified explanation) that the principal amount of that debt cannot be lowered (Restructuring of Enterprise Act, Section 45; Act on the Adjustment of the Debts of a Private Individual, Section 26). Section 3(1) of the Restructuring of Enterprise Act and Section 3(1) of the Act on the Adjustment of the Debts of a Private Individual define "secured debt" as follows: a debt where the creditor holds a security right, which is effective against third parties, over property that belongs to or is in the possession of the debtor, insofar as the value of the security object at the commencement of the proceedings would have sufficed to cover the amount of the creditor's claim after the deduction of liquidation costs and claims with a higher priority.

9 Use of IPR Security in the Light of Statistics

Statistical data is available on the registration (or requests for registration) of pledges of patents and trademarks. The following data, provided by the Finnish Patent and Registration Office, is from 23 January 2019.⁶⁹ The total number of national patents granted in Finland that may still be in force within the maximum patent protection time of 20 years (that is, patents whose maximum term has not expired, regardless of whether they are actually in force) is 14,378. Registration of a pledge has been requested with respect to 131 of these national patents.⁷⁰ The total number of European patents validated in Finland that may still be in force within the maximum patent protection time of 20 years is 82,497. Registration of a pledge

⁶⁷ See Section 41(2) of the proposed new Trademarks Act, discussed in Sect. 4.2 above.

⁶⁸ Of course, any surplus belongs to the bankruptcy estate.

⁶⁹ In file with the author.

⁷⁰ The total number of national patents in force in Finland is 7,167.

has been requested with respect to 61 of these European patents.⁷¹ Current data for pledges of patents is not available, but the numbers would be even lower than the above-mentioned numbers for requests for registration of a pledge. This is because the above-mentioned numbers for granted and validated patents include patents that have already expired. In addition, some of the registered pledges have come to an end, and some of the requests for registration of a pledge may have been rejected.

More exact data is available on the registration of pledges of trademarks. The number of registered pledges of a trademark (situation of 23 January 2019) is 262, while the total number of registered trademarks or pending applications for trademark registration is 68,096. In sum, pledges of patents and trademarks are rarely used in Finland.

No statistical data exists for security over copyright. As noted above, copyright is not registrable under Finnish law, and consequently neither are security arrangements that concern specific copyright. Due to uncertainty regarding achieving third-party effectiveness,⁷² these arrangements are likely to be uncommon. However, they have occasionally been seen in contract and bankruptcy practice.⁷³

Enterprise mortgages, in contrast, are frequently used, although their role is often that of supplementary security. Indeed, enterprise mortgages are by far the most common way to use IPRs as security under Finnish law, and they cover both industrial rights and copyright alike. The following data, provided by the Finnish Patent and Registration Office, was collected at the end of February 2019.⁷⁴ The number of enterprises that have one or more enterprise mortgages in force is 76,603. The total number of enterprise mortgages in force is 112,942, while the total number of promissory notes with a mortgage entry in force is 249,822.⁷⁵ The total principal amount of all promissory notes with a mortgage entry is EUR 164,799,535,559.26.

The nearly negligible use of patents and trademarks as security in Finland (other than through enterprise mortgage) is not easy to explain. The legal framework for pledges of patent and trademark is, by and large, adequate, so that third-party effective pledges of these types of IPR can reliably be obtained. Therefore, reasons should be sought elsewhere, including in the special characteristics of IPRs.

A study group consisting of practitioners has also recently observed that “IPRs are not as commonly used as a specific subject-matter of a security interest, as they are as a part of a floating charge [enterprise mortgage]”.⁷⁶ They explain it as follows:

This is presumably at least partly due [to] the realization and valuation of IPRs being more complex than those of most other forms of movable assets. 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. The

⁷¹ The total number of European patents in force in Finland is 44,973.

⁷² See Sect. 4.3 above.

⁷³ Tepora (2004), p. 193. Tepora refers to arrangements where a pledge of copyright is complemented with an agreement aiming to prevent the pledgor from distributing copies of the copyright protected work, e.g., a film or a video.

⁷⁴ In file with the author.

⁷⁵ As discussed in Sect. 6 above, promissory notes with a mortgage entry are used as mortgage instruments and do not express any actual debt owed by the mortgagor or relate to any specific debt relation. The number of promissory notes with a mortgage entry does not reveal how many of them are currently used in security arrangements and how may remain with the enterprise ready to be used or re-used in a security arrangement.

⁷⁶ Lindberg et al. (2016), p. 6.

rather strong emphasis on IPRs as a part of a floating charge [enterprise mortgage], where assets are usually realized as a whole, may be seen as a logical consequence of this.⁷⁷

This is certainly plausible. Another factor may be the prevalent use of the enterprise mortgage as a blanket security covering almost the entire movable property of an enterprise, given that later pledges of a specific IPR are ineffective against the holder of an earlier enterprise mortgage.⁷⁸ Further explanations might be found in the territorial nature of IPRs and the relatively small size of the Finnish market.⁷⁹

10 Conclusion

The question whether one can reliably obtain a third-party effective security right over an asset is a fundamental test of adequacy for any system of security rights. As presented above, the Finnish law of security passes this test in terms of patents and trademarks, but fails it in terms of copyright – other than as part of an enterprise mortgaged property. Then again, the statistical data discussed shows that the actual use of these types of security rights can be nearly negligible even if the legal framework is adequate in this sense.

Although the need for legislative or judicial solutions is greatest in respect of security over copyright, all types of IPR security could benefit from a law reform, provided that this reform would manage to clarify their part of the legal framework for IPR security. This is because Finnish law contains very few provisions specifically related to IPR security and it is often unclear how the general legal framework for security – much of which is based on case law and doctrine patching up fragmentary legislation – should be applied in the case of IPR security. The proposed new Trademarks Act promises such clarifications. The crucial impulses for this reform came from outside the national context, as is so often the case.

Postscript

The new Trademarks Act (544/2019) was enacted on 26 April 2019 and entered into force on 1 May 2019. It introduced the changes discussed in Sections 4.2 and 7 and elsewhere in this chapter.

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⁷⁷ *Ibid.* Lindberg et al. also list aspects of laws on security over IPRs that, in their view, could be improved (at pp. 11–13). Among other things, they call for more provisions or case law on IPR valuations, raising the priority percentage of enterprise mortgage (“floating charge”) to 100 and simplifying the system, and limiting a security provider’s rights in certain situations.

⁷⁸ See Sect. 6 above.

⁷⁹ Market size may be a relevant factor, e.g., where a prospective security provider holds different national patents for the same invention and has to choose which of them to use as security. This is so especially if the legal framework for security over patents varies greatly between the relevant states, making it excessively difficult or cumbersome to obtain and manage third-party effective security rights in several states simultaneously.

Economic Committee report TaVM 38/2018. Talousvaliokunta: Hallituksen esitys eduskunnalle tavaramerkkilaiksi ja siihen liittyviksi laeiksi sekä tavaramerkkioikeudesta tehdyn Singaporen sopimuksen hyväksymiseksi ja voimaansaattamiseksi

Government proposal HE 181/1992. Hallituksen esitys eduskunnalle etuoikeusjärjestelmän uudistamista koskevaksi lainsäädännöksi

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Abbreviations

EPC	European Patent Convention
EU	European Union
HE	<i>Hallituksen esitys</i> , Government proposal (Finland)
IPR	Intellectual property right
KKO	<i>Korkein oikeus</i> , Supreme Court (Finland)
OJ	Official Journal of the European Union
PCT	Patent Convention Treaty
TaVM	<i>Talousvaliokunnan mietintö</i> , Economic Committee report (Finnish Parliament)
WIPO	World Intellectual Property Organization