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Lending & Secured Finance 2021

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Intellectual Property and Personal Data in Drop-Down Financings

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Introduction

An increasingly common form of liability management transaction in the leveraged finance market is a "drop-down financing", in which a borrower and a group of lenders create new financing that is structurally senior to an existing capital structure with respect to an asset or group of assets owned by a subsidiary that is not party to the pre-existing financing. A drop-down financing is fundamentally the sum of two related transactions. **First**, assets are transferred – typically, contributed – by a parent to a subsidiary that is not an obligor of the main pre-existing parent debt (the "drop-down" step); **second**, the subsidiary incurs or guarantees structurally senior debt secured by the contributed assets. There has been intense focus in the loan market on drop-down financings recently, as these transactions result in the creation of debt that is structurally senior to an existing secured financing using assets that may have been collateral to support that existing financing. The backdrop against which these transactions typically occur – a borrower in financial distress or at least anticipating and trying to avoid distress – can make the exercises challenging for all parties involved.

In several recent high-profile drop-down financings, the contributed assets, and, therefore, the collateral for the new financing, consist entirely or predominantly of intellectual property ("IP") and personal data, sometimes including the company's core brands and/or consumer and client data. This chapter explores the rationale for and benefits (to both borrowers and lenders to a subsidiary) of utilising IP and data as the underlying asset for these financings.

Brand Intellectual Property

There have been several drop-down financings in which brand IP has been contributed to the subsidiary and serves as the foundational collateral securing the financing. From a property or legal standpoint, the core brand usually consists of the trademarks epitomising a company's business. Generally speaking, in order to use a trademark without infringement, an entity either needs to own or have a licence to use the trademark. This principle also applies within a group of affiliated entities: if a trademark is owned by a parent's subsidiary (including after giving effect to a "drop-down"), the parent needs a licence from the subsidiary to use the trademark. The risk that a parent loses its licence to its core brand can be ignored or managed while the parent maintains sole control of the subsidiary, but that risk can suddenly become manifest and significant when third parties gain the power to interfere with that shareholder control, including as a result of lenders implementing customary secured creditor covenants or exercising remedies against the subsidiary. If, in such case, the parent loses its licence to use its core brand, whether as a result of the termination of the licence agreement with its subsidiary or the suspension of the licence, the results could be dire for the parent. Even if rebranding were possible – and in some cases, depending on the significance of the brand identity, it is not – a termination or suspension may not afford the parent an orderly transition period to continue its business operations with its core brand until rebranding takes place.

This leverage afforded to the subsidiary and the ability to concentrate the value of the enterprise in the subsidiary may not be as significant when other types of assets are contributed to a subsidiary, and it is one important reason why creditors value core brand assets as a basis for a drop-down financing. But there are others. For the same reasons that a core brand has value to the parent, it also has value to a third-party purchaser. Where the core brand is the "crown jewel" of the business, that value can be significant and concentrated in one trademark or a suite of related trademarks (as opposed to other asset categories – e.g., equipment, inventory or vehicles – where value may be spread out over a large number of assets or categories of assets that could be easily replaced). In a downside scenario, this concentration facilitates the purchase of the core brand by licensing companies whose goal is to monetise the brand through further licensing arrangements, without the need to purchase any "hard" assets from the company (which may not be owned by the subsidiaries).

In addition, trademarks can often be transferred among related legal entities and pledged to creditors quickly and efficiently and without third-party approvals. The transfer is typically effectuated through a relatively straightforward contribution agreement and related filings with the United States Patent and Trademark Office ("USPTO"), and the security interest in favour of the lenders to the subsidiary is documented in traditional pledge and security documentation, a "short form" version of which is filed with the USPTO along with other filings as necessary to perfect the security interest. Other asset classes such as real estate or vehicles can be substantially more difficult to transfer and encumber.

It is interesting to note that while patents and copyrights can also be transferred quickly and efficiently, patent and copyright assets have not been utilised as frequently as trademarks in recent drop-down financings.[1] A possible basis for this may be the comparative flexibility of that portion of IP law: depending on the particular property rights, the parent may be able to redesign its products or revise its software code such that it no longer infringes the transferred patent or copyright even if the parent's licence were terminated, reducing the value of the asset and the leverage of a creditor secured by it.

To be clear, there is no general structural reason that asset categories other than trademarks cannot be the basis of drop-down financings. The total mix of attributes described above,

however, explains why trademarks, and therefore a company's core brand, have been a preferred asset category to secure drop-down financings. The prevalence of IP in drop-down financings is certainly not a secret to loan market participants, and arrangers and creditors in recent years have been increasingly focused on including limitations in loan agreements on transfers of material IP. These limitations, which often focus on transfers of material IP to unrestricted subsidiaries or other non-loan parties (but many examples of which do not create special limitations on distributing material IP to shareholders), are intended to address the fact that "investments" and other baskets utilised under existing credit agreements to facilitate drop-down financings are typically available equally to IP and other asset categories. Having transfer limitations that focus solely on IP is not necessarily an approach that is too narrowly focused on historic transactions, since IP will likely continue to be a preferred asset category to secure drop-down financings. But market participants should strive to remember that IP-specific transfer limitations do not in any way limit drop-down financings secured by other asset categories, and those types of financings may be facilitated through the use of obvious, and potentially large but capped, "investments" baskets; through the use of less obvious and potentially uncapped baskets; or through the use of a combination of baskets.

Personal Data

To date, personal data has not played nearly the same role in drop-down financings as trademarks have, but there are recent examples of personal data being contributed along with core brands and/or other assets to form the collateral package for the financing. Personal data is information that can be used to identify individuals, which may include not only the names, physical and e-mail addresses, social security numbers and/or other identifying information of individuals, but also information relating to health, financial position and consumer/personal preferences. For many companies that sell goods or provide services to consumers, personal data is vital to their sales and services operations. As with trademarks, if personal data is contributed to a subsidiary, the parent must obtain rights from the subsidiary to continue to use the personal data, which rights could be terminated or suspended by the subsidiary in certain circumstances. The ability to terminate or suspend these rights, of course, can buttress the leverage that subsidiary lenders in a drop-down financing have over the parent (and its lenders). In addition, personal data may be valuable in its own right, independent of the core brand, as an asset that could potentially be sold to certain third parties either as a stand-alone asset or as a necessary or desirable component of a business line (whether of the parent or subsidiary) being acquired by a third party.

A key difference between trademarks and personal data in the context of drop-down financings is that the transferability of personal data to third parties or even to controlled subsidiaries is more complex and, as a result, the circumstances under which personal data can form the bedrock, or even a component, of the collateral package for a drop-down financing are more limited. The ability to transfer and/or pledge personal data is impacted not only by contract and privacy policies, but also by data privacy laws. If the parent acquired the personal data directly from an individual, the parent's privacy policy and notices provided to the individual will govern – and potentially limit – the parent's ability to use, transfer and/or pledge that personal data. On the other hand, if the parent acquired the personal data from a third party, any such use, transfer and/or pledge will be subject to the terms of the contract with the third party and the third party's own privacy policies and notices. In all cases, data privacy laws also need to be considered, as these laws may further limit the ability of the parent to transfer and/or pledge personal data. Depending on the jurisdictional expanse of the business and the proposed personal data to be transferred and/or pledged, multiple data privacy laws could apply (e.g., the General Data Protection Regulation ("GDPR") and the California Consumer Privacy Act). The full scope of these laws, and the myriad ways in which they apply to transfers and pledges of personal data, is beyond the scope of this chapter, but certain key considerations for drop-down financings are set forth in Annex I (see below). It is important to note that the complexity of and risks related to violations of data privacy laws are increasing, especially as the regulatory and legislative landscape continues to evolve rapidly, which demands due consideration in connection with the use of personal data in drop-down financings.[2]

Licence Agreements and Key Licence Terms

As discussed above, any IP or personal data contributed to a subsidiary in a drop-down financing must be licensed back to the parent in order for the parent to have continuing use of those assets. While a short-form licence agreement could generally address any IP or personal data concerns raised by the contribution, the subsidiary's rights under the licence agreement usually serve as a material component of the collateral package for the drop-down financing and provide meaningful collateral value to the subsidiary's lenders. During the term of the licence agreement, the parent will usually have exclusive rights to use the IP and personal data. These exclusive rights would encumber the IP and certain rights in the personal data in the event of a sale of the IP and/or personal data to a third party (as a result of a foreclosure or otherwise), which could severely limit the ability of the subsidiary lenders to monetise the IP and/or personal data following a default, unless the licence is terminated. To enhance the value of the collateral and the flexibility of the drop-down lenders' rights and remedies with respect to licensed collateral, there is often significant focus on, and negotiation of, the licence agreement's terms. While a comprehensive treatment of the terms of these licence agreements is beyond the scope of this chapter, there are certain key provisions to consider:

- **Ongoing Royalty Payments to the Subsidiary and Continued Use**. Lenders to a subsidiary often look to the licence agreement itself to generate meaningful cash flows for the subsidiary through ongoing royalty payments by the parent. This feature is of critical importance as such payments may be the primary (or sole) source of liquidity for the subsidiary and, therefore, the primary (or sole) source of cash available to make ongoing interest and other payments to the lenders. These royalty payments can be structured in a number of ways, including as "fixed" payments or as "percentage-based" payments tied to either the gross or net revenues of the parent or, alternatively, to some measure of the revenue attributable to the use of the IP itself. If the royalty payments are based on the use of the licensed IP, the subsidiary and its lenders may seek to protect the royalty payments by including covenants in the licence agreement obligating the parent to continue to use and invest in the IP by, for example, maintaining minimum advertising spending to support the brand and/or by not rebranding or launching potentially dilutive competing brands. To add to the complexity of these negotiations, royalty payments can be relatively large – in some cases, in excess of $50 million per year – and percentage-based royalty payments are sometimes coupled with minimum payment requirements. From the standpoint of creditors of the parent, the treatment of royalty payments under the

parent's debt facilities will depend on the corporate structure and the specific covenant package, but these arrangements may implicate both the investments and affiliate transactions covenants. Lenders to the parent may view these royalty payments as added leakage from their credit group, above and beyond the leakage resulting from the initial contribution of the IP to the subsidiary.

- **Exclusivity**. Absent a termination or suspension of the licence agreement, the parent will seek to retain exclusive rights to the IP so that competitors or other third parties cannot exploit the IP for their own benefit. Of course, in a non-distressed scenario in which the IP is owned by a controlled subsidiary, this is a non-issue. However, exclusivity becomes an issue for the parent in a distressed scenario in which the subsidiary's lenders seek to sell the IP to a third party. Unless the licence is already terminated, these third parties would purchase the IP subject to the exclusive licence to the parent, meaning that the third parties would effectively be purchasing a stream of cash flows from the parent and, if – and only if – the licence agreement is eventually terminated or suspended, the right to exploit the IP themselves or through licensing. While subsidiary lenders may view this type of exclusivity as an acceptable part of the overall drop-down financing structure, it puts greater importance on the financial terms of the licence and the termination and suspension triggers.
- **Termination and Suspension Events**. As noted above, termination and suspension events are critical for a number of reasons. From the parent's standpoint (and from the standpoint of its lenders), terminating or suspending the licence agreement could have existential consequences. From the standpoint of the subsidiary's lenders, the ability to terminate the licence agreement not only affords them negotiating leverage, but also provides them an avenue to sell the IP to a third party free and clear of the licence, permitting full realisation of the value of the asset through sale to a purchaser with the immediate ability to exploit the IP itself. Of course, termination of the licence agreement would also result in the subsidiary's loss of the related royalty stream. As a result of these high stakes, the range of termination events is often a key negotiation point, with some licence agreements containing only very narrowly tailored termination events (e.g., for failure to pay the ongoing royalty). The suspension of a licence agreement can also pose a meaningful threat to the ongoing operations of a parent, but may also provide the parent with a meaningful ability to cure the event that resulted in the suspension and, thereafter, resume use of the IP and personal data.
- **Treatment on the Parent's Bankruptcy**. If the parent files for bankruptcy protection under the United States Bankruptcy Code, the parent would have the ability to assume or reject its executory contracts (often including IP licences). In drop-down financings, the parties are often heavily invested in ensuring that the parent assumes the licence agreement. This is because, on the one hand, the parent will often need to have continued access to its core brand and personal data in connection with a reorganisation and, on the other, the royalty payments under the licence agreement will continue to support the subsidiary's debt expense. As a result, the licence agreements often include language specifically contemplating reorganisations and insolvencies, permitting assumption and providing for significant – and perhaps prohibitive – financial costs to the rejecting party.

These provisions are often collectively designed to provide leverage to the subsidiary lenders in a downside scenario as against the parent and, just as important, the parent's lenders. In many bankruptcy proceedings, a successful reorganisation of the parent depends on the reorganised parent having continued access to its core brand. Because of this, the pre-petition parent lenders who, upon the debtor's emergence from bankruptcy, may become equity owners of (or creditors to) the reorganised parent are often incentivised to agree to the relatively favourable treatment afforded to the subsidiary lenders in order to obtain continuing access to the core brand through a licence agreement.

Endnotes

1. Though patents and copyrights have been prominently used in some pharmaceutical and entertainment industry financings.
2. As an example, the GDPR includes fines for certain violations thereof in an amount up to 4% of a violating company's annual revenue.

Annex I

Key questions to consider in structuring drop-down financings secured by personal data include:

- Does the initial transfer of personal data to the subsidiary require updates to privacy policies or new consents? Depending on the nature of the personal information, the California Consumer Privacy Act ("CCPA") requirements around "sales" of personal information could require an updated notice, with the relevant consumers being given the right to opt out of the transfer. This could apply to both the initial transfer to the drop-down subsidiary as well as later transfers in connection with an exercise of remedies.
- Does the transfer of personal data to the subsidiary introduce new privacy law compliance burdens? If the subsidiary is incorporated in a new jurisdiction, that jurisdiction's data privacy laws may apply to all of the personal information held by the subsidiary regardless of its source. For instance, if the subsidiary is organised in Europe, the GDPR could extend to apply to all of the personal data held by it, even if the parent had historically kept its non-European data separate in order to limit the reach of the GDPR. This could introduce both operational and risk burdens as the company would now need to implement a programme to respond to data subject requests from a larger population and subject a broader set of data to the controls and potential fines under the GDPR.
- How should the transfer of personal data be structured from a "data controller" perspective? Companies will need to carefully consider whether the subsidiary should be treated as a data processor or data controller under the GDPR (and similar regimes) to ensure that responsibility for the data is maintained and that the relationships are appropriately documented. For instance, the GDPR requires that data controllers and data processors enter into contracts with, at least, a specific set of data privacy-driven terms and, depending on the arrangement between the data controllers, they could be jointly liable for any violations of the GDPR.
- Would the personal data be transferable in connection with an exercise of remedies if it is not transferred together with other assets? The CCPA includes exceptions to the concept of "sales" to the extent that the acquirer of the personal data assumes control of all or part of the associated business. Transfers of just the data may not fall within this exception and so could trigger the notice/opt-out mechanism described above. Additionally, attempts to sell personal data as a stand-alone asset out of bankruptcy have been challenged, with some resulting sales forcing the personal data to be sold to a buyer of at least some of the buyer's other assets.

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