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IP Policy Must Focus On COVID-19 Cure, Not Special Interests

By **Robert Stoll** (April 16, 2020, 2:44 PM EDT)

COVID-19 is a pandemic that will change our world. Already, the virus has killed more than 140,000 people across the globe and devastated the international economy.

We live in isolation and mourn our dead from afar because the only tool we have to stave off infection and avoid crashing our health care system is social distancing. In isolation, we do what we can to work and live and sustain our families, communities and nations.

The pandemic, as with many momentous events in history, has revealed who we are as a people. We applaud the heroes among us: the selfless health care workers, courageous first responders and brave grocery store teams. However, just as we celebrate our better nature, there are those who seek to benefit from tragedy by gouging profits where they can and taking advantage of the precarious state of our economy.



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We now have had several rounds of stimulus bills, and while the focus has been on alleviating the suffering of those affected by COVID-19 in terms of their health and economic well-being, some provisions, like those related to funding mail-in ballots, still break down in a partisan divide.

We need to keep our focus on fighting the virus and not each other.

The COVID-19 battle has an impact on the very essence of intellectual property rights and policy. Many innovative companies with patent-protected products and processes important in the war against this virus have been donating their protective gear and drugs to help with the fight. Others are collaborating with competitors to develop a vaccine.

There have been several IP provisions affecting the pandemic discussed internationally, some of which have been enacted in the U.S., and some draft IP-related bills with specific pandemic provisions are circulating right now.

One recent IP effort resulted in a letter to Director General Francis Gurry of the World Intellectual Property Organization, urging him "to take a clear stand in favor of ensuring that intellectual property regimes are a support, and not a hindrance, to efforts to tackle both the Coronavirus outbreak and its consequences."

The signatories ask Gurry to encourage WIPO member states to use existing treaty flexibilities to access medicines and support online education; urge right holders to permit free use of their coronavirus-related IP; support global pooling of IP rights; and support member states efforts' to use exceptions to IP.

The goal of developing a treatment or cure for COVID-19 is one that everyone can support, but the signatories to the WIPO letter, many of whom represent academic and civil society organizations, do not historically support a strong patent system. The letter they have penned does not raise the issues of state-supported compensation for valuable IP or state collaborations with innovative companies to find cures.

Nor was there any mention of support for innovative company efforts to find a cure. The goals recommended by the signatories reinforce and promote an agenda they have supported long before the emergence of COVID-19.

A positive step to adjust to the new reality included in the Coronavirus Aid, Relief and Economic Security, or CARES, Act, signed into law on March 27, allows for the director of the U.S. Patent and Trademark Office to waive or adjust any timing deadlines established in statute to provide relief to patent and trademark filers and owners during the pandemic.

Fortunately, attempts to overreach, including provisions unrelated to COVID-19 that permitted the director to declare emergencies in the future, or to rely on statutory authority to waive dates if the electronic system crashed, were excised from the final bill.

The Facilitating Innovation to Fight Coronavirus Act has recently been circulating in the Senate. One section of the bill provides for immunity from liability for unapproved use or modification of medical devices, practicing without a license if instructed to by someone with a license, or testing or treating outside a standard health facility, where the above activities are intended to counter COVID-19 during the emergency.

A second section of the bill would extend the term of a patent related to the treatment of the coronavirus by 10 years more than provided by existing law. This latter provision appears excessive in relation to the fight against COVID-19.

One recent suggestion for a legislative focus that seems to be gaining steam is an increase in trademark and patent fees to offset what is expected to be a downturn in future filings. Trademark filings are a leading indicator of trends in intellectual

property filings, and we are seeing a reduction since the virus took hold in the U.S.

But it is too early to anticipate what fees will be necessary to operate the USPTO in an effective manner and whether any downturn in filings will be severe and sustained. It seems a statutory change in fees is premature and not immediately necessitated by the pandemic.

Also, there have been discussions with Capitol Hill staffers to determine if there might be an opportunity to incorporate other IP changes to must-pass legislation including provisions related to post grant procedures and patent subject eligibility, both of which have merit but are not necessitated by the pandemic.

It is disappointing to see the different sectors of the IP community go to their familiar corners and support positions they have always held irrespective of the current world-wrenching conditions. It would have been heartening if the representatives of civil society groups and academic institutions showed the same support for intellectual property owners victimized by the pandemic that they showed for other affected industries and entities during debate over the trillion-dollar stimulus package.

Where are the intellectual property organizations and companies that could lead efforts to ensure that all who need lifesaving drugs, equipment and information receive it and are not unnecessarily hindered by intellectual property protection?

We are in the crisis of our generation, and we need to pull together to get through it. All of our efforts must focus on beating this virus. This is not the time to push for our special interests or to try to gain a leg up on the opposition. We need full review and testing of significant changes to our intellectual property system to ensure we don't enact legislation that has unintended consequences. We need to make sure that any changes undertaken to fight this horror are laser-focused.

After we have beaten this scourge, we can review proposals related to post-grant procedures, patent subject matter eligibility, director authority and a patent term that spurs innovation. After comprehensive analysis, we can develop a legislative package that will make the system work better for the IP community. We need to review all noncritical provisions thoroughly in the light of day. Apropos of the current environment, sunshine is one of the best disinfectants.

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