Client Alert

April 2020

If Passed, the Facilitating Innovation to Fight Coronavirus Act Would Provide Liability and Patent Protections to Healthcare Professionals Battling COVID-19

In two prior alerts, we addressed ways in which i) the federal government and ii) IP owners themselves may help in the fight against COVID-19 by temporarily broadening rights to use, make, and sell technologies protected by IP rights.

A third creative solution that tries to balance IP rights protection with public health protection has been proposed by a member of Congress. On March 30, 2020, US Senator Benjamin E. Sasse (R-NE) introduced the Facilitating Innovation to Fight Coronavirus Act.[1]

The act has two main parts. The first part would limit liability for health care professionals who are fighting coronavirus (e.g., in cases where a health care provider uses a medical device in a manner that is unapproved or a retired doctor resumes the practice of medicine without a license) during the duration of the national emergency.

The second part would delay, and then extend, the patent term of eligible patents related to "the treatment of the Coronavirus Disease 2019 (COVID-19)." In particular, the legislation: i) delays the start of the patent term from the date of the earliest filing (US or international (PCT), excluding provisional applications) to "the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to that disease terminates"; and ii) extends the patent term by 10 years. Eligible patents would include any "new or existing pharmaceutical, medical device, or other process, machine, manufacture, or composition of matter, or any new and useful improvement thereof used or intended for use in the treatment of" COVID-19.

While in theory this could be very useful to help treat and end the pandemic, in practice, the act's language leaves some important questions unanswered.

The legislation does not describe what it means to be related to the treatment of COVID-19. In this regard, it is unclear whether a patent would have to be explicitly directed to the treatment of COVID-19 or instead could be indirectly related to such treatment. For example, would the legislation apply to patents related to disinfectants, soaps, masks, gloves, etc.? Similarly, would the legislation apply to patents that could be more tenuously related to the treatment of COVID-19, such as software patents?

Further, the legislation does not describe who or what would designate a patent as being related to the treatment of COVID-19. For example, could an applicant self-identify a patent or does the responsibility to determine relatedness fall to the US Patent and Trademark Office or another governmental agency?

[1] *See* https://www.sasse.senate.gov/public/index.cfm/2020/3/sasse-pushes-liability-shield-for-coronavirus-doctors for Senator Sasse's press release.

There are also questions with respect to how a delay of the patent term can actually be implemented, as well as how such a delay would affect potential infringers both before and after the start of the term, and whether the act applies to existing patents or only those granted after the act takes effect.

In summary, the legislation is well-intentioned, but will likely need to address the above-discussed issues before it can pass.

Contacts

Roman Khasidov
rkhasidov@HuntonAK.com

Aimee Soucie
asoucie@HuntonAK.com