

Innovation's Relationship with IP and Antitrust Laws in Times of Crisis

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The global pandemic and the economic crisis are becoming opportunities to create, develop and promote solutions to overcome the health emergency and establish the growth of a new, emerging economy. The innovations being developed are inherently linked to intellectual property (IP) and competition law, which is why these intangible assets and the rights generated from them must be protected, safeguarded and respected.

In the following article, Holland & Knight's IP, antitrust and trademark law attorneys provide insight on how remote work, social distancing, online business relationships and other factors have led individuals and companies to apply in a special way [intellectual property](#) and [competition law](#) in times of crisis.

Intellectual Property

Trademarks. The limitations that some companies have for the development of their commercial activities put at risk their positioning and acquired recognition due to, among other things, the decrease in interaction with consumers. Given this, several companies have started to "reinvent" themselves by creating new lines of business that supply current needs and even provide solutions to certain problems from a health perspective. They also are promoting new experiences for their consumers, thus establishing new relationships and market niches.

The reinvention of these companies will likely lead to new alliances, trademarks and products that in the crisis environment become part of their most valuable assets. These "new" companies will need new logos or names to better identify what they do. Companies will need to follow trademark law in establishing and protecting their new identities. Even with the pandemic, authorities across the globe continue to provide IP services and protect against infringement.

Companies must be careful in this remote work environment that they make sure all employees and creative personnel adhere to trademark laws, that their new products or trademarks don't infringe on third parties, and that they have taken steps to protect their IP before launching new products or services. One step to take is conducting a preliminary trademark search to verify the viability of the expressions chosen to identify these new businesses. Companies also should seek to try and maintain in force the signs over which rights have been granted since these intangible assets can be a source of income and a mechanism for reinvention.

On the other hand, it is important to make a maintenance plan for trademarks because due to the crisis they could be canceled or will no longer be used, and to establish the legal defense strategy to be followed. This may range from keeping the advertising active to argue force majeure events such as border closures, among others.

Patents or Industrial Designs. There is an incalculable potential in the creation of new inventions or improvements for products and procedures found in the market. It is clear that by spending more time at home, people will begin to become aware of needs or desires that they otherwise would probably not have realized.

People are now at home thinking of solutions to everyday situations, and this could lead to the rise of hundreds of inventions and processes that will leverage not only the personal economic development but that of companies and even countries. Governments, corporations and society should focus part of their aid efforts to encourage, collect and support at-home innovators and analyze the best way to provide them with IP protection.

As an example in the health sector, the European Commission created through the European AI Alliance a virtual

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warehouse to collect artificial intelligence and robotics ideas to combat and treat COVID-19. These ideas range from diagnosis to treatment, as well as the cleaning and disinfection of health centers, improvement of logistics and possible home care.

All sectors of the global economy could experience unforeseen transformation as the new dynamics of coexistence, work and even leisure will spur ideas to help us live better under the new economic, cultural and political dynamics.

To protect and inspire these innovators during a time of crisis, constant communication and reports of developments are essential. IP offices, lawyers and other services are instrumental in helping to determine the feasibility of the protection of inventions or services and at the same time help avoid violating the rights of third parties that may generate potential conflicts.

Copyright: Creation of audiovisual content could be one of the areas with the greatest growth during this crisis. Educational institutions, entertainment companies, influencers, health professionals, law firms and many others have turned to using graphics and other designs to do or promote their work. Creators of original content are becoming more essential in the current market and need to protect their rights so they are not exploited.

The isolation that is being widely experienced across the globe will generate the incorporation of new companies, new business lines and in general new opportunities that will become fixtures in a new economic order.

It is worth mentioning that all this digital creation through webinars, videos in social networks, podcasts and in general all human intellect creations are protected by copyright, as long as they comply with the requirements of the law as it is to be original. For this reason, companies and creators must strive for their protection and maintenance in the market as their products can provide solutions for themselves and third parties, which will result in revenues and answers to many of the problems experienced and originated during the current crisis.

Antitrust/Competition Law

Unfair Competition: While many companies and individuals will tend to focus their efforts on providing solutions or positive actions, it is also undeniable that crisis sometimes results in an ideal mechanism for deceiving others, so any product or service that offers solutions to current problems should be carefully analyzed.

Additionally, special attention should be paid to the promotion of the company's own activities, since although in times of crisis even greater dynamism is required than in normal conditions, the promotion of its products or services cannot contravene the competition regime.

Companies must self-regulate to avoid their own and third-party violations that could aggravate the current crisis. For example, companies need to proactively prevent the generation of information or products that discredit, deceive, confuse or affect third parties and consumers, or that violate existing rules. Special attention should be paid by the companies that manufacture and commercialize hygiene or health products related to the virus and its possible cures or treatments.

In line with the above, advertising carried out through influencers, who in times of isolation are one of the most important communicators, should follow guidelines that contribute to self-regulation. These include: 1) the responsibility to inform in each publication if the product or service promoted is made under a commercial relationship, 2) the information provided to the user, regarding the commercial relationship, should be in a clear and visible language, and 3) the opinion of the influencers should be based on their own experience.

Many influencers have become reference for different trademarks, which makes the regulation of that commercial relationship an imminent necessity. The following are some of the most relevant points to address when using social media influencers. These should be implemented as appropriate on a case-by-case basis and with proper legal advice.

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1. Establish a contract that regulates the commercial relationship between the parties.
2. Be sure the agreement includes a force majeure clause, which provides for situations such as the current health crisis.
3. If your products or services are aimed at health, verify that the claims are demonstrable and verifiable.
4. Establish clear parameters for influencers, where they are obliged to comply with the law and the internal rules of the company.

Companies could even create an internal manual for influencers, which could be integrated as a part of the contract and which would require minimal variations depending on the product to be promoted or the person who will do it. This would speed up the formalization of the commercial relationship with the influencer.

Competition Restrictive Practices: Free competition may be distorted by the assistance required by particular firms or sectors. If the crisis continues, it will be necessary to grant assistance or permits that would not be guaranteed under normal conditions. Given that, in certain cases the government will have to make the free competition regime application more flexible, as incentives that will be created are likely to generate inequalities in the market.

In the case of agreements between competitors, the competition authority in Colombia endorsed their configuration in the transport sector, for example, since the transportation of medical supplies, food, shipments and others is vital for the country during the crisis. This does not prevent other sectors or specific situations from also being subject to a lessening of this type of behavior.

However, the above must be previously endorsed by the government and be justified by existing needs. Severe penalties would be enforced for those who seek to take advantage of this flexibility for cartelization or abuse their market position, such by implementing unjustified price increases or restricting the delivery or sale of products to cause scarcity concerns.

Both the government and the private sector must act in a transparent and coordinated manner, thus achieving a widespread benefit for the economy.

Mergers and Acquisitions: Regarding the issue of mergers, the crisis may trigger the need for market changes, particularly in the most affected sectors of the economy and even more in those that have suspended their activities. This would lead to the need for the merger of companies, with a view to their survival in the market.

This type of situation may lead to the application of the exception of economic efficiency contained in Article 12 of Law 1340 of 2009. If the companies applying to merge demonstrate in a technical manner that the benefits to society outweigh the possible negative impact, and that there is no other possible alternative, regulators must accept the application. The Superintendence has reiterated on many occasions that the positive results could be the improvement of the competitiveness of the companies, of the production and distribution processes, and others that benefit the consumer in general and the company itself.

Thus, it is clear that this crisis could ease or at least allow some economic mergers, which under normal conditions would not be possible since there will be an imminent need for some companies to improve their competitiveness to remain viable. Because of this, mergers are expected among companies in the tourism, transportation, school services, entertainment, food and health sectors.

Personal Data and Cybersecurity: Many companies have established programs and guidelines related to COVID-19, so it is necessary to review whether these take into account the regulations for the protection of personal data. Workers, suppliers, clients and prospective customers are now more often communicating via email or by phone, which means that the proper use and safeguard of the data generated falls to companies. The business strategies used or the collection of information on the company's staff also cannot go against personal data regulations.

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Therefore, even if it is the authority itself that requests information, particularly for health issues, the procedure to be employed by the company must be analyzed on a case-by-case basis, in order to avoid violating privacy rights.

It is important to take into account that with remote work, access to networks other than those established in the workplace becomes one of the greatest challenges. Information security risks increase as do the actions of unscrupulous third parties that will try and take advantage of the situation.

Given the above, companies must constantly remind their employees not to open emails that may be suspicious, verify the authenticity of emails, and not to share personal, third-party or company information if it is not completely necessary and with prior corroboration that it is within the legal framework. It is essential to have constant communications with remote employees and management about the personal data risks for both employees and customers.

If you are interested in learning more or require advice on any of the topics addressed in this article, contact the authors.

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the author of this alert for timely advice.

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