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Intellectual Property and Bankruptcy Post *Mission Products*

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INTELLECTUAL PROPERTY AND BANKRUPTCY POST MISSION PRODUCTS

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1. INTRODUCTION

As the year 2020 remains synonymous with ever-increasing economic turmoil, licensors, licensees and creditors with security interests in intellectual property should be familiar with the framework of laws that apply in the context of bankruptcy in the United States. The oil and gas industry is particularly poised for a difficult year amidst an accelerated slump in oil and commodities prices in the wake of the SARS-CoV-2 pandemic that will likely lead to an increase in bankruptcy filings.[1] With the aforementioned context in mind, this paper seeks to outline and summarize the latest developments in the treatment of intellectual property rights during bankruptcy proceedings.

2. PERFECTING SECURITY INTERESTS IN INTELLECTUAL PROPERTY

This section addresses four major categories of intellectual property rights in the United States: patents, copyrights, trademarks and trade secrets. Each of the foregoing areas of law were developed to address distinct policy concerns. Copyright law and patent law are both designed to encourage innovation by providing exclusive rights, whereas trademark law serves to prevent customer confusion and protect the value of identifying symbols. Furthermore, even though copyrights, patents and trademarks protect ownership of publicly-available subject matter, trade secrets are only protected to the extent the subject matter remains confidential.

A. Patent

i. Overview of Patent Law

The Patent Act of 1952[2] ("***Patent Act***") provides that a patent may be obtained on "any new and useful process, machine, manufacture, or composition of matter, or any useful improvement thereof . . ." that is novel and nonobvious.[3] Typical examples of patentable inventions include manufacturing equipment, consumer electronics and pharmaceuticals. Patentholders have the right to exclude other parties from (1) making, (2) using, (3) offering for sale, (4) selling the patented invention throughout the United States or (5) importing the patented

[1] *Media Covers Spring 2020 Updates to Energy Bankruptcy Reports*, HAYNES AND BOONE (April 23, 2020), *available at* https://www.haynesboone.com/-/media/Files/Energy_Bankruptcy_Reports/Oil_Patch_Bankruptcy_Monitor ("Driller bankruptcies are already on the rise and many expect the pace to accelerate as depressed global energy demand due to the COVID-19 pandemic and increased oil production from Saudi Arabia and Russia has sent oil prices tumbling to the $20-a-barrel mark").
[2] 35 U.S.C. § 101 – 376.
[3] 35 U.S.C. § 101 – 103.

invention into the United States, in each case, for a period of 20 years following the effective date of filing.[4]

ii. Perfection of Patents Under Federal Law (USPTO) and State Law

The United States Patent and Trademark Office ("***USPTO***") maintains a register of patents, applications and related interests, which are assignable by an instrument in writing and have the "attributes of personal property."[5] The Patent Act states that assignments, grants and conveyances of patents and applications are void against subsequent purchasers or mortgagees unless timely recorded with the USPTO, but the Patent Act does not specifically address the recordation of security interests.[6] Nevertheless, other documents relating to interests in patents or applications, including license agreements and security agreements will be accepted and recorded by the USPTO to provide notice of interests in or ownership of a patent or application to third parties.[7] Therefore, a secured creditor should file a UCC-1 financing statement in the state where the debtor is located to perfect its security interest in a patent against subsequent lien creditors, and record the security interest with the USPTO to perfect against bona fide purchasers and mortgagees.[8]

B. Copyright

i. Overview of Copyright Law

The Copyright Act of 1976 ("***Copyright Act***") protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device," but does not protect "ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries."[9] Copyrightable works typically include books, periodicals and other literary works, songs, motion pictures, photographs, software and architectural work.[10] Copyright owners have the exclusive rights to: (1) reproduce the copyrighted work; (2) prepare derivative works based on the copyrighted work; (3) distribute copies of the work to the public; (4) perform the work publicly; (5) display the work publicly; and (6) perform the work publicly by means of a digital audio transmission, and may seek legal and equitable remedies against a party that violates the foregoing rights.[11] A copyright may be transferred to another party, giving the transferee all of the rights held by the former owner, or licensed pursuant to a licensing agreement.[12]

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[4] 35 U.S.C. § 154(a)(1) – (a)(2).
[5] 35 U.S.C. § 261.
[6] 35 U.S.C. § 261.
[7] *313 Recording of Licenses, Security Interests, and Documents Other Than Assignments [R-07.2015]*, UNITED STATES PATENT AND TRADEMARK OFFICE (2018), *available at* http://www.uspto.gov/web/offices/pac/mpep/s313.html.
[8] *See* David Muradyan, *How to Perfect a Security Interest in Intellectual Property (Copyrights, Trademarks and Patents)*, THE IP LAW BLOG (May 13, 2011), *available at* http://www.theiplawblog.com/2011/05/articles/copyright-law/how-to-perfect-a-security-interest-in-intellectual-property-copyrights-trademarks-and-patents/.
[9] 17 U.S.C. § 102.
[10] 17 U.S.C. § 101, 205.
[11] 17 U.S.C. § 106, 501 – 513.
[12] 17 U.S.C. § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by [17 U.S.C. § 201(d)(1)] and owned separately.

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