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Could your new Covid-19 related intellectual property (IP) be commandeered by the Crown?

Universities across the nation have been working valiantly to produce a vaccine for SARS-CoV-2, otherwise known as Covid-19, in addition to working tirelessly on new testing options. It is easy in these times to forget that universities may still own valuable intellectual property (IP) created in these efforts.

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Please note: the information contained in this legal update is correct as of the original date of publication.

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In light of the pandemic, there are certain rights within the Patents Act 1977 which are potentially enabled. Most notably is the 'Crown Usage' exemption which arises in a "period of emergency".

The Houses of Parliament are permitted under the act to approve a draft Order which will declare a period of emergency. Though unlikely (as such a declaration has never been made before), the declaration of a period of emergency would allow the government certain rights of use in relation to "patented inventions" which would otherwise infringe that patent.

These rights may be exercised "for the services of the Crown" and may involve the ability to sell and further produce or supply specified drugs and medicine.

This authorisation for the Crown to use an invention can be given either before or after the patent for the invention is granted, and either before or after the authorised acts are done by any government department. Therefore, provided the invention is known, the government can act when they wish.

There is no protection garnered by contract either. The use of the invention by a government department will not be restrained or prevented by any licence, assignment or agreement between the invention proprietor and a third party. Any payments required under these third-party agreements may also be set aside (although compensation could be payable).

However, it should be emphasised that it would be highly unlikely for the government to have to exercise such a right; rather, the private sector itself is motivated enough towards making an accessible and affordable drug for the population. It is both more valuable in terms of profit and reputation to do so, and therefore it is unlikely the government will have to intervene. Nevertheless, we should all be live to the possibilities. Universities private sector partners may, in fact, be the greater risk for universities not receiving appropriate credit or value for Covid-19 related IP.

In any case, the IP potential for these products and processes is substantial and many researchers and manufacturers will naturally wish to protect both their pre-existing IP rights and the IP rights that they accrue in helping the fight against the virus.

For further information and support, contact Selina Hinchliffe, one of our Partners specialising in IP, with particular experience advising academic institutions on their IP rights under research and development agreements.

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