

Winter COVID-19 Relief Bill: Overview of Key IP and Entertainment Provisions

By: Frank A. Bruno, Randy M. Friedberg, Ilaria Maggioni and Katherine M. Todd

Intellectual Property Alert

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Congress passed The Consolidated Appropriations Act, 2021 (Act) on December 21, 2020 and the Act was signed into law by President Trump on December 27, 2020. Though titled as COVID relief, the Act includes sweeping changes to U.S. copyright and trademark law and funds the Save Our Stages Act (SOS), a bipartisan bill which provides financial aid for entertainment and cultural institutions affected by a quasi-total shutdown due to COVID-19. Some of the changes will become effective on the same date as the Act while others will require implementation by the appointed authorities and take effect at a later date provided by the Act and indicated below.

Trademark Provisions

The Act incorporates the Trademark Modernization Act or TM Act of 2020 (TMA) which includes the following major amendments to the current trademark law. These changes are expected to take effect on the effective date of the Act unless indicated below for specific procedures.

Injunctive Relief. The new law makes it easier for trademark owners to obtain injunctions to stop infringing use of marks by eliminating the plaintiff's burden to prove "irreparable harm." Currently, in most federal districts, to obtain an injunction in trademark cases, in addition to showing likelihood of confusion between the marks, the trademark owner must also demonstrate that it would suffer irreparable harm if the court does not enjoin use of the infringing mark. Under the new law, "irreparable harm" is presumed if the owner shows likelihood of confusion, and the burden shifts to the accused infringer to show why the injunction should not be entered.

Trademark Examination Procedure. The TMA gives United States Patent and Trademark Office (USPTO) Examining Attorneys discretion to set shorter 60-day response deadlines rather than the customary six-month deadline. The accelerated process may improve the overall timeline from application to registration but it will potentially increase the cost of examination since trademark applicants will have to respond more quickly or be prepared to pay an extension fee to obtain more time.

Another significant change is that the new law will allow third parties, such as other trademark owners, to submit evidence against registration of a pending application directly into the USPTO record and require the Examining Attorney to consider that evidence in rejecting the application. This new third-party intervention procedure shall take effect and become available in December 2021, one year after the date of enactment of the Act. Until now, it was possible for third parties to submit a "letter of protest" but it was not very effective since the letter could not be argumentative and the Examining Attorney had discretion to disregard it. The new system will potentially avoid the wait and significant cost of filing oppositions. However, trademark owners will have to be more proactive by setting up trademark watches to detect confusingly similar marks early at the filing stage, and maintain good records of the use of their own marks to be faster to intervene and attack potentially infringing trademark applications during examination.

Non-use Challenges. As alternatives to costly and protracted cancellation proceedings, the TMA makes two new potentially more agile and faster procedures available to trademark applicants for removing unused trademarks from the Register. These new procedures shall take effect and become available in December 2021. Trademark owners are cautioned to implement stringent checks and educate company personnel to ensure that their marks are maintained in use in interstate commerce since now it may be easier for

others to attack their validity. The new procedures are (1) ex parte expungements, to remove registrations by showing that they have never been in use in commerce, so they should have not been registered; and (2) ex parte reexaminations, to remove registrations that are no longer in use by seeking re-examination of the registrant's declarations of use.

These petitions include specific strict timelines after which they are no longer available, so non-use investigations and actions must be considered and undertaken without delay. The USPTO Director's decisions are appealable to the Trademark Trial and Appeal Board (TTAB), and then to the Court of Appeal for the Federal Circuit (CAFC).

Copyright Provisions

Copyright Small-Claim Board. The Act incorporates the Copyright Alternative in the Small-Claims Enforcement Act of 2020 (CASE Act of 2020), which establishes a small claims court within the United States Copyright Office (USCO), the Copyright Claims Board (Board), for copyright infringement claims under \$30,000. The Board shall begin operations no later than one year after the date of enactment of this Act, but the Register of Copyrights may extend the deadline up to 180 days for good cause upon notification to Congress and the public. The Board is comprised of three panelists and may issue injunctions and award damages (within its jurisdictional limit) and attorneys' fees. A copyright application filed with the USPTO is required to bring a claim, but the Board cannot decide the case until copyright registration issues, and if the case is pending for more than one year while waiting for registration the Board may dismiss the case without prejudice.

Participation is voluntary. The defendant is entitled to opt-out and elect to have the claim adjudged by a federal court, but if it does not opt-out the case is decided by the Board. The Board's decisions are binding but appealable in federal district courts.

Criminalization of Piracy. The Act also incorporates the Protecting Lawful Streaming Act of 2020 (PLSA), which extends criminal prosecution not only for unauthorized digital transmission of copyrighted material but also for precursory activities such as offering, providing, or marketing a digital transmission of copyrighted works without the copyright owner's consent. The PLSA is intended to deter large-scale digital piracy before it happens. The Act makes it a felony punishable with fines and imprisonment up to 10 years.

Save Our Stages Provisions

Approximately \$15 billion of the relief Act is allocated to funding for the Save Our Stages Act aimed at aiding small venues operators, one of the segments of the entertainment and cultural institution industries most severely impacted by COVID-19 restrictions. The opening date for grant applications should be announced in the upcoming days. The Associate Administrator Office of Disaster Assistance of the Small Business Administration (SBA) will administer the program and is expected to implement an application process shortly. The Act requires the SBA to report to Congress a plan for oversight and audit of the SOS grant program by February 10, 2021, and submit monthly reports thereafter.

The new legislation provides aid to eligible taxpayers administered by the SBA, including:

Eligible Taxpayers. Eligible for the relief are taxpayers that were fully operational as of February 29, 2020 as "live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, or talent representatives," who can demonstrate at least a 25% reduction in gross earned revenues quarter by quarter comparing the years 2020 to 2019.

Timing of Relief Award Priority. The first 14 days of administration will give priority to issue grants to eligible businesses with a 90% revenue loss, and the subsequent 14 days to eligible businesses with a 70% revenue loss. A reserve of 20% of overall appropriated funds (\$3 billion) will be set aside to ensure availability for all other eligible entities after the initial 28 days.

Venues. To be eligible for the grants, the venues operated by the eligible taxpayers must have enumerated characteristics specified for each type in the Act, such as having an audience, typical equipment, issue tickets or similar, being run mostly with paid employees and not volunteers, etc. The Act sets specific parameters to determine which institutions qualify for SOS relief essentially as a small business operator (rather than larger organizations) in the entertainment and cultural field.

Grants. The application for grants under the SOS must include a declaration of self-certification of need. The grant may be used to cover six months of expenses, such as payroll costs, rent, mortgage, utilities, personal protective equipment (PPE) and payments to independent contractors (up to \$100,000 to each). Entities that have already received a PPP loan prior to the enactment of the SOS, may still receive an SOS grant, but entities may not receive both a PPP loan and a grant after the enactment of the SOS. Available grants are:

Initial grant: 45% of gross revenue earned in 2019, up to \$10 million.

Supplemental grant: up to 50% of the first grant, provided the business had a revenue loss of 80% as of December 1, 2020 (but the total of both grants may not exceed \$10 million).

Prohibited expenses. Funds received from grants under the Act may not be used to purchase real estate; for payments of loans originated after February 15, 2020; to invest or re-lend funds; for contributions or expenditures to, or on behalf of, any political party, party committee, or candidate for elective office.

We will continue to monitor the legislation and provide updates. If you have a question regarding the legislation or how it may impact you or your business, contact Frank Bruno (brunof@whiteandwilliams.com; 215.864.6225), Randy Friedberg (friedberg@whiteandwilliams.com; 212.714.3079) or Ilaria Maggioni (maggionii@whiteandwilliams.com; 212.868.4838).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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