Psychedelic Patents: Ethical Lapses

High-Threat Patents: The Consequences of Inadequate Prior Art Research When Attorneys Fail to Acknowledge Traditional Psychedelic Uses

Written by D. Burgundy Morgan, J.D. with contributions by David A. Casimir, J.D., Ph.D., Shahin Shams, Ph.D., and Sisi Li, Ph.D.; Data provided courtesy of Porta Sophia - Psychedelic Prior Art Library; Research contributions by Chris Byrnes, M.T.S., J.D., and Laurel Kilgour, J.D.; Special Acknowledgment to Roman Haferd, J.D., Ethics Committee Board Representative; First published by The Psychedelic Bar Association coordinated by The Ethics Committee; Title artwork generated by AI.

The United States Patent and Trademark Office (USPTO) has established Rules of Professional Conduct to ensure that attorneys and agents representing clients in patent matters adhere to high ethical standards. Among these rules, each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the USPTO, which includes a duty to disclose to the Office all information known to that individual to be material to patentability of an invention. This requirement includes an obligation to disclose prior art known to any such individual that is relevant to the patentability of the invention. Due diligence in

conducting prior art searches can be critical, particularly when filing patents on substances like psychedelics, which have a long history of traditional use by indigenous peoples. Failure to conduct comprehensive prior art due diligence and disclose relevant findings to the USPTO can lead to ethical violations, jeopardizing both the patent system's integrity and the rights of indigenous communities.

Porta Sophia, a non-profit prior art library and search tool, exemplifies the efforts of a public benefit organization with a mission to protect the public domain to combat the current problems in the psychedelic patent landscape: the increasing submission of high-threat patents attempting to monopolize existing technologies and knowledge in the public domain. These filings are not only persisting but becoming more common, posing significant risks to the integrity of the patent system and the rights of indigenous communities.

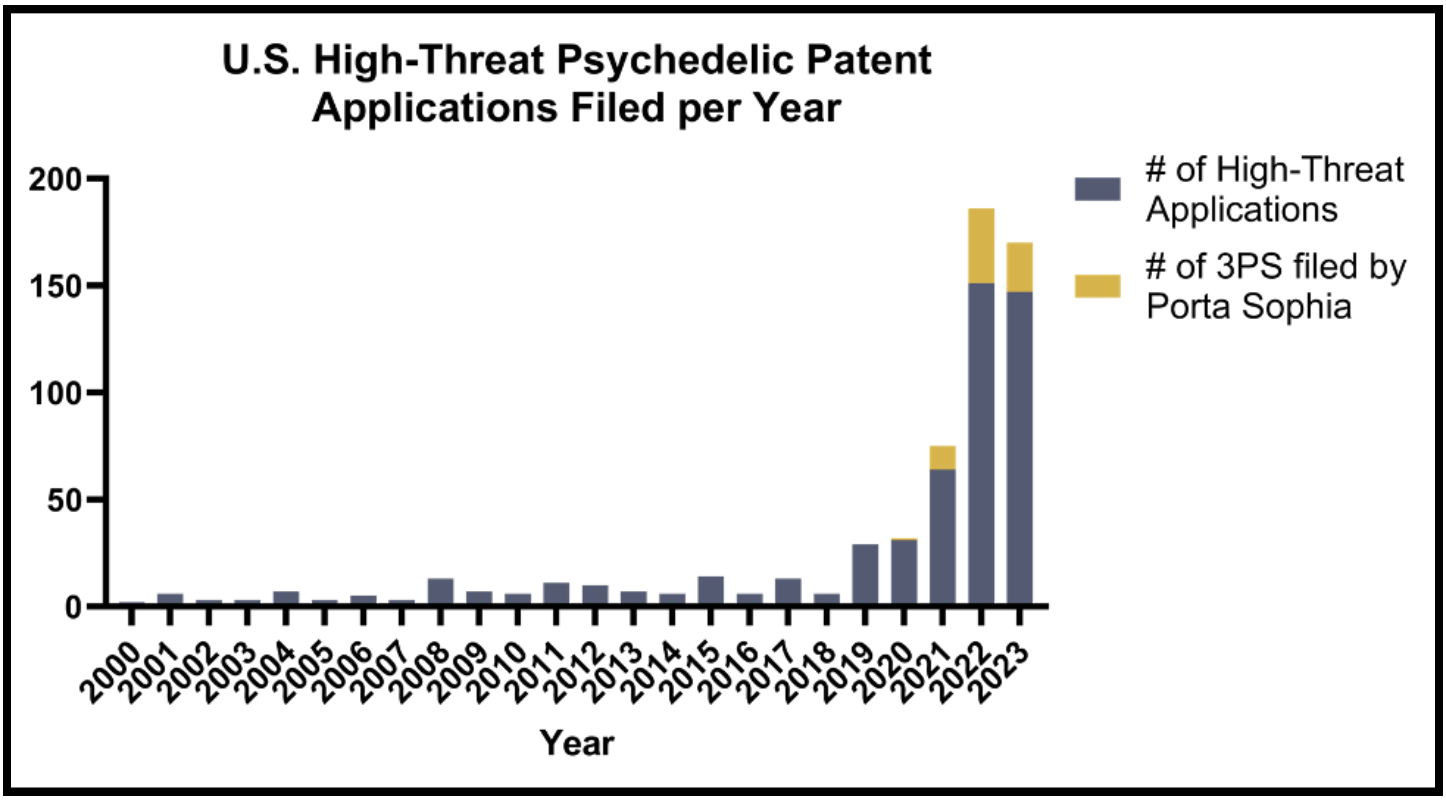

Figure: Number of high-threat psychedelic patent applications filed in the U.S. (2733% increase between 2018-2023). Number of high-threat applications filed in the U.S. (Grey). Number third party pre-issuance submissions filed by Porta Sophia with the USPTO to provide relevant prior art for high-threat patents (Yellow). *Chart provided courtesy of Porta Sophia.*

At the time of writing of this blog article, the beneficial uses of psychedelics are experiencing renewed interest by the institutions that had previously stigmatized them. As a result, the USPTO is experiencing a significant increase in patent applications for psychedelics at a time when patent examiners may not be well-informed on traditional uses and prior art.

While generally, the patent examination process involves filing applications with a reasonably broad scope and subsequently working with examiners to narrow the claims, ethical obligations under the rules of professional conduct does not allow misrepresentation nor willful ignorance.

The psychedelic field is unique due to its rich prior art and historical context, necessitating legal professionals to conduct exceptionally thorough due diligence to adhere to the professional standards set by the ABA. This is particularly important due to the impact on colonialism that attempted to suppress and erase indigenous history, knowledge and traditions, and further compounded by the Nixon-Era war on drugs that criminalized indigenous spiritual and religious practices. In response to criminalization, robust underground therapeutic, ceremonial, and recreational practices were developed and remain in place today. These practices, which make up part of the public domain that should be free from threats of patent infringement, is also at risk from overly broad patents

The Importance of Prior Art in Patent Applications

Prior art encompasses all information that has been made publicly available before a given date that might be relevant to a patent's claims of originality. This includes scientific research, patents, publications, and traditional knowledge. For psychedelic substances, prior art often involves traditional uses by indigenous peoples and experimental work, often underground, by psychonauts, which can significantly impact the patentability of a new application.

Why Is This Important?

Failure to disclose traditional uses of psychedelics not only undermines the patent process but also disrespects and exploits indigenous knowledge. This can lead to biopiracy, where corporations or individuals patent substances or practices long known and used by indigenous cultures, depriving these communities of their rights and benefits from their own heritage. The monopolization of public psychedelic information through patenting can have broad sweeping negative impact. If known psychedelic drugs are improperly patented, there is a risk of known compounds becoming inaccessible behind extraordinarily high prices, as is the trend in the mainstream biopharmaceutical industry. As such, these psychedelics may be unavailable to the people that need them from a financial perspective. Innovation prospects relating to psychedelic compounds and their utility as potential therapeutic interventions can also be heavily restricted due to the improper granting of a patent. Beyond single filings, overly broad patents open the door for patent owners filing floods of follow-on “child applications” that can further privatize existing practices.

Willful Ignorance Is No Excuse:

Attorneys are subject to oversight by both state bars and the USPTO, and patent agents are regulated federally. Both must meet higher ethical standards to avoid misrepresentation. Resources like Porta Sophia’s database and Erowid, among others, can aid patent professionals in navigating this complex landscape ethically. Looking ahead, there is a need for increased vigilance and

adherence to professional standards to ensure ethical compliance in this rapidly evolving field. Willful ignorance is no excuse for attorneys who submit high threat psychedelic patent applications. Resources for easy and free search tools and libraries compiling prior art are linked below.

www.portasophia.org

www.erowid.org

www.isomerdesign.com

USPTO Rules of Professional Conduct

The USPTO's Rules of Professional Conduct are based on the American Bar Association's Model Rules, with specific modifications for the practice before the USPTO. Key rules relevant to prior art due diligence include:

Rule 11.303 - Disclosure of Prior Art: Attorneys must disclose all known prior art that is material to the patentability of an invention.

Rule 11.301 - Candor and Truthfulness: Attorneys must not knowingly make false statements of fact or law to the USPTO or fail to correct false statements.

Rule 11.101 - Competence: Attorneys must provide competent representation, which includes the necessary legal knowledge, skill, thoroughness, and preparation.

Rule 11.103 - Diligence: Attorneys must act with reasonable diligence and promptness in representing a client. This includes Due Diligence, more aptly steps to “Do” Diligence.

Rule 11.803 - Duty to Report Misconduct: USPTO practitioners must maintaining the integrity of the profession. This rule requires mandatory reporting of practitioners who violate the rules of professional conduct that raise a substantial question as to that practitioner’s honesty, trustworthiness, or fitness as a practitioner in other respects.

Ethical Violations in the Context of Psychedelic Patents can include:

1. Failure to Disclose of Prior Art (Rule 11.303):

A. Material Information: Traditional uses of psychedelic substances are material to their patentability. Attorneys are ethically bound to disclose this information to the USPTO.

B. Comprehensive Disclosure: Ensuring that all relevant prior art, including non-written and traditional knowledge, is disclosed helps maintain the integrity of the patent system and respects the

contributions of indigenous communities.

2. Candor and Truthfulness (Rule 11.301):

A. False Statements: Submitting patent applications that ignore known traditional uses can be seen as making false statements by omission. Attorneys must correct any misstatements or omissions in their filings.

B. Ethical Breach: Knowingly withholding information about traditional uses violates the duty of candor and can lead to serious ethical repercussions.

3. Competence and Thoroughness (Rule 11.101):

A. Inadequate Prior Art Searches: Failing to thoroughly search for and disclose prior art, including traditional indigenous uses, shows a lack of competence and thoroughness. Psychedelic substances have been used by various indigenous cultures for centuries, and such uses are critical prior art that can impact patentability.

B. Legal Knowledge: Understanding the significance of traditional knowledge in the context of patent law requires specialized legal knowledge. Attorneys must be aware of resources that document traditional uses and incorporate this information into their prior art searches.

4. Diligence (Rule 11.103):

A. Reasonable Efforts: Attorneys must make reasonable efforts to uncover all relevant prior art. This includes consulting ethnobotanical literature, traditional knowledge databases, and other resources that document the historical use of psychedelics by indigenous peoples.

B. Prompt Disclosure: Any discovered prior art must be promptly disclosed to the USPTO to ensure that the patent examination process is based on a complete and accurate record.

Misleading the Patent Office: Ethical Implications

When patent attorneys submit applications for psychedelic substances without adequate due diligence and background research, they risk misleading the patent office in several ways:

1. **Incomplete Disclosure**: By failing to disclose traditional uses as prior art, attorneys present an incomplete picture of the novelty and originality of the patent application. This can lead the patent office to grant patents that should not have been approved.
2. **False Claims of Novelty**: Claims of novelty and nonobviousness are central to patentability. If an attorney overlooks or deliberately ignores traditional knowledge, the application may falsely assert that the substance or its uses are novel, misleading the patent examiner.
3. **Ethical Breach**: Such actions constitute an ethical breach. By not being candid with the patent office about all known prior art, the attorney is essentially presenting false or misleading information.

Consequences of Misleading the Patent Office

The consequences of misleading the patent office and an attorney's state bar rules of professional conduct are far-reaching:

- **Invalid Patents**: Patents granted on the basis of incomplete information can be later challenged and invalidated, leading to costly legal battles and wasted resources.
- **Injustice to Indigenous Peoples**: Overlooking traditional knowledge disrespects and exploits indigenous cultures, potentially leading to biopiracy.
- **Professional Sanctions**: Attorneys found in violation of rules of professional conduct can face disciplinary actions, including suspension or disbarment.
- **Mandatory Reporting of Misconduct:** Such actions may also be subject to mandatory reporting by other attorneys. According to 37 CFR Part 11, practitioners have a duty to report if they are aware of violations that raise substantial questions regarding another practitioner's honesty, trustworthiness, or fitness to practice law. This requirement is also reflected in ABA Rule 8.3, which mandates that lawyers report such misconduct to the appropriate professional authority.
- **Inequitable Conduct:** Acts or omissions with intent to deceive the USPTO, such as failure to disclose material prior art, can be deemed inequitable conduct during District Court litigation involving a patent. Equitable remedies are available against parties that commit inequitable conduct, most often resulting in the patent being deemed unenforceable, but often also providing a basis for attorney-fees awards.

Conclusion

Patent attorneys must adhere to the USPTO's Rules of Professional Conduct that include disclosing all relevant information identified in prior art searches, including traditional uses of psychedelic substances. Violating these ethical duties can mislead the USPTO and result in invalid or unenforceable patents, harm to indigenous communities, and potential disciplinary actions against the attorneys involved. By utilizing resources such as Porta Sophia, attorneys can ensure comprehensive and diligent prior art searches, uphold the integrity of the patent system, and respect the rich knowledge traditions of indigenous peoples.

Resources:

Porta Sophia: https://portasophia.org, a non-profit organization that maintains a free database specifically for researching prior art related to psychedelic substances.

OED: USPTO Office of Enrollment and Discipline (https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/office-enrollment-and-discipline)

USPTO Rules of Professional Conduct: https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/uspto-rules-professional-conduct.