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The Placebo Effect in Intellectual Property

The placebo effect – a response of a patient to non-therapeutic treatment which mirrors that expected from the therapy – is often disparaged in law. The placebo effect is not a “real” effect, and it arises through trickery. Hence, the FDA determines the efficacy of drugs by comparing them to placebos, approving drugs only when they consistently outperform the placebos. But we’re increasingly learning that the distinction between the mental and the physical is a false one. The fact is that people get real physiological relief from placebos, and to them that relief is indistinguishable from the relief they would get from the active treatment.

This view has a number of important implications in law, and particularly in intellectual property law. First, we think the placebo effect needs to be accounted for in the determination of whether an invention has utility such that it is patentable. And this will undoubtedly have an effect on the way claims are written and interpreted, which will then impact other statutory determinations – novelty, non-obviousness, and enablement. Second, the placebo effect implicates the balance between patent and trademark protection. Because the placebo effect derives from expectations, and those expectations are often created through marketing, legal protection of the features that trigger a placebo response in patients may well be redundant with patent protection. Alternatively, trademark law might regard features that trigger the placebo response – features like color, shape, and packaging – as functional features in the sense that the placebo “function” can be accessed by competitors only by making use of those features. By default, then, these features should be open for all to use unless either (1) there is reason to believe the placebo effect is costly to create and will not be created absent the ability to restrict access to its triggers, or (2) there is a risk the consumer welfare benefits of the placebo effect will be dissipated by overuse. The legal determination of functionality, and the policy determination of the relative levels of patent and trademark protection, therefore need to account for the placebo effect.