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RECENT TRENDS INVOLVING INTELLECTUAL PROPERTY RIGHTS IN THE RESPONSES TO COVID-19

To Our Clients and Friends:

As the pandemic continues, organizations around the world are grappling with the intellectual property implications associated with encouraging the rapid distribution of personal protective equipment ("PPE") and the development of pharmaceutical treatments to help fight COVID-19. Increasing public attention is also being directed to misconduct associated with some of these efforts, such as price gouging for PPE, or the distribution of fake or ineffective products. In this alert, we review recent initiatives promoting the donation of intellectual property rights that entities may use in connection with their efforts to combat COVID-19, related pending legislation, and how some entities are using trademark law to combat what they regard as price gouging for PPE and false marketing of coronavirus testing kits.

(1) Continuing Efforts to Facilitate the Donation of Patent Rights During the COVID-19 Pandemic

As discussed in a prior alert, the urgency of the COVID-19 crisis has prompted initiatives such as the Open COVID-19 Pledge, which would permit businesses to provide urgently needed supplies without running the risk of finding themselves defendants in patent infringement litigation. Signatories to the Open COVID-19 Pledge grant a non-exclusive, royalty-free, worldwide license to use their patents and copyrights "for the sole purpose of ending" the COVID-19 pandemic. Companies such as Intel and Mozilla have subscribed to this Pledge.

Academic institutions have taken similar steps. Last week, Stanford University, Harvard University, and the Massachusetts Institute of Technology established the "COVID-19 Technology Access Framework" to encourage research institutions to implement technology transfer strategies to help in the fight against COVID-19. The principal component of the framework provides "rapidly executable non-exclusive royalty free licenses . . . for the purpose of making and distributing products to prevent, diagnose and treat COVID-19 infection during the pandemic and for a short period thereafter." In exchange for the rights granted under these licenses, the framework requests that licensees broadly distribute products developed with the licensed technology at low cost during the term of the license. On April 10, 2020, Yale University also signed onto the framework.

International organizations, such as the U.N.-backed nonprofit "The Medicines Patent Pool," are also working to facilitate patent sharing and streamline access to information about patents as a way to accelerate the fight against COVID-19. The Medicines Patent Pool has begun to gather patent information relating to products that are tested in clinical trials to treat COVID-19, such as the biologic tocilizumab and the antiviral remdesivir. By publishing the information on its website, the organization provides a publicly available repository of patent data that companies around the world can consult as they work on medical innovations.

Finally, the outgoing Director General of the World Intellectual Property Organization (WIPO), Francis Gurry, is reported to have stated publicly that he will make an announcement this week regarding a "special mechanism to share drug patents." More than 135 organizations, representing more than 32.5 million educators in 199 countries, signed a letter requesting that Director Gurry facilitate the removal of licensing restrictions by intellectual property rights owners to "achieve universal and equitable access to COVID-19 medicines and medical technologies."

Gibson Dunn will continue to monitor developments that may be of interest to businesses who hold, or seek to use, intellectual property rights.

(2) Pending and Existing Legislation Intended to Promote the Development of COVID-19 Treatments

Several efforts by the U.S. government to expedite development of medical treatments for COVID-19 involve intellectual property or implicate intellectual property rights. For example, Section 4017 of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act includes programs aimed at facilitating the distribution of PPE by providing appropriations for government purchases of PPE through the Defense Production Act. A prior alert discussing the interplay between the Defense Production Act and a federal provision addressing immunity from infringement suits, 28 U.S.C. § 1498(a), is available here. Title II of the CARES Act also includes appropriations for the National Institutes of Health to support research on COVID-19 treatments.

Since the CARES Act was enacted, Senator Sasse (R-Neb.) proposed a bill intended to encourage investment into research and development for COVID-19 treatments. With respect to any "patent issued for a new or existing pharmaceutical, medical device, or other process . . . used or intended for use in the treatment of the Coronavirus Disease," the bill (among other things) would extend patent exclusivity "for 10 years longer" than the term patent owners would otherwise receive under the Patent Act (typically, exclusivity expires 20 years from the date on which the patent application was filed in the United States, *see* 35 U.S.C. § 154). The bill specifies that "the term of the patent shall not begin until the date on which the [coronavirus] national emergency terminates"—and thus effectively seeks to suspend certain patent rights on the foregoing medical products during the pendency of the COVID-19 national emergency, in exchange for a 10-year extension on the "tail end" of the patent.

Finally, the federal government has also used legislation enacted prior to the coronavirus outbreak—*i.e.*, the Public Readiness and Emergency Preparedness Act ("PREP Act")—to provide immunities to certain businesses seeking to meet the nation's emergency needs. The March 2020 Declaration activating the PREP Act, issued by the Secretary of the Department of Health and Human Services, extended immunity "from suit and liability under federal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from" manufacture, testing, development, distribution, administration or use of qualifying products used to combat or reduce the spread of COVID-19 (the "PREP Declaration"). A prior alert describing the activities and products that come within PREP Act immunity is available here, and another prior alert discussing the immunity in the context of patent infringement claims is available here.

(3) Trademark Suits to Protect Against Price Gouging and False Marketing

As demand for personal protective equipment, testing kits, and other products important to the fight against COVID-19 continues to soar, so too does the risk of price gouging, false advertising, and other misconduct relating to the manufacture, distribution, or sale of such products. Some companies have asserted their copyrights and trademarks in litigation that targets some of this alleged misconduct.

In Florida, CoronaCide LLC, a COVID-19 test manufacturer, has accused healthcare company Wellness Matrix Group of falsely marketing CoronaCide's test kits for at-home use. A complaint filed by CoronaCide in the U.S. District Court for the Middle District of Florida asserts that WM Group lifted text and images from CoronaCide's materials to advertise CoronaCide's test kits for use by consumers at home, but that the kits are only intended for use by licensed healthcare professionals.

And at least one company has used trademark law to protect against alleged price gouging for personal protective equipment. In a lawsuit filed in federal court in Manhattan, 3M claims that New Jersey company Performance Supply LLC misused the 3M trademark and employed other misleading tactics in order to "exploit the increased demand for Plaintiffs' 3M-brand N95 respirators by offering to sell them for exorbitant prices." Compl. ¶ 34. New York's price-gouging statute, N.Y. Gen. Bus. Law § 369-R, allows the State Attorney General to bring an action to stop the practice when there is "any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers." 3M's complaint, however, asserts private causes of action under state and federal trademark law to attack the defendant's alleged resale of the goods at an excessive price. We may see additional suits brought by companies seeking to stop abusive practices relating to the manufacture, distribution, sale, or marketing of their trademarked products used to combat COVID-19.

Gibson Dunn lawyers regularly counsel clients on the issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, or the authors:

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