

April 28, 2020

UPDATE ON INTELLECTUAL PROPERTY-RELATED ISSUES IN THE RESPONSES TO COVID-19

To Our Clients and Friends:

Institutions around the world continue to grapple with the intellectual property implications associated with their efforts to facilitate the prevention, diagnosis, and treatment of COVID-19. In a prior alert, we discussed recent initiatives promoting the donation of intellectual property rights in connection with businesses' efforts to combat the pandemic, such as the [Open COVID Pledge](#) and the [COVID-19 Technology Access Framework](#), as well as recent efforts to use trademark law to combat alleged price gouging for personal protective equipment ("PPE"). In this alert, we provide a brief update on these and other initiatives.

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

The Open COVID Pledge and the COVID-19 Technology Access Framework, which seek to facilitate the removal of intellectual property obstacles to the fight against the virus, are garnering further support. 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 were among the first to subscribe. Since early last week, additional technology titans—Amazon, Facebook, HP, IBM, Microsoft, and Sandia National Laboratories—have also joined the pledge. The number of patents and patent applications within the scope of the license that signatories of the Open COVID Pledge grant the public is substantial. IBM, for example, in [announcing](#) its commitment to the Open COVID Pledge, asserted that it has over 80,000 existing patents and patent applications to which the pledge would apply, and that it would include new patent applications filed through 2023 as part of its pledge as well.

The COVID-19 Technology Access Framework (the "Framework") encourages research institutions to implement technology transfer strategies to expedite the manufacture and distribution of products that help prevent, diagnose, and treat COVID-19 infections. Like the Open COVID Pledge, those who sign onto the Framework commit (among other things) to granting non-exclusive, royalty-free licenses to intellectual property rights for the purpose of promoting the development of products to fight the pandemic. In addition to the initial signatories (Stanford University, Harvard University, and Massachusetts Institute of Technology), and Yale University, which we previously noted joined on April 10, more institutions—including Georgetown University, Northeastern University, and RTI International, a non-profit research institute—have committed to the framework.

Finally, the World Intellectual Property Organization ("WIPO") recently [announced](#) the launch of a new search functionality in its global patent database, "Patentscope," which contains over 83 million patents

and related documents. The new search functionality is directed towards returning documents that may be relevant to innovators focusing on developing new technologies to help prevent and treat the virus.

(2) Manufacturer 3M Obtains Temporary Restraining Order in its Effort to Stop Alleged Price Gouging

Last Friday, April 24, 2020, the manufacturing company 3M obtained a temporary restraining order in the Southern District of New York against Performance Supply, LLC enjoining it from, among other things, “using the ‘3M’ trademarks” in connection with “3M-brand N95 respirators” and other 3M goods; from “falsely representing that 3M has increased the price(s) of its 3M-brand N95 respirators”; and from otherwise “offering to sell any of 3M’s products at a price . . . that would constitute a violation of New York General Business Law § 369-[r],” that is, New York’s price gouging statute. In the lawsuit, 3M alleges that Defendant Performance Supply, LLC offered to sell New York City’s Office of Citywide Procurement millions of N95 respirators bearing the 3M logo and at inflated prices. 3M is asserting nine causes of action against Performance Supply, LLC for violations of federal and state trademark laws, as well as New York State laws addressing deceptive business practices and unfair competition. A telephonic preliminary injunction hearing has been scheduled for May 4. We are continuing to monitor for similar suits using trademark law to curb abusive practices relating to the manufacture, distribution, sale, or marketing of trademarked products used in responding to 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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