

May 13, 2020

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

To Our Clients and Friends:

This Alert reports on the steady pace of patent litigation and patent review filings during the COVID-19 pandemic, and notes that some aspects of ongoing patent litigation are also proceeding as usual. The Alert also discusses intellectual property litigation involving a hand sanitizer manufacturer, and provides brief updates on the Open COVID Pledge, and on manufacturer 3M's efforts to combat price gouging of personal protective equipment ("PPE") (earlier developments reported [here](#) and [here](#)).

### **(1) Patent Lawsuit Filings Continue at a Steady Pace**

Based on year-to-year filings, the pandemic does not appear to have deterred patent owners from commencing infringement lawsuits. In March 2020, a total of 313 patent complaints were filed in the federal courts, an increase from the 256 that were filed in March 2019. Likewise, in April 2020, 380 patent complaints were filed, an increase from the 292 filed in April 2019. Petitions seeking the review of patent claims before the U.S. Patent Trial and Appeal Board ("PTAB") also continue to be filed at a level comparable to filings before the pandemic. In March 2020, 100 petitions for review were filed, and in April 2020, 99 petitions were filed. Although these numbers are lower than the 129 and 104 petitions that were filed in March and April 2019,<sup>[1]</sup> monthly filing rates in the PTAB varied even before the pandemic.<sup>[2]</sup> The simplest take-away is that new patent cases continue to be filed in the United States at rates similar to filing rates before the pandemic.

Although patent jury trials previously scheduled for March and April have been postponed, many other court proceedings have continued during the pandemic—with appropriate adaptations. The Federal Circuit now operates essentially as a virtual court; it held telephonic oral arguments in April, and another 26 telephonic oral arguments are expected in May. And some district courts are conducting bench trials in patent cases remotely. Judge Henry Coke Jr. in the U.S. District Court for the Eastern District of Virginia, for example, is currently presiding over a bench trial in a patent infringement case, *Centripetal Networks v. Cisco Systems*, No. 18-cv-00094-HCM-LRL (E.D. Va. 2018), in which the plaintiff is seeking up to \$557 million in damages for alleged infringement of its cybersecurity patents. Opening statements took place over Zoom on May 7. The court's pre-trial order is available [here](#). One patent case that was originally scheduled for a virtual bench trial in late May, however, was postponed to July 6 at the request of the attorneys.<sup>[3]</sup>

### **(2) Continued Efforts to Facilitate the Donation of Patent Rights During the COVID-19 Pandemic**

The Open COVID Pledge, which reflects a commitment by the signers to eliminate intellectual property rights as a potential obstacle to developing products and treatments for fighting against the virus,

continues to gain 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, followed shortly by additional technology giants, such as Amazon, Facebook, HP, IBM, Microsoft, and Sandia National Laboratories. Since our prior update, several Japan-based technology companies have also signed on, including Canon and Toyota. AT&T, noting in a [press release](#) last week that it “generates roughly 5 patents every business day,” has signed the pledge as well.

### **(3) The Department of Justice and Manufacturer 3M Obtain Injunctions Associated with, Respectively, the Sale of Hand Sanitizer and the Sale of N95 Masks**

Last week, Judge Carter of the United States District Court for the Central District of California permanently enjoined Innovative Biodefense, Inc. (“IBD”), which manufactures hand sanitizers and lotions under the brand name Zylast, from “directly or indirectly manufacturing, processing, packaging, labeling, holding or distributing” certain Zylast products, like the “Zylast Broad Spectrum Antimicrobial Antiseptic” and “Zylast XP (Extended Protection) Antiseptic Foaming Wash.”<sup>[4]</sup> The injunction was issued after the Department of Justice (“DOJ”) sued IBD, on behalf of the FDA, alleging that IBD was effectively marketing certain Zylast products as new drugs (by claiming that the products were effective against various infectious diseases like Ebola and norovirus) without the requisite FDA approval, in violation of the Food, Drug, and Cosmetic Act (“FDCA”). The court previously ruled on summary judgment that IBD and its co-defendants (the company’s CEO and another employee) had violated the FDCA as a matter of law, and then held a bench trial on the defendants’ affirmative defenses of laches and unclean hands—which were based on allegations that the DOJ was selectively enforcing the FDCA against IBD to benefit the makers of the competing Purell hand sanitizer.<sup>[5]</sup> The court found that no evidence supported those defenses.

The injunction against IBD is effective until either: (a) the company obtains FDA approval to market the Zylast products through a new, abbreviated, or investigational new drug application; or (b) the company retains independent experts to review the formulation and labeling of the products and certify to the FDA (among other things) that the products comply with FDA regulations concerning over-the-counter drug formulations.

Finally, as noted in our [last alert](#), the manufacturer 3M previously secured a temporary restraining order (“TRO”) against Defendant Performance Supply, LLC, arising from 3M’s allegations that the defendant had offered to sell New York City’s Office of Citywide Procurement millions of N95 respirators bearing the 3M logo and at inflated prices.

Following a telephonic preliminary injunction hearing on May 4, Judge Preska, of the Southern District of New York, converted the TRO into a preliminary injunction against Performance Supply, LLC, enjoining the company 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]” (New York’s price gouging statute).<sup>[6]</sup> In addition to concluding that 3M had demonstrated that it met the Second Circuit’s

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factors for a preliminary injunction, the court emphasized 3M’s efforts to collaborate “with law enforcement, retail partners, and others to help thwart third-party price-gouging, counterfeiting, and fraud in relation to 3M-brand N95 respirators during COVID-19.”<sup>[7]</sup> The court also found that 3M has taken active steps to protect the goodwill of the 3M brand, including by filing other trademark suits in California, Florida, Indiana, and Wisconsin.

We are continuing to monitor intellectual property-related updates and trends in the response to COVID-19.

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[1] These figures were obtained from conducting searches in Docket Navigator. For each of the time frames discussed above, the numerical figures reflect the total number of (1) complaints filed in federal district courts asserting patent infringement and declaratory judgment claims, including claims pursuant to the Hatch Waxman Act and Biologics Price Competition and Innovation Act; and (2) petitions before the PTAB seeking *inter partes* review, post-grant review, or covered business method review.

[2] United States Patent and Trademark Office, *Trial Statistics IPR, PGR, CBM* (March 2020), [https://www.uspto.gov/sites/default/files/documents/trial\\_statistics\\_20200331.pdf](https://www.uspto.gov/sites/default/files/documents/trial_statistics_20200331.pdf).

[3] *Ferring Pharm. Inc. v. Serenity Pharm. LLC*, No. 17-cv-9922 (CM) (SDA), Order (Dkt. 679) (S.D.N.Y. Apr. 28, 2020).

[4] *United States of America v. Innovative Biodefense, Inc.*, No. 8:18 CV 996-DOC (JDE), Order of Permanent Injunction (Dkt. 215) at 2-3 (C.D. Cal. May 4, 2020).

[5] *Id.*, Findings of Fact and Conclusions of Law (Dkt. 214) at 27-30.

[6] *3M Company v. Performance Supply, LLC*, No. 20-cv-02949 (LAP)(KNF), Order (Dkt. 22) at 3-4 (S.D.N.Y. May 4, 2020).

[7] *Id.*, Findings of Fact and Conclusions of Law (Dkt. 23) ¶¶ 27-29.



*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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