

June 12, 2020

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

To Our Clients and Friends:

This Alert reports on recent intellectual property law developments relating to the COVID-19 pandemic. First, we describe new initiatives launched by the United States Patent and Trademark Office (“USPTO”) and the United States Department of Energy (“DOE”) compiling helpful information for intellectual property stakeholders seeking to combat the pandemic. Second, we report on a recent copyright infringement lawsuit based in part on circumstances arising from the pandemic, namely, the creation of an online “National Emergency Library.” Finally, we discuss manufacturer 3M’s continued efforts to use trademark law to combat price gouging in connection with the sale of personal protective equipment, such as N95 respirators.

### **(1) The USPTO and DOE Launch New Initiatives to Facilitate COVID-19-Related Innovation**

**The USPTO:** On June 3, 2020, the USPTO launched its “COVID-19 Response Resource Center,” which serves as a “central hub” of information about USPTO initiatives and other intellectual property information related to the pandemic. The resource center includes links to other sources covering patent applications and licensing, trademark counterfeiting and consumer fraud, and international updates relevant to the COVID-19 pandemic.

The linked patent sources include (1) the USPTO’s COVID-19 Prioritized Examination Pilot Program, which seeks to expedite the examination of patent applications submitted by “small” or “micro” entities (including institutions of higher education) that cover products or processes related to combatting COVID-19; and (2) the USPTO’s “Patents 4 Partnerships” program, a platform that allows patent holders (and owners of published patent applications) relating to COVID-19 technologies to list such patents and applications if they are available for licensing (prior discussion of these programs is available [here](#)). The trademark section of the resource center directs consumers to avenues for reporting fraud or counterfeiting related to COVID-19. Finally, the international section compiles updates from the World Intellectual Property Organization addressing measures foreign intellectual property offices have taken in response to the pandemic.

**The DOE:** To make DOE resources available to innovators seeking to combat COVID-19, the DOE’s Office of Technology Transitions added a “COVID-19 portal” to the agency’s “Lab Partnering Service” program, and created a new “COVID-19 Technical Assistance Program.” According to Secretary of Energy Dan Brouillette, these programs “will help transition” the DOE’s resources from its 17 national laboratories “into the hands of America’s motivated and talented innovation community” during the pandemic.

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First launched in 2018, the DOE's Lab Partnering Service ("LPS") is an online tool that provides investors and innovators access to the DOE's technical expertise and intellectual property. It consists of main three components: (1) an "expert search" function, which lists experts working for DOE's laboratories by specialty, and provides a means to contact these experts; (2) a "technical summaries" function, which provides information about the DOE's developing technologies, including publications from the agency's labs and other participating research institutions; and (3) a "visual patent search" tool, which allows users to search the DOE's U.S. patents and published patent applications resulting from DOE-funded research and development. The recent addition of LPS's "COVID-19 portal" allows users to access these functions in a manner more targeted to COVID-19 research and technologies.

The DOE stated that its "COVID-19 Technical Assistance Program" (CTAP) will provide "targeted funding" to assist non-DOE entities working with DOE (presumably on COVID-19-fighting efforts). The agency does not yet appear to have publicly released further information about the program, and directs interested entities to contact its Office of Technology Transfer Office.

## **(2) Publishers Take Legal Action Against Internet Archive's "National Emergency Library" While 3M Sues Amazon Vendor for Counterfeit N95 Masks**

On June 1, 2020, four large publishing companies sued Internet Archive for copyright infringement in the Southern District of New York. Internet Archive is a non-profit organization that provides public access to various digital media collections, including searchable archives of website pages (commonly known as the "Wayback Machine"), and public domain materials.

This suit arises from Internet Archive's "Open Library" service, which lends digital copies of books to the public for free. The complaint alleges that before the pandemic began, Internet Archive asserted that it could lend digital copies of books without infringing copyrights under a theory of "Controlled Digital Lending," whereby Internet Archive would ensure that it had in its possession a physical copy of every publication it offered to users online.[1] In the wake of the pandemic, however, Internet Archive began offering a "National Emergency Library," which it describes as "a temporary collection of books that supports emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries are closed." The publishers' complaint asserts that neither Internet Archive's controlled digital lending theory nor its "self-appointed role as 'National Emergency Library'" is a legally cognizable defense to copyright infringement, and that Internet Archive's actions have disrupted the "carefully calibrated ecosystem that makes books possible in the first place." [2] Among other claims, the complaint seeks statutory damages for willful infringement and an accounting of Internet Archive's "profits, gains, advantages or the value of business opportunities received" from its alleged acts of infringement.[3]

The director of the non-profit organization Public Knowledge (which is one of Internet Archive's supporters and describes its core focus as "advocat[ing] for policies that serve the public interest" with regard to copyright and internet law) has publicly expressed disappointment with the lawsuit, asserting that Internet Archive's National Emergency Library "is justified under the circumstances of the pandemic, when so many print books paid for by the public are inaccessible."

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Separately, manufacturer 3M continues to broaden its global efforts using trademark law to combat price gouging in connection with the sale of PPE. Last week, the company filed a new action in the Central District of California against an online vendor and several affiliated companies alleging that these defendants operated an unlawful scheme to “advertise and sell counterfeit, damaged, deficient, or otherwise altered respirators to unwitting consumers,” using 3M’s trademarks.[4] The complaint asserts that the defendants further engaged in price-gouging, “by selling purported 3M-branded N95 respirators . . . at an average price . . . far in excess of 3M Company’s average list prices for N95 respirators.”[5]

As of June 8, 3M has filed more than a dozen lawsuits in its fight against price gouging and counterfeiting, and has secured the removal of more than 3,000 websites offering counterfeit products from e-commerce platforms around the world.

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

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[1] *Hachette Book Grp., Inc. v. Internet Archive*, No. 1:20-cv-04160, Compl. ¶¶ 8-10 (S.D.N.Y. June 1, 2020).

[2] *Id.* ¶¶ 9, 13.

[3] *Id.* at 52 (Prayer for Relief).

[4] *3M Co. v. KM Bros. Inc.*, No. 2:20-CV-05049, Compl. ¶ 1 (C.D. Cal. June 8, 2020).

[5] *Id.* ¶ 16.



*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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