

June 26, 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 the United States Patent and Trademark Office's new initiatives to expedite review of initial trademark applications for COVID-19-related trademarks, and to extend additional relief from certain deadlines under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Second, we provide updates on the Open COVID Pledge (a project facilitating the donation of patent rights during the pandemic), and a lawsuit arising from the COVID-prompted creation of a "National Emergency Library."

(1) The United States Patent and Trademark Office ("USPTO") Prioritizes COVID-19-Related Trademarks and Extends Deadlines Under the CARES Act

Expedited Trademark Application Process: On June 12, 2020, the USPTO announced a new examination procedure that aims to prioritize and expedite review of certain COVID-19-related trademark and service mark applications. The USPTO ordinarily evaluates trademark applications in the order in which they were received, although applicants can request that the initial examination of their application be advanced out of turn when special circumstances exist. In view of the need for medical products and services to combat the pandemic, the USPTO Director is leveraging this procedure to accept petitions to advance the initial examination of marks specifically used to identify medical products and services intended to help prevent, diagnose, treat, or cure COVID-19. Having found that the COVID-19 pandemic presents an "extraordinary situation," the USPTO director has also agreed to waive application fees for these petitions.

Medical products and services that qualify for prioritized examination include "diagnostic tests, ventilators, and personal protective equipment," that prevent, diagnose, treat, or cure COVID-19, and that are subject to FDA approval, and "medical services or research services" in support of the prevention, diagnosis, treatment of, or cure for COVID-19. If a petition for prioritized examination is granted, the application will be immediately assigned for attorney review, which is intended to expedite examination by approximately two months.

Further CARES Act Deadline Relief: The USPTO has also expanded the type of relief available under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which granted the USPTO temporary authority to extend statutory deadlines. The USPTO previously exercised that authority to extend deadlines regarding prosecution and maintenance fees. Under the USPTO's latest June 11 notice, certain non-provisional applications can now claim priority to applications filed more than 12 months earlier. Specifically, non-provisional applications that are filed before July 31, 2020, can claim priority

to those applications for which (i) the original priority period expired between March 27, 2020 and July 30, 2020, (ii) the delay in filing “was due to the COVID-19 outbreak” (as defined in the USPTO’s April 28, 2020 notice), and (iii) the applicant meets other formal filing requirements. The extension applies to U.S. applications only.

(2) Growth of The Open COVID Pledge

The urgency of the COVID-19 crisis has prompted initiatives like the [Open COVID Pledge](#), which is intended to help businesses make use of technology needed to provide supplies and treatments to combat the pandemic, without running the risk of becoming defendants in patent infringement litigation. Signatories to the 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 (prior reporting available [here](#)).

Since it was launched in April, the pledge has garnered support of some of the world’s largest patent owners, collectively holding hundreds of thousands of patents. That pledged intellectual property now covers a range of applications in health care, diagnostics, and emergency response, such as 3D-printed respirators, methods for designing grocery stores to ensure social distancing, and software for accelerating COVID-19 diagnoses. Recently, the Open COVID pledge website added a feature providing examples of how pledged technology can be used, [reportedly](#) in an effort to boost the project’s ability to spur follow-on innovation, in light of [studies](#) finding that pledge efforts that simply publish lists of patents do not boost such innovation.

(3) Internet Archive Ends National Emergency Library Project

As reported in our [last update](#), four large publishing companies sued Internet Archive in early June 1 for copyright infringement, arising out of Internet Archive’s “National Emergency Library,” implemented during the pandemic. Internet Archive [described](#) the new library 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 project was intended to run until the end of June, but Internet Archive ended the project on Tuesday, June 23, due to the pending lawsuit.



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:

AUTHORS: *Richard Mark (rmark@gibsondunn.com), Joe Evall (jevall@gibsondunn.com), Doran Satanove (dsatanove@gibsondunn.com), and Amanda First (afirst@gibsondunn.com)*

GIBSON DUNN

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.