

# Coronavirus

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## COVID-19 Impacts on Intellectual Property and the Federal Courts

### How the COVID-19 Pandemic is Affecting Intellectual Property Litigation in the Federal Courts, PTAB and ITC, and Prosecution Before the USPTO

As the ongoing COVID-19 pandemic continues to impact our personal and professional lives, we are working to stay abreast of the rapidly changing situation in the various courts and agencies that handle patent and other IP matters, as well as the USPTO. Below is an outline of the various standing orders and rulings from courts and individual judges that may be of interest. Given that the courts are likely to continue to adjust their responses to the situation, including the various “stay at home” orders now issuing from state and local governments, we will continue to monitor the courts and provide updates accordingly.

#### FEDERAL COURTS

##### *U.S. Court of Appeals for the Federal Circuit*

- The National Courts Building complex is closed to the public
- All arguments for the April sitting have been either cancelled or moved to telephonic
- Requirements to file paper copies are suspended
- The clerk’s office is reducing support by telephone, and parties are encouraged to email questions to [casequestions@cafc.uscourts.gov](mailto:casequestions@cafc.uscourts.gov)

The U.S. Court of Appeals for the Federal Circuit has responded to COVID-19 concerns by cancelling some arguments scheduled for its April sitting and deciding to hold other arguments by telephone. In an initial order, the court announced that it would cancel arguments for cases it believed could be decided effectively on the briefs, hold telephonic hearings for cases where at least one arguing attorney was based outside of the Washington,



DC area, and proceed with in-person hearings in all other cases. The in-person hearings would have been open only to the parties and arguing counsel, as access to the National Courts Building complex continues to be restricted to the public. On March 18, the Federal Circuit changed course and decided to hold all April hearings telephonically. The court has not provided details regarding the logistics of these hearings, but it has indicated in orders to parties that “[t]he Clerk’s Office will provide additional instructions to counsel at least one week ahead of argument.”

#### ***Northern District of California***

- Courthouses are closed to the public until May 1, 2020.
- Jury trials scheduled before May 1, 2020, are vacated.
- Civil matters will be decided on the papers or a hearing will be held by telephone or videoconference.

The U.S. District Court, Northern District of California, has responded to COVID-19 concerns by closing all courthouses to the public until at least May 1, 2020, and has vacated any trials scheduled before that date. All civil matters will otherwise move forward and be decided on the papers or, if the assigned judge believes a hearing is necessary, the hearing will be held by telephone or videoconference. Conference call lines for hearings will be available to members of the press and public free of charge, to the extent practicable. The court has also temporarily suspended its requirement that a courtesy copy of all filings be sent to the chambers of the assigned judge. More information is available from the court [here](#). Any new updates will be posted on that site.

#### ***Central District of California***

Effective March 23 through and including May 1, 2020:

- All CD Cal. courts are closed to the public except for hearings on criminal duty matters.
- In civil cases, no hearings will go forward except for emergency time-sensitive matters, such as requests for temporary restraining orders and preliminary injunctions, as ordered by the assigned judicial officer. Any hearings on emergency civil matters will proceed telephonically only.
- CM/ECF is available for e-filing. Until further notice, all district judges and magistrate judges do not require mandatory chambers copies during the pandemic.
- More information is available [here](#).

#### ***District of Delaware***

As of March 23, 2020, the courthouse is open after “a thorough deep-cleaning of the affected areas was performed this weekend,” after an attorney tested positive for COVID-19 that recently appeared before the court. The other orders or notices relating to the virus that remain in effect are:

- No jury trials until April 30
- All scheduling orders remain effective unless modified by court order
- Video or teleconferences are encouraged
- No paper copies to be provided to the court

#### ***Southern District of New York***

- All civil and criminal jury trials scheduled to begin between March 16<sup>th</sup> and April 27<sup>th</sup> are continued pending further order from the Court ([standing order](#)).



- Compliance with all trial-specific deadlines in civil and criminal cases scheduled to begin before April 27<sup>th</sup> is at the discretion of the presiding judge.
- Court houses remain open with [limited access](#).
- “Civil Case Operations will proceed at the discretion of the individual Judge. In-court appearances will be limited strictly to Emergency matters, and even these should be conducted by teleconference or (if the presence of witnesses is required) videoconference if possible.” If videoconference is not possible, appearances will proceed according to the [COVID-19 Protocols Memorandum](#), issued on March 20.
- For more information, see SDNY’s Response to COVID-19 page [here](#).

#### ***Eastern District of New York***

- All civil and criminal jury trials scheduled to begin between March 16<sup>th</sup> and April 27<sup>th</sup> are continued pending further order from the Court ([standing order](#)).
- Commencement of hearings, conferences, and bench trials is at the discretion of the presiding judge. Judges are, however, “strongly encouraged to conduct court proceedings by telephone or video conference where practicable, and/or adjourn matters or deadlines, or stay litigation, where in-person meetings, interviews, depositions, or travel would be necessary to prepare for any such proceedings.”
- Court houses remain open with [limited access](#).
- For more information, including any future administrative orders, view the EDNY’s website [here](#).

#### ***Eastern District of Texas***

On March 16, 2020, Chief Judge Gilstrap issued an order continuing all criminal and civil jury trials through May 1.<sup>1</sup> Pending pretrial deadlines were not automatically continued. The order allows individual judges “maximum discretion” to decide how to handle hearings, orders, and their schedule while the order remains in effect. A few notes about specific courts and judges:

- The Plano Courthouse is closed through April 1.
- Judge Gilstrap has recently denied requests to extend discovery based on COVID-19 concerns, noting that “the Court is not inclined to implement delays or grant continuances unless party can put forward specific concerns backed by firm restrictions from a governmental/public health level or actual exposure.”<sup>2</sup>

#### ***Western District of Texas***

On March 20, 2020, the US District Court for the Western District of Texas issued a revised [order](#) regarding court operations in view of the COVID-19 pandemic. The order will remain effective through May 1, 2020.

In summary, the Court has ordered that:

- The Courts of the Western District are now closed with some narrow exceptions.
- All settings before the Court currently scheduled before May 1, 2020 are cancelled pending further order by the Court with the exception of certain criminal proceedings.
- All deadlines in scheduling order remain in place other than a trial date remain in effect unless modified by the Judge.

#### ***District of New Jersey***



Pursuant to Standing Order 20-02 (March 16, 2020), all courthouses in the District of New Jersey are to remain open for official business during the COVID-19 outbreak subject to the following provisions:

- Jury selections and jury trials scheduled to begin before April 30, 2020 are continued, pending further Order of the Court.
- Scheduling orders and all other deadlines set by Federal or Local Rules or court Orders remain in effect unless modified by the Court or the assigned judicial officer.
- Discovery disputes may be referred to the Magistrate Judge for resolution.
- Judicial officers may accommodate reasonable requests for filing or scheduling adjustments.
- Hearings, conferences, sentencings, changes of plea hearings, and bench trials are to be continued subject to the discretion of individual judicial officers.
- Aside from ordering a jury trial, individual judges may take such actions as may be lawful and appropriate.
- Judicial officers are encouraged to conduct proceedings by telephone or videoconferencing.
- ADR proceedings may be conducted via video and/or telephone conference, subject to the discretion of the respective designated ADR neutral.

#### UNITED STATES PATENT AND TRADEMARK OFFICE

In the United States, the Patent and Trademark Office considers the effects of the Coronavirus outbreak to be an “extraordinary situation” within the meaning of 37 CFR 1.183 and 37 CFR 2.146 for affected patent and trademark applicants, patentees, reexamination parties, and trademark owners. Below, the USPTO has provided some guidance as to the relief they are currently offering if and when certain deadlines may be missed.

##### **PTAB**

As of March 16, the USPTO closed all of its offices to the public, including its hearing rooms. PTAB trial deadlines remain unchanged. Due to the USPTO office closings, oral arguments scheduled to take place at USPTO offices going forward, are being conducted remotely by video or telephone. Parties are receiving specific instructions through orders issued in their cases. These orders so far are instructing parties to contact the PTAB five business days before the oral hearing to receive video set-up information. One or more parties can, however, request to participate telephonically instead of by video. Questions about these procedures can be directed via email to [PTABHearings@uspto.gov](mailto:PTABHearings@uspto.gov) or via telephone at 571-272-9797. For the latest updates on the USPTO's response to the novel coronavirus, visit the USPTO's coronavirus [website](#).

Parties continue to be permitted to liberally modify due dates for Patent Owner Response, Petitioner Reply, and Patent Owner Sur-reply by stipulation. For depositions scheduled in the next 2-4 weeks that cannot be moved, parties are using video and telephonic deposition capabilities provided by most court reporting services.

##### **USPTO**

###### **Petitions to Revive**

For patent applicants or patent owners who were unable to timely reply to an Office communication due to the effects of the coronavirus outbreak, which resulted in the application being held abandoned or the reexamination prosecution terminated or limited, the USPTO will waive the petition fee to revive such application when the patent applicant or patent owner files the reply with a petition, where the petition includes a statement that the delay in filing the reply required to



the outstanding Office communication was because the practitioner, applicant, or at least one inventor, was personally affected by the Coronavirus outbreak such that they were unable to file a timely reply. There are time limits for when this petition must be filed and we can address those if the situation arises. Further, if the provisions set forth herein do not apply, relief may still be available on petition to the USPTO, but the type of petition would depend upon the facts of the situation and the relief sought.

### **Patent-Related Statutory Time Periods and Requirements**

The USPTO is not granting any waivers or extensions of dates or requirements set by statute. The following patent-related time periods are not extendable by petition: (1) the period to file a nonprovisional patent application claiming the benefit of a prior-filed foreign application; (2) the period during which a nonprovisional application claiming the benefit of a prior filed provisional application must be filed in order to obtain benefit of the provisional application's filing date; (3) the copendency requirement between a parent application which issues as a patent and a later filed child application, which requires that the child application be filed prior to issuance of the patent application; (4) the 3-month time period to pay the issue fee; and (5) the two-month time period from the date of patentee service, for a requester to file, in an *ex parte* reexamination, a reply to a statement filed by the patentee. There are several other deadlines that fall into this category and are not extendable by petition.

### **INTERNATIONAL TRADE COMMISSION**

The U.S. International Trade Commission has responded to COVID-19 concerns by implementing modified access and filing procedures and postponing certain hearings. The procedures outlined below are effective until May 12, 2020 unless revised or otherwise stated below.

- The Commission building is closed to the public through April 3, 2020, and all Commission employees are teleworking full time.
- The Secretary's office will accept only electronic filings during this time. No in-person paper-based filings, paper copies, or physical media filings of any electronic filings will be accepted by the Commission.
- The Commission has ordered the Administrative Law Judges to postpone all hearings scheduled during the next 60 days, i.e., until May 12, 2020. The ALJs have begun issuing revised scheduling orders in the individual investigations. The Commission will re-evaluate the schedule after 45 days for any additional postponements. The ALJ's otherwise are using their standard procedures to conduct section 337 investigations.
- All discovery will continue, and any essential outside participation by the Office of Unfair Import Investigations staff attorneys will be decided on a case-by-case basis.
- For further details, please see the Commission announcements located [here](#) and [here](#).

### **OUR TEAM**

King & Spalding's Intellectual Property, Patent, Trademark and Copyright Litigation group has extensive experience before the federal courts and USPTO. Our team runs the gamut from well-respected counselors and prosecutors to seasoned first-chair trial attorneys who have handled dozens of patent cases in district courts around the country and before the ITC, as well as one of the foremost USPTO litigators in the country who has served as counsel in hundreds of trials before the USPTO's Patent Trial & Appeal Board. We have the practical perspective to help our clients understand the consequences of current events and strategic considerations on a case-by-case basis.



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ABU DHABI	BRUSSELS	DUBAI	HOUSTON	MOSCOW	RIYADH	SINGAPORE
ATLANTA	CHARLOTTE	FRANKFURT	LONDON	NEW YORK	SAN FRANCISCO	TOKYO
AUSTIN	CHICAGO	GENEVA	LOS ANGELES	PARIS	SILICON VALLEY	WASHINGTON, D.C.

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<sup>1</sup> [http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2020-03%20%20COVID-19\\_signed.pdf](http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2020-03%20%20COVID-19_signed.pdf)

<sup>2</sup> *Saint Lawrence Comms. LLC v. Amazon.com, Inc.*, No. 2:19-cv-00027-JRG (E.D. Tex. Mar. 12, 2020)