

# Coronavirus

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For more information,  
contact:

Steve Rizzi  
+1 212 556 2269  
srizzi@kslaw.com

**King & Spalding**

New York  
1185 Avenue of the Americas  
New York, New York 10036-  
4003  
Tel: +1 212 556 2100

## An Update on COVID-19 Impacts on Intellectual Property Cases at the Federal Courts

In the past month, the first remote patent trial commenced in Norfolk, VA, jury trials have been continued, case schedules extended and stayed (where there was sufficient justification), and the Federal Circuit has indicated that telephonic oral arguments will continue indefinitely. In addition, the USPTO launched new COVID-19 initiatives. More details on May's developments can be found below.

***Court of Appeals for the Federal Circuit***

The Federal Circuit issued an Order on May 18 directing that all oral arguments will be conducted telephonically until further notice. The Court has been conducting telephonic arguments since April.

***Eastern District of Texas***

On May 22, 2020, Judge Gilstrap issued two orders in cases where the parties jointly requested to delay cases due to the COVID-19 pandemic.

First, in *SAS Institute Inc. v. World Programming Ltd. et al.*, No. 2:18-CV-00295, the court denied without prejudice the parties' joint request for a 90-day extension of the July 6 trial date, notwithstanding that one of the defendants is a foreign corporation with witnesses located overseas, and that it would be difficult for two of plaintiff's trial counsel to attend the trial due to travel restrictions. The court anticipated that the situation would continue to evolve prior to the scheduled trial date, but indicated that the parties could later seek similar relief "if present impediments do not abate or are otherwise modified/lifted."

On the other hand, in *Canon, Inc. v. TCL Electronics Holdings Ltd., et al.*, No. 2:18-CV-00546, Judge Gilstrap granted-in-part the parties' joint motion to extend the schedule, because the parties were "unable to conduct depositions of foreign-based witnesses due to travel restrictions and declared states of emergency." Judge Gilstrap noted that "the parties specifically identif[ied] impediments to proceeding with the above-captioned case."



### **Western District of Texas**

On May 18, Judge Albright granted the parties' joint request to stay the case for six months in *Coil Chem LLC et al. v. Durachem Production Co. et al.*, No. 7:19-cv-00225, due to the pandemic.

On May 22, in *Clinicomp International, Inc. v. Athenahealth, Inc.*, No. 18-cv-0425, Judge Yeakel denied the parties' joint motion to revise the case schedule, which included a request to move the trial date from February 2021 to April 2021, but indicated that, other than the dates for the final pretrial conference and trial, the parties could revise the dates in the scheduling order without Court approval.

### **District of Delaware**

On May 27, the District of Delaware revised its Standing Order concerning the COVID-19 pandemic, and continued all civil and criminal jury selections and jury trials scheduled to begin before June 30, 2020. The order otherwise grants individual judge's discretion to grant "reasonable requests for filing or scheduling adjustments" due to the pandemic, as well as to conduct in courtroom proceedings, including bench trials, while still encouraging judges to conduct proceedings remotely where practicable.

### **District of New Jersey**

On May 22, 2020, the District of New Jersey issued two additional standing orders related to the COVID-19 pandemic. Standing Order 2020-12 superseded the court's prior orders, and further continued all jury trials to August 31, 2020. The order does not provide for any further blanket extension of filing and discovery deadlines, but it does authorize judges to "apply the principles of flexibility and accommodation to reasonable requests for filing or scheduling adjustments necessitated by reasonable and fact-based travel, health or safety concerns, or advice or directives of public health officials."

In Standing Order 2020-13, the court established rules concerning the use of masks/face coverings in court facilities that applies to everyone entering or occupying the facilities, and ordered that all persons shall engage in social distancing. The order also authorizes court security officers to delay visitors without a mask/face covering to determine if their business can be handled without entry to the building.

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

In *Ferring B.V. v. Serenity Pharmaceuticals, LLC*, No. 17 Civ. 9922, Chief Judge McMahon issued an order on May 27 regarding the trial procedures for a bench trial set to proceed by July 6. Although some witnesses were prepared to travel to New York to testify live, she ordered that all witnesses, some of which are based on Europe, would testify remotely. She also ordered the parties to reach agreement as to whether counsel, some of which are not based in New York, would conduct their cross-examinations from the courtroom or remotely, with the caveat that if counsel based out of state were not prepared to quarantine in New York City for two weeks before trial (as required by the court's protocols), then all attorneys should be remote so as not to have only one side's attorneys in the courtroom.

### **Central District of California**

In *DivX, LLC v. Netflix, Inc.*, 2-19-cv-01602, Judge Gutierrez granted defendants' motions to stay pending IPR, and noted that likely delays in the case caused by the COVID-19 pandemic supported the stay: "It is likely that if these cases were to proceed on their current schedule, hearings and trial would be subject to delays, particularly because criminal matters will take priority over these patent infringement actions."



On May 27, 2020, Judge Fitzgerald granted Defendant's unopposed request to extend the case schedule by 60 days in Nike, Inc. v. Sketchers U.S.A., Inc., No. 19-cv-09230, due to the ongoing COVID-19 restrictions in Los Angeles County.

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

The court issued [General Order 72-3](#) on May 21, which: i) continued all new jury trials through September 30, 2020; and ii) ordered that, through September 20, 2020, all civil matters will be decided on the papers, unless the assigned judge believes a hearing is necessary, which will be conducted by telephone or videoconference. This provision also applies to bench trials.

### ***U.S. Patent and Trademark Office***

The USPTO launched and extended several COVID-19-related initiatives in May. On May 4, the office introduced "[Patents 4 Partnerships](#)," a web-based platform to provide ready access to COVID-19-related patents and published patent applications. On May 8, the PTO launched the COVID-19 Prioritized Examination Pilot Program for small and micro entities, and subsequently set up a [web page](#) with details about the program. And finally, on May 27, the PTO issued notices regarding further relief being provided under the CARES Act for both [patent](#) and [trademark](#)-related fees and deadlines.

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