

# Using Your Intellectual Property Rights to Combat Price Gouging

Using another company's trademarked logo, tagline or other content to promote your own company is a sure-fire way to find yourself on the wrong end of a trademark infringement lawsuit. Using another company's logo or name to imply that you have authorization or approval from it to resell its products at wildly inflated prices can end the same way.

Recently, 3M took a stand against sellers doing just that. 3M manufactures N95 masks used by frontline health care workers across the country in the fight against COVID-19. Using trademark law in a unique fashion, 3M filed 10 lawsuits across the country and in Canada alleging companies were improperly claiming or implying they had the full support of 3M to not only sell and distribute the masks, but to do so at massively inflated prices.

In some cases, 3M alleges that its masks were being sold for up to six times above list price. In one of the first cases, the U.S. District Court for the Southern District of New York granted a temporary restraining order against Performance Supply LLC after 3M successfully argued that Performance Supply used the 3M logo and other tactics to advertise N95 masks listed at a price up to 500 percent above list price.<sup>[1]</sup> 3M argued that Performance Supply attempted to make New York City officials and consumers believe 3M was fully supportive of the wildly inflated prices. 3M alleged that Performance Supply's practices would have caused New York City to pay more than \$30 million over list price for the masks. On May 4, 2020, the Court granted a preliminary injunction banning Performance Supply from using 3M's name to advertise or sell the masks or to pose as an affiliate or partner to 3M.

In late April 2020, 3M filed a lawsuit against Hulomil LLC for similar price-gouging practices. The allegations in the Hulomil case are even more nefarious. In its lawsuit filed in the U.S. District Court for the Western District of Wisconsin,<sup>[2]</sup> 3M alleges that Hulomil misled buyers in Wisconsin into thinking they were dealing directly with 3M and that Hulomil would "initiate production" of the 3M masks once a contract was signed for prices two to three times above list price. According to the complaint, Hulomil even required its buyers to enter into a non-disclosure agreement in an attempt to hide the details of any inflated deal.

3M has been vocal in condemning these types of price gouging, and has taken

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active steps to combat this activity. In addition to actively pursuing price-gougers through civil suits, 3M published that it has been working with law enforcement authorities around the world, creating a "3M COVID-19 Fraud hotline" for consumers to help detect fraud and avoid counterfeit products. 3M has also published information on its website<sup>[3]</sup> to identify legitimate pricing and products.<sup>[4]</sup>

What can we learn from the recent 3M cases? There are two main takeaways: (1) you can use your intellectual property rights in unique ways to stop illegitimate sales, price gouging or other distribution problems that can harm your company's reputation; and (2) you should monitor distributors and any "gray market" sales of your products to prevent reputation damage or unauthorized sales, and be prepared to take action to distance yourself from those sales.

Price gouging is not *per se* illegal under the federal Lanham Act (15 U.S.C. 1125). However, 3M's lawsuits demonstrate that tricking a consumer—no matter if the buyer is an individual or a large organization like a state government—into believing the price gouging was endorsed by the manufacturer can be a violation of the Act. The cases also show that courts are willing to accept these unique arguments to issue restraining orders and injunctions to protect the public.

While the current COVID-19 crisis highlights the need to monitor product sales (especially when those products are used in the health care industry), it is important to monitor product sales and trademark usage by your distributors and sellers at all times, regardless of product type. By keeping a watchful eye on distributors and sellers, companies can take early action to protect their sales and reputation and avoid the potential public relations nightmare. As 3M has shown, taking early and firm action against these practices can maintain consumer trust even during a global health crisis.

Feel free to contact Reinhart's [Intellectual Property Litigation](#) and [Commercial and Competition Law](#) groups with questions about how to use your intellectual property rights and terms and conditions with sellers and distributors of your products to protect your image and reputation.

<sup>[1]</sup> *3M Co. v. Performance Supply LLC*, case number 1:20-CV-02949, in the U.S. District Court for the Southern District of New York.

<sup>[2]</sup> *3M Co. v. Hulomil LLC*, case number 3:20-CV-00394, in the U.S. District Court for the Western District of Wisconsin.



[3]

<https://multimedia.3m.com/mws/media/18036700/fraudulent-activity-price-gouging-and-counterfeit-products.pdf>

[4] *3M Company v. 1 Ignite Capital LLC et al*, case number 4:20-cv-00225, in the U.S. District Court for the Northern District of Florida

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