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PATENT & TRADEMARK POLICY REPORT FEBRUARY 10, 2017



I. Congressional Developments:

- In a *Politico Pro* interview this week, House Energy & Commerce Subcommittee on Communications and Technology Chairwoman Marsha Blackburn (R-TN) discussed net neutrality, broadband infrastructure expansion, the NTIA, broadband privacy, and technology companies' reaction to President Trump's executive order on immigration. Blackburn said that she would "like to see net neutrality become history" and get rid of the Title II classicization. She said that legislation on the matter is possible and that she has "constituents that want to be able to use paid prioritization." She also expressed a desire to modernize and re-organize the FCC. Addressing President Trump's immigration order, Blackburn said that tech companies "probably don't understand" the order, and encouraged the tech community "to continue to work with the administration."
- This week, Senator Chris Coons (D-DE), Ranking Member of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts authored an op-ed in *IP Watchdog* on recent developments related to Section 101 of the Patent Act, which covers patentability requirements. Coons writes that recent Supreme Court decisions on Section 101 "have substantially moved the line on what is patent-eligible" and "created uncertainty about the validity of previously issued patents." He calls this an erosion of patent protection and worries that it could impede investment in research and development. Senator Coons goes on to offer some "overarching principles about how we might ideally legislate" on 101. He says legislation should be "technology neutral," refrain from making it "more difficult for new technologies to receive patent protection;" and make "the process of determining what is patent-eligible...clearer and simpler." Read more [here](#).

Headlines and Highlights:

- Senate confirms Jeff Sessions to be next U.S. Attorney General.
- Sen. Hatch holds meetings with tech executives, plans to unveil "innovation agenda" next week.
- U.S. Chamber of Commerce releases its *International IP Index*.
- Sen. Coons writes op-ed on Section 101 developments.
- Group of law firms files class action suit against Apple, alleging they intentionally bugged software following patent lawsuit.
- President Trump signs executive order on crime, lists cybercrime and intellectual property theft as examples of the "illicit activities"

- *Politico* is reporting this week that Sen. Orrin Hatch (R-UT), Chairman of the Senate Finance Committee, has been meeting with representatives from Amazon, Apple, Oracle, Cisco, and Qualcomm to discuss tech policy, and the Senator will “unveil an innovation agenda” at an event in the Capitol next week. The discussions have centered on topics like copyright reform, data privacy, and high-skilled immigration.
- It was announced this week that Rep. Judy Chu (D-CA) will be the newest member of the House Ways and Means Committee, taking the slot of former Rep. Xavier Becerra (D-CA), who left to become California’s attorney general. Rep. Richard Neal (D-MA), the Ways and Means Committee Ranking Member, released a [statement](#) applauding her addition to the panel, saying “Judy has gained invaluable experience in how to make the tax code work for local communities and small businesses—something she will bring with her as our committee looks to tackle tax reform.”
- Senators Susan Collins (R-ME) and Claire McCaskill (D-MO) reintroduced their *Increasing Competition in Pharmaceuticals Act* last Friday. The bill aims to expedite the Food and Drug Administration (FDA) approval process for certain applications for generic drugs. The legislation would also create a new priority review voucher “that would be awarded to the sponsor of a successful application for a medical shortage or sole-source drug that makes it to market.” Read more [here](#). Another [bill](#) aimed at expediting the approval of generic applications, the *Lower Drug Costs Through Competition Act*, has been introduced in the House by Representatives Gus Bilirakis (R-FL) and Kurt Schrader (D-OR).
- Following the confirmation of Senator Jeff Sessions (R-AL) to be the next U.S. Attorney General, Alabama Governor Robert Bentley appointed Luther Strange to fill the state’s now-vacant Senate seat. Since 2011, Strange has served as the Alabama Attorney General, a position that saw him [successfully prosecute](#)—alongside 33 other states—Apple, for its price-fixing of E-books. Read more [here](#).

II. Administration Updates:

- On Wednesday, Sen. Jeff Sessions (R-AL) was confirmed as the next Attorney General of the United States in a near-party-line vote, 52 to 47. “I can’t express how appreciative I am for those of you who stood by me during this difficult time,” Sessions said following the vote. “By your vote tonight, I have been given a real challenge. I’ll do my best to be worthy of it.” Read more [here](#).
- President Trump signed an executive order on Thursday titled “Enforcing Federal Law With Respect to Transnational Criminal Organizations and Preventing International Trafficking.” The order, which largely focuses on international criminal organizations such as drug cartels, briefly addresses intellectual property theft. The order states that it “shall be the policy of the executive branch to strengthen enforcement of Federal law in order to thwart transnational criminal organizations” and lists cybercrime and intellectual property theft as examples of the “illicit activities” that those criminal organizations undertake. The executive order also instructs the interagency Threat Mitigation Working Group (TMWG) to issue a report within 120 days on transnational criminal organizations and “recommended actions for dismantling them.” Read the order [here](#).

- On Thursday, the White House issued a [press release](#) formally announcing the 24 people who will be serving in President Trump's Cabinet.

III. USPTO Updates:

- It is still unclear whether Michelle Lee will continue as Director of the United States Patent and Trademark Office (USPTO), and whether she is still serving in the position. *IP Watchdog's* Gene Quinn reports that his sources say "Michelle Lee continues to be seen" at the agency and that patents continue to be issued with her signature. Meanwhile, Lee has been canceling previously scheduled speaking engagements, and many USPTO employees do not know who is currently leading the agency. Quinn's sources also tell him that the USPTO "was prepared last week to issue patents with the signature of Drew Hirshfeld, who is the Commissioner of Patents and seems to be currently in the position of Acting Director," but "at the last minute...a decision was made to revert back to Michelle Lee's signature." Quinn also points out that using Lee's signature could put the agency in violation of 35 U.S.C. 153, which requires the Director to sign issued patents. Media reports have suggested that former judge Randall Rader and Johnson & Johnson intellectual property lawyer Philip Johnson are vying for the job. Read more [here](#) and [here](#).
- The USPTO's Patent Quality Chat webinar series will continue on February 14th from noon-1 p.m. ET. The topic for this month's series will be "Understanding the ADS: Little Things Make a Big Difference," and will present tips for more effectively filing your patent application as the USPTO focuses how to correctly use an Application Data Sheet (ADS).
- The USPTO is delaying for 60 days the effective date of its final rule titled "Changes in Requirements for Affidavits or Declarations of Use, Continued Use, or Excusable Nonuse in Trademark Cases," which was published in the Federal Register on January 19, 2017. That rule amends the USPTO's rules concerning the examination of affidavits or declarations of continued use or excusable nonuse filed pursuant to section 8 of the Trademark Act, or affidavits or declarations of use in commerce or excusable nonuse filed pursuant to section 71 of the Act, to allow the USPTO to require additional proof of use to verify the accuracy of claims that a trademark is in use in commerce in connection with particular goods/services identified in the registration. The delay results from the White House's [memorandum](#) which requires regulations that have been published in the Federal Register but have not taken effect as of January 20, 2017 to have their effective date postponed by 60 days. The effective date of the rule is now March 21, 2017. Read the Federal Register notice [here](#).
- The USPTO has extended the deadline to submit feedback on the incapable informational matter exam guide. The new deadline is March 15, 2017. Read more [here](#).

IV. Judicial Updates:

- Late last week, Christina Grace and a number of law firms [filed a class action lawsuit](#) against Apple Inc., alleging that the tech company schemed to force iPhone users to upgrade to iOS 7 in a bid to save money after losing a 2012 patent infringement lawsuit. The 2012 lawsuit, *VirnetX v. Apple*, found Apple's "Facetime" feature to be infringing VirnetX's patents on "transferring audio and video data over a direct connection" and ordered the company to pay \$302.4 million in damages. To avoid further infringement charges, Apple began to connect Facetime users via a "relay method" using third party servers run by the Massachusetts-based

company Akamai. However, after learning of the greatly increased cost to use Akamai's third-party servers, Apple, the lawsuit alleges, devised a software workaround in iOS7, and implemented a "Facetime Break" on April 16, 2014, to compel iPhone users to upgrade from their current iOS6. Undisclosed damages are being sought and the suit seeks to find Apple violated California's unfair competition law and is liable for trespass to chattels. Read more [here](#).

V. International Updates:

- On Wednesday, the U.S. Chamber of Commerce released its *International IP Index*, which rates 45 world economies on the strength of their intellectual property protection regimes. In a statement, David Hirschmann, the President and CEO of the Chamber's Global Intellectual Property Center, said that this year "a clear pack of leaders has emerged," made up of the United States, the United Kingdom, Japan, and the European Union. On the other hand, the report criticizes countries such as Canada and Australia for implementing "policies that undermine their proud traditions of IP-led innovation." Read more [here](#).
- This week, the International Chamber of Commerce's (ICC) Business Action to Stop Counterfeiting and Piracy (BASCAP) program and the International Trademark Association (INTA) released a [report](#) finding that the worldwide value of trade in counterfeit and pirated goods was in the range of \$710 to \$917 billion in 2013, and that the worldwide value of digital piracy in movies, music, and software was \$213 billion in 2015. Read more [here](#) and [here](#).
- A number of World Health Organization (WHO) member states are angling to get the WHO to address the controversial recent report and recommendations of the United Nations (UN) High Level Panel on Access to Medicines. During a WHO Executive Board meeting in late-January, the agenda for the World Health Assembly, which will take place in May, was altered such that agenda item 14.3, titled 'Addressing the global shortage of medicines and vaccines,' is now titled, 'Addressing the global shortage of, and access to, medicines and vaccines.' Read more [here](#) and [here](#).

VI. Industry Updates:

- Microsoft has announced that it is creating a "patent umbrella" to protect its cloud service customers from patent lawsuits. The company will allow its customers to choose one of Microsoft's patents to use to defend against lawsuits, and also expand its provision of funds and legal resources to targeted customers. Read more [here](#).
- The Intellectual Property Owners Association (IPO) has released a report on its proposal to amend Section 101, which IPO's board of directors approved last week. The report provides background on the proposal, including the historical development of the interpretation of Section 101 by the courts, the concerns that IPO's proposed amendments are intended to address, and further explanation of IPO's proposed amendments. Read the report [here](#).