

PATENT & TRADEMARK POLICY REPORT JULY 21, 2017



I. Congressional Developments:

- On Monday, Senators Hatch (R-UT) and Wyden (D-OR) and Reps. Brady (R-TX) and Neal (D-MA) sent a letter to United States Trade Representative (USTR) Lighthizer urging him to “consult closely” with Congress in any potential upcoming talks surrounding the Korean-U.S. free-trade agreement (KORUS). “There are a host of areas in which our trade relationship with Korea can be enhanced,” the letter reads. “However...the Administration must consult closely with the Chairs and Ranking Members of the committees of jurisdiction, and Congress more broadly, throughout the process.” Read the letter [here](#).
- Late last week, Rep. David Cicilline (D-RI), the top Democrat on the House Judiciary Antitrust Subcommittee, sent a letter to House Judiciary Chairman Bob Goodlatte (R-VA) and House Judiciary Antitrust Subcommittee Chairman Tom Marino (R-PA) calling for a hearing on Amazon’s proposed \$13.7 billion acquisition of Whole Foods. “Competition is essential for a healthy economy,” Cicilline writes. “Amazon’s proposed purchase of Whole Foods could impact neighborhood grocery stores and hardworking consumers across America.” In the letter Cicilline also underlines the dangers of Amazon’s online dominance, which he said enabled “it to prioritize its products and services over competitors.” Citing a September 2016 [report](#) by *ProPublica*, Cicilline writes that “Amazon’s pricing algorithm favors Amazon and its sellers by favoring ‘its own products ahead of better deals offered by others it charges for services.” Read the entire letter [here](#). In related news, Senator Cory Booker told *Recode* this week that “consolidation that’s happening all over the country is not a positive trend,” and mentioned that Amazon, Facebook, and Google deserve regulatory attention in this regard. Booker said that the

Headlines and Highlights:

- Rep. Cicilline and Sen. Booker call for scrutiny of Amazon-Whole Foods merger.
- USTR releases “Summary of Objectives for NAFTA Renegotiation.”
- D. Bruce Hoffman selected as Acting Director of FTC Bureau of Competition.
- American Conservative Union and others write Sec. of Commerce outlining necessary qualities of next USPTO Director.
- Qualcomm loses appeal before EU court regarding \$665,000 daily fine.
- Sens. Hatch and Wyden write USTR Lighthizer urging him to “consult closely” with Congress regarding potential KORUS renegotiation.

Congressional Black Caucus plans to send a letter to the Department of Justice raising concerns about the proposed Amazon-Whole Foods merger, citing fears that the merger could be harmful to majority-black areas lacking access to grocery stores. Booker also said that the “U.S. government absolutely should take a look at Google.” Read more [here](#).

- On Tuesday, the House Energy and Commerce Subcommittee on Oversight and Investigations held a [hearing](#) on the Health Resources and Services Administration’s (HRSA) oversight of the 340B drug pricing program. Subcommittee Chairman Tim Murphy (R-PA) highlighted a “lack of reporting requirements in the 340B statute,” given that “covered entities are not required to report their annual savings through participation in the program, or how they used the money saved.” Full Committee Chairman Greg Walden (R-OR) likewise wondered whether HRSA knows how those savings are spent, with an HRSA witness telling him that the agency “does not audit or have access to that information” given that “the statute is silent” in that regard. Read more [here](#).

II. Administration Updates:

- D. Bruce Hoffman has been [selected](#) to serve as Acting Director of the Federal Trade Commission (FTC) Bureau of Competition. Hoffman is currently the head of law firm Shearman & Sterling’s Antitrust Group. Current Acting Bureau of Competition Director Markus Meier will return to leading the Bureau’s Health Care Division.
- Neil Alan Chilson has been appointed Chief Technologist at the Federal Trade Commission (FTC). Chilson was previously an Attorney Advisor in the Acting FTC Chairman’s office, where he was responsible for technology, privacy, and data security issues. He previously worked at the law firm Wilkinson Barker Knauer, where he handled telecommunications and privacy issues. Read more [here](#).
- On Monday, the Office of the United States Trade Representative released its “[Summary of Objectives for the NAFTA Renegotiation](#).” On intellectual property, USTR writes that it wants to “ensure provisions governing intellectual property reflect a standard of protection similar to that found in U.S. law” and also “ensure standards of protection and enforcement that keep pace with technological developments, and in particular ensure that rightsholders have the legal and technological means to control the use of their works...” Senate Finance Chairman Orrin Hatch (R-UT) released a [statement](#) on the summary, writing that the “objectives—which will be further developed as the negotiations proceed—are an important part of the public discussion about the launch of the upcoming talks among our three nations.” “However... future negotiating objectives must include stronger protections for intellectual property rights, upgraded rules and enforcement procedures for American exporters and investors, and improved regulatory practices that treat American goods and services fairly.”

III. USPTO Updates:

- The USPTO has published a final rule clarifying certain provisions of the Rules of Practice before the Trademark Trial and Appeal Board (TTAB) regarding deadlines for filing motions to compel discovery, motions to test the sufficiency of responses or objections to requests for admission, and motions for summary judgment. The final rule, which is effective on July 21, 2017, clarifies a previous final rule that went into effect in January 2017. Read the Federal

Register notice [here](#).

- The Trademark Public Advisory Committee will hold its quarterly meeting on Friday, July 28 at the USPTO headquarters in Alexandria, VA. Read more [here](#).
- On Tuesday, July 25 the USPTO will hold a half-day seminar on the treatment of standard-essential patents in China. The seminar will be held at the USPTO Global Intellectual Property Academy in Alexandria, Virginia. Read more [here](#).
- A group of twenty organizations, including the American Conservative Union, Conservatives for Property Rights, Eagle Forum, Small Business Technology Council, and Wi-LAN have sent a letter to Commerce Secretary Wilbur Ross detailing characteristics “it is imperative that the next PTO Director possess.” Those characteristics include “unquestionable commitment to buttressing the U.S. patent system;” a “firm understanding of the risks and rewards at stake and borne by small inventors and IP-centered startup companies, early-stage businesses built around a patented invention, and established R&D companies;” and “a thorough commitment to promoting and advocating for U.S. competitiveness and the sanctity of intellectual property rights.”

IV. Judicial Updates:

- On Thursday, Intel issued a public statement to the U.S. International Trade Commission (ITC) in support of Apple in their patent dispute with Qualcomm. In January, Apple filed suit against Qualcomm, accusing the chipmaker of giving unfair licensing terms for its technology in an effort to maintain a competitive market advantage. Intel, which described itself as “Qualcomm’s only remaining competitor,” said that Qualcomm is using the “Commission’s process...to quash incipient and potential competitors and avoid competition on the merits.” Read more [here](#).
- On July 17, Cray Inc. filed an appeal asking a federal appeals court to throw out a ruling that requires the company to defend a patent lawsuit from Raytheon in East Texas. Judge Gilstrap of the U.S. District Court for the Eastern District of Texas denied Cray’s motion to transfer the lawsuit, writing that Cray “has a regular and established place of business” in the district. Read more [here](#).

V. International Updates:

- Qualcomm lost an appeal before a European Union court against a \$665,000 daily fine for failing to submit certain requested information to the European Commission. The European Commission had previously charged Qualcomm with using anti-competitive tactics to the detriment of Icera, a British phone software company. Qualcomm has argued that the request for information is financially burdensome and time consuming. A judge ruled that Qualcomm “does not claim that its financial viability would be at risk or that its market share could be affected substantially,” and further “does not give any explanation as to why it would be impossible to seek compensation for the alleged financial costs it would suffer by answering the questions.” Read more [here](#).

VI. Industry Updates:

- Joseph Allen, who previously worked as an aide to former senator Birch Bayh (D-IN), has published an op-ed in *IP Watchdog* critical of Senator Angus King’s (I-ME) amendment to the National Defense Authorization Act [directing](#) the Department of Defense “to authorize third parties to use inventions that benefited from Department funding whenever the price of a drug, vaccine, or other medical technology is higher in the U.S. than the median price charged in the seven largest economies that have a per capita income at least half the per capita income of the U.S.” The amendment was adopted by the Senate Armed Services Committee. Allen argues that the amendment “undermines a fundamental goal of Bayh-Dole: establishing a uniform patent policy for all agencies,” and worries that the provision will deter the commercialization of Department of Defense inventions, among other criticisms. Read more [here](#).
- On Monday, Robert Epstein—a senior research psychologist at the American Institute for Behavioral Research and Technology, and the former editor-in-chief of *Psychology Today* magazine—penned an op-ed in the *Huffington Post* on the European Union’s recent \$2.7 billion fine of Google for anticompetitive practices. In the piece, Epstein argues that the decision shows “authorities are...beginning to figure out how extensively Google is using its platforms to suppress competition and manipulate user behavior.” One such manipulation Epstein highlights is the “featured snippet.” “Google officials have long known that people don’t really want to see a list of 10,000 search results when they ask a question; they just want the answer,” Epstein writes. However, as Epstein explains, the answer is “often wrong” and when you give an undecided user what they believe to be “*the answer*” you have an “even larger impact on their opinions, purchases, and voting preferences.” Read more [here](#).