

## PATENT & TRADEMARK POLICY REPORT SEPTEMBER 15, 2017



### I. Congressional Developments:

- On Tuesday, Sen. Rob Portman (R-OH), a former United States Trade Representative (USTR), delivered remarks at an event titled “NAFTA Renegotiation: Strengthening North America Prosperity and Competitiveness” held at the Center for Strategic and International Studies (CSIS). Read a transcript of his remarks [here](#).
- Senator Amy Klobuchar (D-MN), the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, introduced two antitrust bills on Thursday. The *Consolidation Prevention and Competition Promotion Act* [would require](#) companies seeking “mega-mergers” to prove that their proposed merger does not harm competition. The bill also adds the term “monopsony” to the *Clayton Antitrust Act*, “so single buyers controlling the market are also illegal,” and creates a new “Office of the Competition Advocate” to “help consumers with complaints, encourage antitrust investigations, and analyze and publish reports on merger activity.” The [second bill](#), called the *Merger Enforcement Improvement Act*, is intended to “improv[e] the agencies’ ability to assess the impact of merger settlements, requiring studies of new issues, adjusting merger filing fees to reflect the 21<sup>st</sup> century economy, and providing adequate funding for antitrust agencies to meet their obligations to protect American consumers.” Read more [here](#).
- On Tuesday, September 19<sup>th</sup> at 10 a.m. the Senate Finance Committee will hold a hearing on “Business Tax Reform.” “There are a variety of changes the tax code that can be made to help shift the economic landscape and create fertile ground for businesses to invest and hire new workers here at home,” Senate Finance Chairman Orrin Hatch (R-UT) said in a press release announcing the hearing. “Next week, we will hear from experts

### Headlines and Highlights:

- FTC Acting Chair gives speech on “Antitrust in the Digital Age.”
- Senate Finance to hold hearing on “Business Tax Reform.”
- Pharmaceutical company Allergan transfers patents to Mohawk Tribe to avoid PTAB trials.
- France, Italy, Germany and Spain urge EU to tax internet companies’ revenue, not profits
- Sen. Klobuchar introduces two antitrust bills.
- Nonprofit groups from Canada, Mexico, U.S. urge NAFTA negotiators to strengthen IP protections in agreement.
- Sen. Portman, a former USTR, gives speech on NAFTA renegotiation.

about policy options that have the potential to boost economic growth and give American businesses the tools they need to create and retain higher-paying American jobs and stay competitive in today's global economy." Read more [here](#).

- On Tuesday at 10 a.m. the Senate Foreign Relations Committee will hold a nomination hearing for former Gov. Jon Huntsman (R-UT) to serve as U.S. Ambassador to Russia. Huntsman has served for a number of years as co-chair of the Commission on the Theft of American Intellectual Property, which released its 2017 [report](#) back in February.
- Last Friday, pharmaceutical company Allergan announced that it had transferred patents on its best-selling eye drug Restasis to the Saint Regis Mohawk Tribe in upstate New York. The terms of the deal would see Allergan pay the tribe \$13.75 million up front, and \$15 million annually, to hold the patents and lease them back to Allergan. In exchange, the tribe will claim sovereign immunity as grounds to avoid a patent claim through the USPTO's Patent Trial and Appeal Board. On Friday, September 15<sup>th</sup>, Senator Sherrod Brown (D-OH) criticized the deal, claiming it "rips off consumers" and cannot "be the new normal." Brown said his staff had requested a meeting with Allergan representatives regarding the deal. Read more [here](#) and [here](#).

## II. Administration Updates:

- Federal Trade Commission (FTC) Acting Chair Maureen Ohlhausen gave a speech on Tuesday titled 'Antitrust Enforcement in the Digital Age.' Ohlhausen said that although some people fear "we are spiraling towards a dystopian future where a few giant technology companies will ultimately gain sustained control over our economic lives," she is "concerned about the push to adopt an approach that will disregard consumer benefit in the pursuit of other perhaps even conflicting goals." Ohlhausen argued that regulators, who "possess no crystal ball," should avoid trying to steer the digital economy in any certain direction, and that many dominant firms are often more vulnerable to competition than they appear, given that "major shift[s] in technology could very well leave them behind." She also stressed that, for a number of reasons, "harm to some competitors does not equal harm to competition." However, Ohlhausen affirmed that if the predictive tools of antitrust policy "suggest that competition will be harmed and consumers made worse off from the behavior of any firm, even a [digital] platform, antitrust enforcers should act." Read more [here](#).
- Ohlhausen gave two other speeches this week, one on [Monday](#), in which she discussed the theme of regulatory humility in antitrust, and one on [Friday](#), about the link between competition and liberty.
- Food & Drug Administration (FDA) Commissioner Scott Gottlieb announced in a [blog post](#) this week that the FDA will work to ensure that "incentives offered by the ODA [Orphan Drug Act] are granted by FDA in a way that's consistent with the manner Congress intended." The FDA will "soon" hold a public meeting on "complex scientific and regulatory issues such as those raised by molecularly targeted drugs and biologics and the appropriate application of orphan incentives in that paradigm." The FDA will also issue guidance documents "and other policies" to address "criticism that [under the ODA] some sponsors are using designations as a way to sidestep other important public health goals set out by Congress." In particular, one of those guidance documents "will close a loophole that allows sponsors to avoid an obligation to study drugs in pediatric indications" in circumstances

where “sponsors received an orphan drug designation for a pediatric subtype of an otherwise common and non-orphaned adult disease.” Gottlieb also noted that the FDA has significantly reduced the backlog of orphan drug designation requests, and will implement process improvements to prevent new backlogs from forming. Read more [here](#).

### III. USPTO Updates:

- The USPTO has announced that on October 18 it will hold a public roundtable about intellectual property infringement at trade shows. The event will include discussion of “approaches, strategies, and effective practices for addressing the kinds of infringement that most often occur at trade fairs and shows, including the infringement of copyright, design, patent, and trademark.” Read the Federal Register notice [here](#).

### IV. Judicial Updates:

- On Wednesday in an opinion by Judge Newman, the Federal Circuit affirmed a district court’s dismissal of Uber’s motion to compel arbitration of Waymo’s trade secret misappropriation and patent infringement suit against Uber concerning self-driving car technology in *Waymo LLC v. Uber Techs, Inc.* Uber argued that equitable principles justified extending arbitration clauses contained in employment agreements between Waymo and then-employee Levandowski, who intervened in the suit, to the suit against Uber because Waymo’s claims were related to Levandowski’s employment at Waymo. The Federal Circuit said that under California law, the doctrine of equitable estoppel did not permit departure from the general contract principle that contracts do not bind non-parties. Waymo’s complaints against Levandowski and Uber did not rely on the employment agreements and Waymo alleged no “concerted misconduct...involving the employment agreements.” (Source: *IPO Daily News*)

### V. International Updates:

- France, Germany, Italy and Spain are urging the European Union to tax large internet companies like Amazon and Google based on their revenue rather than their profits. According to *Reuters*, the four countries’ main concern is that “such companies are often taxed on profits booked by subsidiaries in low-tax countries even though the revenue originated from other EU countries.” Read more [here](#).
- On Thursday, a group of non-profit organizations from the U.S., Canada, and Mexico sent a letter to the chief negotiators of the North American Free Trade Agreement (NAFTA) calling upon them to strengthen the intellectual property provisions of the agreement during the renegotiation process. “Between pharmaceuticals, transportation machinery, medical equipment, computers, chemicals, and creative works like music, movies and television shows, the majority of trade in the NAFTA bloc are IP-intensive products representing billions in value and missions of high paying jobs,” the letter reads. “IP sectors have been key to economic growth and they must continue to be protected in the 21<sup>st</sup> century.” Read the letter [here](#).

## VI. Industry Updates:

- *Wired* published an article this week about the role of the White House Office of Science & Technology Policy (OSTP) in federal hurricane response efforts. The article compares OSTP in the Obama Administration, which “played an outsized role” in such efforts, to OSTP in the Trump Administration, which has much fewer staff, whose work on disaster response likely “has little if any connection to the president’s inner circle.” Read more [here](#).
- *IP Watchdog* reports that a group of conservative organizations, including the American Conservative Union and the Eagle Forum Education & Legal Defense Fund, have written a letter to Senate Majority Leader Mitch McConnell warning against an amendment from Senator Angus King’s (I-ME) to the National Defense Authorization Act that has been [criticized](#) for its potential to undermine the Bayh-Dole Act. The amendment [directs](#) 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 conservative groups’ letter reportedly asserts that the amendment “would jeopardize the certainty of intellectual property rights and exclusive licensing by private-sector entities that take on the great costs and significant risk of commercializing the Defense Department-funded research when these private firms succeed at turning a pharmaceutical discovery into a viable medication.” Read more [here](#).
- Evan Engstrom, Executive Director of Engine Advocacy, has written an op-ed in *Tech Crunch* supporting the Federal Trade Commission’s (FTC) lawsuit accusing Qualcomm of anticompetitive patent licensing. Engstrom worries that Qualcomm’s licensing model could put the Internet of Things (IoT) sector at “serious risk,” criticizing the Avanci patent licensing platform that Qualcomm has formed with Ericsson, Sony, InterDigital, KPN, and ZTE. He states that “if history is any indicator,” Avanci will not offer FRAND terms “without a fight – if reasonable terms are available at all.” Read more [here](#).
- Conversant Intellectual Property Management’s wireless unit has joined Via Licensing Corp.’s LTE technology patent licensing pool. Other companies in the pool include ZTE, Google, AT&T, Verizon, and Lenovo. Read more [here](#) and [here](#).