

## PATENT & TRADEMARK POLICY REPORT JUNE 23, 2017



### I. Congressional Developments:

- Senate Finance Committee Chairman Orrin Hatch (R-UT) has issued a request for public comment on tax reform. The Chairman is asking for “tax stakeholders to provide ideas, proposals, and feedback on how to improve the American tax system.” In particular, Hatch is looking for recommendations on tax relief for the middle class through individual income tax reform; lower tax rates on businesses; removing impediments and disincentives for savings and investment; and “updating our international tax system in order to make our nation more competitive in the global economy and preserve our tax base.” Stakeholders may submit comments to the Senate Finance Committee by July 17, 2017. Read more [here](#).
- Michael Platt, Rep. Marsha Blackburn’s (R-TN) chief of staff, has been [nominated](#) to serve as Assistant Secretary of Commerce for Legislative and Intergovernmental Affairs. He previously served as Rep. Blackburn’s Legislative Director, handling intellectual property, trade, and telecommunications issues. He has also worked for the Recording Industry Association of America (RIAA) and for TechNet.
- On Wednesday, U.S. Trade Representative Robert Lighthizer testified at a Senate Finance Committee hearing on the President’s trade policy agenda and budget for the office of the U.S. Trade Representative (USTR). Lighthizer highlighted four of the Administration’s trade priorities. First, the President plans to renegotiate the North American Free Trade Agreement (NAFTA), with negotiating rounds beginning as soon as August 16, 2017. Lighthizer stated that the Administration “intend[s] to move very quickly” on NAFTA renegotiation. On July 17, USTR will publish a detailed summary of negotiating objectives. Second, the Administration seeks to advance a strong

### Headlines and Highlights:

- USTR Lighthizer testifies before Senate Finance on President’s Trade Agenda.
- STRONGER Patents Act introduced.
- Senate Finance Chairman Orrin Hatch requests public comment on tax reform.
- BBC, Apple, and Nokia agree on patent cooperation.
- American Technology Council holds summit on modernizing and improving federal government operations.
- CEO of Bayer says takeover of Monsanto is “close” to receiving EU approval.
- FDA announces July 18 public meeting on Drug Competition Action Plan.
- BIO and AUTM release study on academic patents.

enforcement agenda, including holding other countries accountable for trade violations. USTR has a number of potential WTO dispute resolution cases under review now. Third, the President seeks to open markets to U.S. exports. Towards this end, the Administration is currently engaged in conversations with all major trading partners about lowering trade barriers that harm U.S. companies, workers, farmers, and ranchers. Finally, the President aims to lower the nation's trade deficit. The first three objectives are intended to advance this final, fourth objective. Several senators addressed intellectual property and technology issues during the hearing. For example, Chairman Hatch (R-UT) said that a renegotiated NAFTA should "improve online IP-enforcement to combat digital piracy in Canada and in Mexico," and Senator Thune (R-SD) urged Lighthizer to appoint senior level officials focused on digital trade at USTR.

- Lighthizer made another appearance before Congress on Thursday, this time before the House Committee on Ways and Means. At that hearing, Reps. John Larson (D-CT), Susan DelBene (D-WA), Jackie Walorski (R-IN), and Pat Meehan (R-PA) all voiced concerns about a lack of protection for intellectual property in trade agreements. Ambassador Lighthizer noted that USTR has an ambassador position for intellectual property and innovation, and argued that protecting intellectual property can help lower the trade deficit. He also criticized Chinese laws that force US corporations to transfer proprietary information to a Chinese partner in order to conduct business in China. Rep. Meehan voiced concern over NAFTA's lack of patent protections, pointing out that "Canada does not recognize 12 years of [data] protections for biologics and Mexico is ambiguous [in that area]." In response, Lighthizer affirmed that he intends to work to maximize protections for biologics. Rep. Jackie Walorski noted that 28 pharmaceutical patents have been invalidated by Canada's Promise Utility doctrine, and Lighthizer stated that protecting patents will be a focus of upcoming negotiations. Digital trade was also discussed during the hearing, with Reps. Erik Paulsen (R-MN), Susan DelBene, and David Schweikert (R-AZ) raising concerns on issues such as the free flow of data and the need for trade agreements that can keep up with the rapid pace of technological change. Lighthizer assured the committee that he views digital trade as "very important" and that he will work with Congress on those issues.
- This week, Senators Coons (D-DE), Cotton (R-AR), Durbin (D-IL), and Hirono (D-HI) introduced the STRONGER Patents Act, which aims to improve on the STRONG Patents Act that Senator Coons introduced in the previous Congress. The bill aims to strengthen patent protections by making a number of changes to post-grant administrative review procedures at the USPTO; restoring the presumption of injunctive relief when a patent has been found to be infringed; and directing the Federal Trade Commission (FTC) to combat abusive patent demand letters. The bill also ensures that funds from patent application fees remain at the USPTO, among a number of other provisions. A section-by-section of the bill is available [here](#). In connection with the bill's introduction, Senator Coons wrote an [op-ed](#) in support of the legislation in *Law 360*, and also joined Senator Cotton in writing a [separate op-ed](#) about the bill on *CNBC.com*.

## II. Administration Updates:

- The White House held multiple events with technology industry stakeholders this week as part of its themed 'Tech Week.' On Monday, the American Technology Council (ATC) held a summit on modernizing and improving the operations of the federal government, mainly through the use of technology and best practices from the private sector. Attendees included

representatives from Microsoft, Amazon, Oracle, Adobe, Qualcomm, SAP, Apple, and Google. Topics of discussion included cloud computing, improving citizen services, data analytics, and immigration. On Tuesday, tech industry stakeholders, such as the Information Technology Industry Council and the Internet & Television Association, discussed tax reform with Gary Cohn and Treasury Secretary Steve Mnuchin. Read more from *Recode* [here](#). On Thursday, the White House held an event focused on emerging technologies, inviting executives from venture capital firms and wireless and drone companies. Companies attending the event included AT&T, T-Mobile, Verizon, General Electric, PrecisionHawk, AirMap, 500 Startups, Revolution, and Lightspeed Venture Partners. Read more [here](#) and [here](#).

- The Food and Drug Administration (FDA) has [announced](#) a July 18 public meeting as part of the agency’s development of a ‘Drug Competition Action Plan.’ In a [blog post](#) this week, FDA Commissioner Scott Gottlieb said that the purpose of the meeting is to “solicit input on places where FDA’s rules – including the standards and procedures related to generic drug approvals – are being used in ways that may create obstacles to generic access.” Additionally, while testifying before a Senate Appropriations subcommittee this week, Gottlieb said that he is working to eliminate the agency’s backlog of orphan drug classification applications within 90 days. Read more [here](#).

### **III. USPTO Updates:**

- The USPTO will hold a public meeting on “measuring the impact of voluntary initiatives undertaken to reduce intellectual property infringement, such as copyright piracy and trademark counterfeiting, that occurs online.” In particular, topics covered will include “methods and metrics for conducting empirical research on the digital economy; evaluating the effectiveness of self-regulatory regimes; case studies of certain private sector initiatives; the role of voluntary undertakings in raising consumer awareness; stemming revenue flows to bad actors; and lessons learned and next steps.” The meeting will be held on July 17 at the USPTO headquarters in Alexandria, Virginia. Read the Federal Register notice [here](#).
- The USPTO has extended the Cancer Immunotherapy Pilot Program until December 31, 2018 due to “continued interest in the pilot program,” and to “allow the USPTO to continue its evaluation of the pilot program.” The program, which permits early review for patent applications pertaining to cancer immunotherapy, was originally scheduled to end on June 28, 2017. Read the Federal Register notice [here](#).

### **IV. Judicial Updates:**

- The *Las Vegas Sun* published an article this week detailing the many troubles the Las Vegas Golden Knights of the National Hockey League (NHL) have had to own its trademark rights. The USPTO denied the team’s trademark application back in December, citing potential confusions with Saint Rose College (NY) and Central Florida University, both of which are named the Golden Knights. On June 6<sup>th</sup>, the NHL, on behalf of Las Vegas, responded with a filing disputing the USPTO’s claim, writing “the marks differ materially in appearance, sound and commercial impression.” Read more [here](#).

### **V. International Updates:**

- Werner Baumann, CEO of Bayer, told reporters this week that talks with the EU antitrust authorities regarding the takeover of U.S. company Monsanto “were very good and constructive,” leading many to believe the deal will be finalized by the end of 2017. Baumann also indicated EU regulators would likely launch an in-depth analysis of the transaction, which would create the largest seeds and crop chemicals provider. Read more [here](#).
- On May 16, 2017, the Court of Justice of the European Union handed down a ruling regarding the EU’s free trade agreement with Singapore. According to the [press release](#), the court held that “the free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone, because some of the provisions envisaged fall within competencies shared between the European Union and the Member States.” Accordingly, “the free trade agreement with Singapore can, as it stands, be concluded only by the EU and the Member States acting together.” The press release also states that the court declared that the “EU has exclusive competence so far as concerns [many] parts of the agreement,” including “the provisions concerning intellectual property rights.” Only two aspects of the agreement fell into areas in which “the EU is not endowed with exclusive competence,” including “the field of non-direct foreign investment . . . and the regime governing dispute settlement between investors and States.” Read more [here](#).

## VI. Industry Updates:

- The *New York Times* reports that the White House’s draft executive order on drug pricing aims to lower drug prices largely by means of easing regulatory hurdles for the drug industry. The draft order allegedly “targets” the 340B program; reduces regulatory and administrative actions “that cause Medicare beneficiaries to pay the list price for drugs” when pharmacy benefit managers get lower prices from drug makers; and targets regulations that “inappropriately or unfairly contribute to higher prices or cost-sharing for medical products for American patients.” The draft order also reportedly directs the U.S. Trade Representative to conduct a study of drug price differences between the United States and other countries, and review whether trade agreements should be modified “to promote greater intellectual property protection and competition in the global market.” Read more [here](#).
- According to a May 23, 2017 [report](#) by the BBC, Apple and Nokia have agreed to “cooperate” following the settlement of a dispute over the use of patented technology in smartphones. Nokia had previously [sued](#) Apple in the Eastern District of Texas in December 2016 for the alleged infringement of patents a number of patents through the manufacture of its iPhone and iPad products. It also filed suits before the International Trade Commission and in 10 countries in Europe and Asia. Read more [here](#). According to the BBC, the two companies have settled the dispute, and signed a deal allowing Apple to use the technologies in return for an up-front cash payment to Nokia. The report also states that Apple will stock Nokia health products in its retail stores.
- The Biotechnology Innovation Organization (BIO) and the Association of University Technology Managers (AUTM) have released a study finding that the licensing of academic patents has contributed as much as \$1.33 trillion to the U.S. economy over a 20-year period. The study also found that over that time period academic patent licensing supported up to 4,272,000 person years of employment. In a statement, BIO President & CEO Jim Greenwood largely attributed those figures to “the enduring effectiveness of the Bayh-Dole

Act,” and warned that “we cannot take tech transfer, or the US patent system upon which it is based, for granted.” Read more [here](#).