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## PATENT & TRADEMARK POLICY REPORT MAY 12, 2017



### I. Congressional Developments:

- On Thursday, Robert Lighthizer, the nominee for United States Trade Representative (USTR), was confirmed 82-14 by the Senate. In related news, on Wednesday, Senator John McCain (R-AZ), Chairman of the Senate Armed Services Committee, and Senator Ben Sasse (R-NE), released a [joint statement](#) announcing they would vote against Robert Lighthizer's nomination to be United States Trade Representative (USTR). The two lawmakers said Lighthizer's "confirmation process has failed to reassure us that you understand the North American Free Trade Agreement's positive economic benefits to our respective States and the nation as a whole."
- At a markup on Thursday, the Senate Health, Education, Labor and Pensions (HELP) Committee voted to table an amendment offered by Senator Bernie Sanders (I-VT) which aimed to allow Americans to import prescription drugs from Canada. The amendment was offered to a bill reauthorizing certain Food and Drug Administration (FDA) user fee programs. Read more [here](#) and [here](#).

### II. Administration Updates:

- On Thursday, President Trump signed an Executive Order titled "Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure." The order states that "Agency heads shall show preference in their procurement for shared IT services" and orders the Director of the American Technology Council to coordinate a report within 90 days of the feasibility of transitioning all agencies to "shared IT services." Read the order [here](#).

### Headlines and Highlights:

- Robert Lighthizer confirmed as USTR by 82-14 vote.
- USPTO Director Lee to deliver keynote remarks at GW IP Law Symposium.
- *Bloomberg* profiles EU Competition Commissioner Margrethe Vestager.
- Trump signs executive order to "strengthen the Cybersecurity of Federal Networks and Critical Infrastructure."
- OMB Director says Trump is looking to take action on drug pricing.
- Treasury Dept. launches website that tracks federal agency spending.
- Future Today Institute Chief calls for government to create sophisticated tools for addressing developments in biological technologies.

- The Treasury Department has [launched](#) a new website that tracks federal agency spending data. The website, called [USAspending.gov](#), is the product of the Data Accountability and Transparency Act (DATA) of 2014. It provides spending data on nearly \$4 trillion in government spending, and covers a wide range of federal government entities, including the USPTO. Read more [here](#). Also this week, members of the House Oversight & Government Reform Committee sent a [letter](#) to the Treasury Department warning of “ongoing implementation challenges” to the success of the DATA Act, such as “longstanding financial management issues.” The letter makes a number of recommendations for the act’s further implementation, such as establishing “clear policies and processes for developing and maintaining data standards that are consistent with leading practices for data governance,” and establishing “mechanisms to assess the results of independent audits and reviews of agencies’ compliance with DATA Act requirements.”
- During a panel discussion on Thursday, Office of Management and Budget (OMB) Director Mick Mulvaney said that President Trump is looking to take action on the issue of drug pricing – potentially by executive order. He said, “the President keeps asking me again and again and again, ‘What are we doing to fix this?’” Mulvaney suggested in particular that the Administration may pursue requiring drug companies to give rebates to the government in Medicare Part D. Read more [here](#) and [here](#).

### III. USPTO Updates:

- On Tuesday, May 16<sup>th</sup> at 9:15 a.m. USPTO Director Michelle K. Lee will be delivering the keynote address at the George Washington University’s IP Law Symposium. David Ruschke, Chief Judge for the Patent Trial and Appeal Board, will also be at the event participating in a panel on “Hot Topics at the PTAB”. Learn more about the event [here](#).
- There were two blog posts on the USPTO Director’s Forum this week: 2017 Inventors Hall of Fame Inductees Honored at the National Building Museum; and Intellectual Property Resources for Small Businesses. Read more [here](#).

### IV. Judicial Updates:

- In a May 11, 2017 development in the [Waymo LLC v. Uber Technologies, Inc.](#) trade secret misappropriation, patent infringement, and unfair competition case, Judge William Alsup has [ruled](#) against Uber on its motion to compel arbitration in its dispute with Waymo LLC, meaning that the case will go to trial. In 2009 and 2012, then-Waymo employee Anthony Levandowski signed two “At-Will Employment, Confidential Information, Invention Assignment and Arbitration Agreement[s].” Although they were not signatories to the agreements, Uber Technologies, Ottomotto LLC, and Otto Trucking LLC moved to compel arbitration of Waymo’s trade secret misappropriation and unfair competition claims based on those agreements. As non-signatories, they could only enforce the arbitration clauses based on certain enumerated principles, none of which applied in dispute between Uber and Waymo. Judge Alsup also noted that “Waymo contends its misappropriation claims here are based, not on any contractual obligation, but on Levandowski’s duty of loyalty under California law.” On the same day, Judge Alsup [referred](#) the case to the U.S. Attorney “for investigation of possible theft of trade secrets.” Read more [here](#).
- On May 11, 2017, the U.S. Court of Appeals for the Federal Circuit denied Cascades

Projection LLC's petition for initial hearing *en banc* in *Cascades Projection LLC v. Epson America*. Cascades Projection filed its [petition](#) on February 15, 2017, asking the court to “initially hear part of its appeal *en banc* in order to resolve whether a patent right is a public right,” and to revisit its 2015 decision in [MCM Portfolio v. Hewlett Packard Co.](#) Signaling the importance of this question to the PTAB AIA trial process, Cascades Projection wrote, “The constitutional question of whether the executive may continue to cancel private property rights without plenary trial court review is too important for the full Court not to consider.” In a per curiam [order](#), the court denied Cascades Projection's petition. Chief Judge Newman and Judges Dyk, Prost, and Hughes concurred in the denial of the petition. Judges O'Malley and Reyna dissenting from the denial. Judge Reyna wrote, among other things, that “the separation of powers weighs in the balance. The core of this dispute involves substantial questions of property rights, Article III, and the Seventh Amendment.” Professor Dennis Crouch's commentary of the case appears [here](#).

## V. International Updates:

- The European Commission [announced](#) on Wednesday that by the end of 2017 it “will prepare legislative instruments to address the issues of possible unfair contractual clauses and trading practices” employed by online platforms such as search engines and app stores. The announcement came as part of the Commission's [mid-term review](#) of its Digital Single Market Strategy. The Commission launched an investigation last year which found that some platforms have engaged in unfair trading practices such as restricting access to data or improperly delisting certain products. Last week, Spotify led a group of companies in a [letter](#) to the Commission arguing that online platforms “have a strong incentive to turn into gatekeepers” and “*can* and *do* abuse their privileged position and adopt B2B practices with adverse consequences for innovation and competition.” The letter specifically mentions the practices of “restricting access to data or interaction with consumers, biased ranking and search results[...], imbalanced terms and conditions and preference of their own vertically integrated services.” The Commission also plans to “move forward with the procedural aspects and principals on removal of illegal content – notice and action – based on transparency and protecting the fundamental rights.” Specifically, this “would concern issues such as minimum procedural requirements for the ‘notice and action’ procedures of online intermediaries related for example to quality criteria for notices, counter-notice procedures, reporting obligations, third-party consultation mechanisms, dispute resolution systems and coordination with public authorities as well as measures against repeat infringers and abusive, bad-faith notices.” Read more [here](#).
- On Wednesday, Samantha Subramanian of *Bloomberg* published a profile on European Union (EU) Competition Commissioner Margrethe Vestager and her attempts to regulate numerous corporations, including Amazon, Apple, and Google. “Vestager's entire tenure has been laced with an instinctive mistrust of big corporations,” Subramanian writes. In the profile Vestager defends her work and rejects the idea that she is specifically targeting U.S. companies. “We're not going hard at U.S. companies specifically. It's not your flag that matters to us. What really matters is: If you want to do business in Europe, you play by the European rule book.” Read more [here](#).

## VI. Industry Updates:

- Cloudflare has [announced](#) a new initiative called ‘Project Jengo,’ which is aimed at invalidating patents owned by the company Blackbird Technologies, which Cloudflare alleges is “a dangerous new breed of patent troll.” Cloudflare is offering to fund two separate awards for research to invalidate Blackbird’s patents. A \$20,000 “bounty” will be divided among submissions finding “prior art which reads on” one particular patent Blackbird has claimed Cloudflare is infringing, and a \$30,000 bounty will be distributed to submissions finding “substantial prior art which reads on any of the 34 other outstanding Blackbird patents or their 3 in-flight patent applications and could lead to” their invalidation. Cloudflare is also [filing ethics complaints](#) with two state bar associations against Blackbird’s attorneys. Read more [here](#).
- In an op-ed in *Wired*, Future Today Institute Chief Executive Amy Webb calls for the government to create a “new, sophisticated toolset” for addressing future developments in biological technologies. First, she suggests that government officials “recognize biology as a technology platform” in order to move conversations about biology toward practical applications. Second, she proposes the establishment of a “dedicated group of nonpartisan scientists, technologists, ethicists, policy experts, and futurists to develop strategic plans on biology, artificial intelligence and robotics.” The group would serve as “connective tissue between legislators and the scientific community.” Webb worries that the U.S. “currently has no coordinated biology strategy” to address emerging technologies such as the Crispr gene-editing tool. She stresses that the Patent Trial and Appeal Board (PTAB), which recently ruled on Crispr patents, evaluates “new research within the context of past inventions” rather than “map[ping] out scenarios for how a patent decision might affect American business and society.” Webb worries that, as a result of the PTAB Crispr decision, “a single for-profit company holds a critical mass of intellectual property rights to the future of genomic editing.” Read more [here](#).