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PATENT & TRADEMARK POLICY REPORT NOVEMBER 3, 2017



I. Congressional Developments:

- On Tuesday, November 7, the House Judiciary Committee’s Intellectual Property Subcommittee will hold a [hearing](#) on the topic of sovereign immunity in the intellectual property system. The hearing will [focus](#) on the use of sovereign immunity to avoid challenges to patents at the Patent Trial and Appeal Board (PTAB), in light of recent controversy over pharmaceutical company Allergan’s use of that tactic in concert with the Saint Regis Mohawk Tribe. The hearing will feature four witnesses: Karl Manheim (Loyola Law School); William Jay (Goodwin Procter); Philip Johnson (Johnson-IP); and Christopher Mohr (Software and Information Industry Association). Allergan earlier [declined to comment](#) to *Reuters* on whether one of its executives would testify at the hearing.
- In a CNBC interview on Wednesday, Allergan CEO Brent Saunders said his company’s arrangement with the Saint Regis Mohawk Tribe “wasn’t desperation, it was tenacity.” He said, “I think people got confused [and] said [that] because I believe in strong intellectual property, I don’t believe in making medicines affordable and accessible, and one has nothing to do with the other.” He emphasized that “the biopharmaceutical industry is grounded in one thing, and that’s intellectual property protection.” Read more [here](#).
- The *Financial Times* has profiled pharmaceutical companies’ attitudes toward and interactions with the inter partes review system, suggesting that they may be open to a “hypocrisy charge” given that they bring inter partes review challenges themselves, despite their criticism of the system. In response, some companies told the *Times* that “while they supported industry-level efforts to reform the IPR system, they would continue to use the process to settle disputes in the meantime.”

Headlines and Highlights:

- House Judiciary Committee to hold hearing on sovereign immunity and the IP system next week.
- Allergan CEO defends Mohawk Tribe maneuver.
- Rep. Lamar Smith to retire from Congress.
- House Republican tax legislation includes a number of provisions affecting intellectual property.
- Amicus briefs in support of IPR process filed in *Oil States* Supreme Court case.
- State attorneys general allege widespread drug price collusion in expanded lawsuit.
- Delrahim delivers speech on international antitrust policy.

Read more [here](#).

- Representative Lamar Smith (R-TX) has announced that he will retire from Congress at the end of his current term. Smith's career is notable for his sponsorship of intellectual property legislation such as the *Stop Online Piracy Act (SOPA)* and the *America Invents Act (AIA)*. Smith is currently the chairman of the House Science Committee, and a member of the House Judiciary Committee, which he formerly chaired. Read more [here](#).
- The *Financial Times* [reports](#) that the new House Republican tax bill, released on Thursday, levies a 20 percent excise tax on “payments between affiliates of the same company, [which] are commonly made as international divisions trade materials, services and royalties for intellectual property.” The *Times* notes that this excise tax “would have a limited effect on US tech companies [...] Although they use IP royalties to shift profits out of the US, their ability to do so is constrained by a provision of existing law that does not apply to foreign-owned companies.” The bill also includes a global minimum tax on overseas earnings, which *The Washington Post* [notes](#) will affect “technology and pharmaceutical companies...[that currently] transfer their intellectual property to a low-tax place...and then the U.S. unit pays royalties on the sales to customers in the United States.” The concept of a global minimum tax, and its implications for intellectual property, was discussed at a Senate Finance Committee [hearing](#) in early October (read more [here](#), [here](#), and [here](#)). Additionally, *IP Watchdog* [reports](#) that the new tax bill repeals “the rule treating the transfer of a patent prior to its commercial exploitation as being available for long-term capital gains treatment.” Furthermore, the bill [includes provisions](#) that would repeal tax credits for orphan drug research and development.
- Senator Amy Klobuchar (D-MN) and Judiciary Committee Chairman Chuck Grassley (R-IA) have [introduced](#) a bill that would require the Food & Drug Administration (FDA) and the Centers for Medicare and Medicaid Services (CMS) to develop a plan to reduce waste caused by small drug vial sizes and over-sized doses. Read more [here](#).
- Last Friday, House Energy & Commerce Committee Chairman Greg Walden (R-OR) announced in a [Medium op-ed](#) that his committee will examine implications for “consumer choice and safety” arising from the practices of technology companies like Facebook, Google, and Amazon. The committee will hold a hearing to consider issues such as the handling and use of consumer data, and tech firms' abilities, for example when displaying search results, to alter “content choices unbeknownst to the consumer.” Recode [reports](#) that the hearing will include discussion of tech companies' algorithms for news feeds and search results. The committee will convene a separate hearing to assess identity verification practices and “whether they can be improved to protect personal data on the web even after a consumer's information has been breached.”
- Facebook, Twitter, and Google testified about Russian election interference at three separate congressional hearings in the Senate Judiciary and House and Senate Intelligence committees this week. Lawmakers criticized the companies for their slow response to investigators, and expressed concern that the companies wield too much power. Additionally, members explored potential regulatory fixes, including changes to election advertising law such as those proposed in the recently-introduced *Honest Ads Act*. Speaking about extremist content on platforms like Facebook, Twitter, and Google, Senator Dianne Feinstein (D-CA) said she is “working on legislation to require tech companies to report known terrorist activity on

their platforms to law enforcement, and to provide law enforcement with civil injunction authority.” Read more [here](#) and [here](#).

- The *Wall Street Journal's* John D. McKinnon and Brody Mullins report that Google, facing a “reckoning” in Washington, is “moving mountains to regain” its “lost political clout.” The article details how Google has become embattled in the nation’s capital on issues such as antitrust, net neutrality, consumer privacy, election interference, liability for illegal content on its platform, and its control over consumers’ access to news stories. The article also chronicles Google’s efforts to win back favor in Washington by means such as campaign contributions to Republicans, increased lobbying expenditures, and “public-service events with members of Congress back home in their districts.” Read more [here](#).
- On Wednesday, the House Judiciary Committee held a hearing on net neutrality and antitrust. At the hearing, Chairman Bob Goodlatte (R-VA) said he is “open to the idea of amending the antitrust laws, if necessary, to account for the characteristics of the internet.” He further stated that vertical agreements “between internet service providers and related businesses” could lead to anti-competitive practices, which “should be aggressively deterred and punished.” Read more [here](#). Separately, Rep. Marsha Blackburn (R-TN), the chairman of the House Energy & Commerce Subcommittee on Communications and Technology [made similar comments](#) on Thursday.
- On Wednesday, November 8, the Senate Judiciary Committee will hold a [hearing](#) titled ‘The Impact of Lawsuit Abuse on American Small Businesses and Job Creators.’

II. Administration Updates:

- Last Friday, Assistant Attorney General for the Antitrust Division Makan Delrahim delivered a [speech](#) at the New York University School of Law. Focusing on antitrust policy abroad, Delrahim bemoaned that some countries are using antitrust “to favor domestic companies or discriminate against foreign firms,” and called for countries to “work together on a mutual consensus toward non-discriminatory enforcement of antitrust laws worldwide.” With respect to the NAFTA and KORUS renegotiations, Delrahim said he intends to work with “USTR and our trade partners to craft competition chapters that fulfill objectives of affirming basic rules of procedural fairness in competition law enforcement.” He also pledged to bolster the staff and resources of the International Section of the Antitrust Division; engage and support new competition agencies abroad; and pursue “new types of agreements” with foreign partners that would focus on non-discrimination, procedural fairness, and transparency.
- President Trump has [nominated](#) Jeffrey Kessler to be Assistant Secretary of Commerce for Enforcement and Compliance. Kessler is currently an attorney at Wilmer Hale, where he has represented United States manufacturers at the World Trade Organization and in domestic trade remedy proceedings.
- The President has declared November 2017 ‘National Entrepreneurship Month,’ and November 21, 2017 ‘National Entrepreneurs’ Day.’ The President’s [declaration](#) emphasizes the importance of protecting intellectual property, and states that the administration “is committed to ensuring that American and global intellectual property regimes firmly protect

American innovations at home and abroad.”

- The Federal Trade Commission (FTC) and Food & Drug Administration will hold a workshop on Wednesday, November 8 about competition in the prescription drug markets. Read more [here](#).
- The FTC has released a staff report on branded drug companies’ patent settlements with generic competitors in fiscal year 2015. The report finds that “the number of reverse-payment patent settlements entered into by pharmaceutical companies in fiscal year 2015 declined from fiscal year 2014.” The report also finds that in fiscal year 2015 “there were 14 potentially anticompetitive patent settlement deals...down from 21” in fiscal year 2014. Read more [here](#).
- The FTC has [released](#) its draft Strategic Plan for Fiscal Years 2018 to 2022. Public comments on the draft are due December 3, 2017.
- Acting Federal Trade Commission (FTC) Chair Maureen Ohlhausen delivered a speech in Silicon Valley last week in which she said that the FTC is focused on “actual harm” in areas such as privacy and patent policy, according to *Bloomberg*. During a question and answer session, Ohlhausen reportedly said that in the area of patent litigation, “what we’re trying to get at is there a litigation problem? Is there an IP problem?” Ohlhausen also said that the *TC Heartland* decision will have a large impact with respect to reducing the incidence of abusive patent litigation. Read more [here](#).

III. USPTO Updates:

- The Trademark Public Advisory Committee (TPAC) held its quarterly meeting on Tuesday. Acting USPTO Director Joe Matal delivered remarks at the beginning of the meeting, saying that the potential confirmation of a new USPTO Director and the departure of John Owens as Chief Information Officer presented an opportunity to review the office’s IT modernization efforts, which have been costly and subject to delays. Matal also said that the USPTO has “presented its case” to the Commerce Department on the issue of shared services, which is still “up in the air.” Matal said that he has heard “negative reports” about shared services from his counterparts at the Canadian, Australian, and European Union patent offices, and said the concept of shared services seems like a “management consulting fad.”
- The USPTO is seeking comments and suggestions regarding the “overall sufficiency” of the Trademark Trial and Appeal Board (TTAB) Standard Protective Order. Read more [here](#).
- The USPTO has launched a two-year ‘Diversion Pilot Program’ that will “offer practitioners who engaged in minor misconduct the opportunity to avoid formal discipline by implementing specific remedial measures.” Read more [here](#).
- The USPTO had updated its Fee Schedule with respect to PCT Fees to Foreign Offices. Read more [here](#).

- The USPTO will hold a Patent Quality Chat webinar on November 14 titled ‘How Is An Examiner’s Work Product Reviewed?’ Read more [here](#).

IV. Judicial Updates:

- Over the past two weeks a number of amicus [briefs](#) were filed in support of Greene’s Energy in the *Oil States v. Greene’s Energy* Supreme Court case. Those briefs were filed by organizations such as Apple, Intel, General Electric, SAP, Public Knowledge, the Alliance of Automobile Manufacturers, and the Association for Accessible Medicines. One brief, filed by Dell, Facebook, Arista, Hewlett Packard Enterprise, Twitter, and a number of other entities, argues that “multiple features of the historical record...make clear that neither Article III nor the Seventh Amendment limits claim cancellation to judicial proceedings.” The Court will hear oral arguments in the case on November 27. Read more [here](#) and [here](#).
- The attorneys general for 45 states and the District of Columbia, expanding an earlier lawsuit, allege that 18 pharmaceutical companies and subsidiaries have engaged in a price-fixing conspiracy. *Reuters* reports that the lawsuit accuses the companies of “divid[ing] customers for their drugs among themselves, agreeing that each company would have a certain percentage of the market.” The companies also allegedly “sometimes agreed on price increases in advance.” The suit also targets Mylan president and executive director Rajiv Malik, and Emcure Pharmaceuticals CEO and managing director Satish Mehta, who are accused of having “spoke[n] directly to one another to agree on their companies’ shares of the market for” a certain drug. Read more [here](#).

V. International Updates:

- President Trump embarked Friday on a 12-day trip to Japan, South Korea, China, Vietnam, and the Philippines. Commerce Secretary Wilbur Ross will also lead a business delegation to China during the president’s visit. Read more [here](#) and [here](#).
- In an *IP Watchdog* piece, Thomas Cueni, the head of the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA), profiles the new Pat-INFORMED initiative being developed between IFPMA and the World Intellectual Property Organization (WIPO). Pat-INFORMED is a database intended to help procurement professionals determine the patent status of medicines. Cueni argues that although the database does not include information about patents that have been rejected or withdrawn, the initiative is only in “its first phase and has been designed as a global version of the tried and tested US Orange Book.” Read more [here](#).

VI. Industry Updates:

- Apple is reportedly planning to manufacture iPhones and iPads without Qualcomm modem chips, according to the *Wall Street Journal*. In January, Apple filed a lawsuit accusing Qualcomm of using anticompetitive tactics to impose unfair patent licensing terms. Read more [here](#) and [here](#). Separately, Qualcomm sued Apple this week, alleging that Apple violated a software license contract. *Reuters* reports that Qualcomm is accusing Apple of

using “its commercial leverage to demand unprecedented access to the chipmaker’s highly confidential software, including source code.” Read more [here](#).

- On Thursday, November 9 the Center for the Protection of Intellectual Property (CPIP) will hold a conference titled ‘Perspectives on the PTAB: The New Role of the Administrative State in the Innovation Economy.’ The conference overview notes, “the PTAB...has raised a host of administrative and constitutional issues. These issues are relatively new for lawyers and scholars working in patent law. They are not, however, new for specialists in administrative law who have long examined them in the context of other federal agencies.” The conference will “bring these two groups together.” Read more [here](#).
- On Tuesday, November 7, the Technology Policy Institute will hold a conference titled ‘Competition and Intellectual Property: Teeing Up the Issues Facing Congress and the Administration.’ The event will feature panel discussions with speakers such as Tyler Grimm, Rep. Darrell Issa’s (R-CA) legislative director, and Jamie Simpson, counsel to the Senate Judiciary Committee. Read more [here](#).