

## PATENT & TRADEMARK POLICY REPORT DECEMBER 15, 2017



### I. Congressional Developments:

- On Wednesday the Senate Judiciary Subcommittee on Antitrust, Competition, and Consumer Rights held a hearing titled ‘The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?’ The hearing featured testimony from Barry Lynn of Open Markets, who argued in favor of broadening the antitrust framework from the consumer welfare standard to include other public interest factors. The other witnesses, and many Senators, espoused the opposing view that moving beyond the consumer welfare standard is too radical of a proposal, and that antitrust law should not be used to pursue public policy goals beyond those concerning the preservation of the “competitive process.” At the hearing, Senator Richard Blumenthal (D-CT) said he has sent a letter urging the Department of Justice to investigate potential anticompetitive threats that might result if the Comcast-NBCUniversal merger is allowed to continue after the conditions of the merger’s consent decree expire in September 2018, and to extend those conditions in the meantime.
- On Thursday morning, Andrei Iancu, the nominee to be the next Director of the U.S. Patent and Trademark Office, was reported favorably by the Senate Judiciary Committee to the full Senate.
- *POLITICO* [reported](#) on Thursday that House Speaker Paul Ryan (R-WI) has told close confidants that he will leave Congress at the end of 2018. Ryan, however, told reporters later that day that the rumor is untrue.
- Minnesota Governor Mark Dayton has appointed current Minnesota Lieutenant Governor Tina Smith to replace Senator Al Franken, who is resigning following allegations of sexual misconduct. Smith, who is expected to be sworn in to the Senate

### Headlines and Highlights:

- High Tech Inventors Alliance publish open letter disputing claims that patent reforms have weakened innovation.
- Iancu, nominee to lead USPTO, is reported favorably out of Senate Judiciary Committee.
- White House releases final IT Modernization Report.
- U.S. Supreme Court declines to hear GoDaddy v. RPost case.
- Minnesota Governor appoints Lieutenant Governor Tina Smith to fill Al Franken’s seat.
- White House Deputy CTO discusses Administration’s science and tech priorities at HHS “Innovation Day.”
- Former USPTO Director says Trump Administration’s Dept. of Justice will favor IP owners over users.

in January, also plans to run in the 2018 special election to complete Senator Franken's term, which ends in 2020. Read more [here](#).

- *Bloomberg* reports that “lawmakers from both parties appear to be warming up to ideas for reining in drug prices.” In particular, members of Congress are eyeing industry practices such as paying generic makers to keep drugs off the market; making minor modifications to drugs in order to extend their patent protection; and using safety programs to prevent generic makers from accessing medicines. *Bloomberg* also reports that “legislators on both sides of the aisle have said in recent weeks that government could use its power as a major buyer of drugs through Medicare, Medicaid, and other programs to thwart such behavior,” with Senators Susan Collins (R-ME) and Rand Paul (R-KY) indicating support for such an approach at a Senate Health, Education, Labor, and Pensions (HELP) Committee hearing on Tuesday. Read more [here](#).

## **II. Administration Updates:**

- On Wednesday, the White House released its final IT Modernization Report. The goal of the report, according to a White House [blog](#), is to articulate actions that will “compliment Agency efforts to modernize citizen facing services—by moving to a more secure, agile, and cost effective infrastructure, much of which will be provided by shared services.” Read the entire report [here](#).
- On Wednesday, Michael Kratsios, the Deputy Chief Technology Officer at the White House, spoke at the Department of Health and Human Services’ “Innovation Day” about the Administration’s tech and science priorities. Kratsios said that the Administration’s priorities include expanding rural broadband, investing in nuclear energy and promoting STEM education. Additionally, Kratsios said the White House is devoted to eliminating regulations it believes act as a barrier to innovation. Read more [here](#).

## **III. USPTO Updates:**

- On Wednesday, Commissioner for Patents Drew Hirshfeld posted a guest blog on the Director’s Forum Blog titled “Updates on Modernizing the Electronic Patent Application Process.” Read the blog [here](#).
- Also on Wednesday, the Department of Commerce posted a blog titled “Leveraging Open Data to Fuel American Innovation.” Read the blog [here](#).

## **IV. Judicial Updates:**

- On Monday, the U.S. Supreme Court declined to hear a patent case between GoDaddy Inc. and RPost Communications Ltd. RPost alleged that GoDaddy’s email marketing product infringed on a broad patent regarding how email works, including email bounce backs. Brian LaCorte, an IP attorney at Ballard Spahr, said that the result will “clear the deck” on other similar general patent cases RPost is pursuing, and that the ruling is “an important benchmark for other patent cases, particularly involving email, as an example of patent ineligibility.” Read more [here](#).
- On 14 December in an opinion by Judge Lourie, the Federal Circuit, on remand from the

U.S. Supreme Court, determined that Amgen’s state law claims of unfair competition and conversion were preempted by the Biologics Price Competition and Innovation Act of 2009 (BPCIA). The patent claims involved were for methods for using filgrastim for stimulating bone marrow to increase production of neutrophils, which were sold under the brand “Neupogen.” Sandoz had sought FDA approval to manufacture a “biosimilar” product. Amgen alleged that Sandoz violated the BPCIA by providing ineffective notice of commercial marketing before the product was licensed by the FDA. Amgen also made claims of unfair competition and conversion under state law. The U.S. Supreme Court held that an injunction under federal law was not available to enforce the BPCIA provision and that a biosimilar applicant may provide the notice either before or after receiving FDA approval. It also directed the Federal Circuit to consider whether the state law claims were preempted. The Federal Circuit found that Sandoz had not forfeited its preemption defense, held that both field preemption and conflict preemption existed, and affirmed the District Court’s dismissal of Amgen’s state law claims. (Source: *IPO Daily News*)

## V. International Updates:

- This week the U.S. International Trade Commission announced that [it will review an administrative law judge’s initial determination that Sony Corp. infringed two Fujifilm Corp. patents](#) for magnetic tape storage and did not infringe three others. Sony argued that the patents are essential to the seventh-generation Linear Tape-Open technology standard. (*IPO Daily News*)
- On Monday, the *Financial Times* posted an article titled “Preparing for Brexit: a to-do list for UK companies” that lists ensuring your intellectual property remains protected as a task. “Intellectual property protection, including patents, trademarks, registered designs and copyright could all change after Brexit,” the story reads. “The British government says European patents will still apply in the UK but, according to the website, the UK is ‘exploring options’ in other IP areas, such as trademarks and designs, because in many cases these will lapse after Brexit.” Read more [here](#).

## VI. Industry Updates:

- On Monday, Dave Kappos, former Director of the USPTO in President Obama’s first term and current partner at Cravath Swaine & Moore in New York, penned an op-ed in *IAM Media* arguing that Antitrust Chief Makan Delrahim’s November [speech](#) at the University of Southern California is a signal that the Dept. of Justice will “no longer favour IP users over owners.” In his op-ed, Kappos criticizes the second Obama Administration for cutting “away at the value of IP rights, favouring users of IP at the expense of rights holders.” Kappos makes specific reference to the Dept. of Justice finding that the consent decrees under which ASCAP and BMI had long operated do not allow for fractional licensing as harmful to copyright owners. “Mr Delrahim’s speech at USC’s Gould School of Law on 10th November marks the start of a new era of DOJ policy,” Kappos writes, “one that stands in welcomed contrast to the actions of the antitrust division during the previous Administration. Read more [here](#).”
- On Wednesday, Farhad Manjoo of *The New York Times* wrote an article titled “How 2017 Became a Turning Point for Tech Giants”, outlining how Google, Amazon, Facebook and others “began to grudgingly accept that they have some responsibility to the offline world.” Manjoo argues that while the tech giants have begun to accept responsibility for their

products, it isn't entirely clear what "responsibility" means and solving the many problems presented by these platforms would be "hard." "Just as the packaged food industry did in the 1950s, Facebook and Google have lured users with convenience, while feeding them a certain diet to cause lasting harm," musician and venture capitalist Roger McNamee told Manjoo. "The problem cannot be addressed by hiring; it can only be fixed by changing the algorithms in ways that will materially reduce profitability." Read more [here](#).

- On Thursday, the [High Tech Inventors Alliance](#) (HTIA)—whose members include Google, Amazon, and Oracle, amongst others—published an open letter to dispute recent statements that patent reforms, such as the 2011 America Invents Act's inter partes review (IPR) process, have weakened innovation. "The AIA's inter partes review process...provides a vital means to challenge the thicket of erroneously granted patents that slow progress by stifling the inventors creating new technologies," the letter reads. Rather than weaken innovation, HTIA writes, "[i]nnovation has thrived—indeed exploded—by every significant metric" in the past five years. Read the letter [here](#).