

PATENT & TRADEMARK POLICY REPORT NOVEMBER 17, 2017



I. Congressional Developments:

- On Monday, November 20th at 10:30 a.m. the Senate Finance Subcommittee on International Trade, Customs and Global Competitiveness will hold a field hearing on “Modernization of the North American Free Trade Agreement.” The hearing will be held at the San Antonio Marriott Plaza Hotel and will feature witnesses including Stephen Vaughn, general counsel in the Office of the United States Trade Representative (USTR); Jeff Moseley, CEO of the Texas Association of Business; and Paola Avila, chair of the Border Trade Alliance, amongst others. Read more [here](#).
- Representative Darrell Issa (R-CA) [told CQ](#) this week that he is drafting legislation that would limit the International Trade Commission’s (ITC) powers in cases where its actions would overlap with patent infringement suits taking place in federal courts. Issa also told *CQ* that House Speaker Paul Ryan (R-WI) is working on the legislation with him, and noted that the bill would likely have to go through both the Judiciary and Ways and Means committees.
- Last Democratic Reps. Ro Khanna of California, Rick Nolan of Minnesota, and Mark Pocan of Wisconsin announced this week the creation of the Congressional Antitrust Caucus. The caucus will focus on combatting economic concentration across industries including airlines and telecom as well as increasing scrutiny of tech mergers. “What Congress can do is really strengthen the enforcement agencies on these issues and make sure they are robust,” Khanna told POLITICO.
- At a Senate Commerce hearing about agriculture technology on Tuesday, an agricultural law attorney mentioned in his testimony that agriculture data “does not neatly fit into existing legal

Headlines and Highlights:

- Antitrust Division chief Makan Delrahim says behavioral remedies in antitrust “often fail to let the competitive process play out,” in ABA speech.
- Senate Finance Subcommittee to hold field hearing on NAFTA Modernization.
- TPP-11 countries make changes to IP chapter, agree to push ahead with deal.
- Sen. Coons, in speech at *IAM Magazine* event, says he has “serious concerns” about direction of patent system.
- Ottawa University Internet and E-Commerce Chair writes “No deal is better than a bad deal: Why Canada won the TPP stand-off.”
- The USPTO has issued a final rule setting new patent fees for Fiscal Year 2017

protections for intellectual property, such as patents, trademarks, or copyrights.” He said that such data “ultimately may be deemed a trade secret...but that will depend upon whether courts interpret existing statutes to include information such as agronomic data.” Read the testimony [here](#).

- On Wednesday the House passed the *Foundations for Evidence-Based Policymaking Act (H.R. 4174/S. 2046)*, a bill intended to spur agencies to make better use of data in their policymaking activities. The legislation includes a version of the *Open Government Data Act*, which contains provisions with implications for government-handled intellectual property. Read more [here](#).
- In a speech at an *IAM Magazine* event this week, Senator Chris Coons (D-DE) said he has “serious concerns about where the patent system is heading,” noting that the U.S. patent system has fallen in annual rankings assembled by the U.S. Chamber of Commerce, and that Census data for 2014 shows new startup creation “at or near a 40-year low.” Coons touted his *STRONGER Patents Act* as a solution to problems with *America Invents Act (AIA)* post-issuance proceedings, which he called “disruptive...to the ability of inventors...to rely on patents to attract investment and pursue their ideas.” Read more [here](#) and [here](#).

II. Administration Updates:

- *Bloomberg* reports that at an event in California last week, Assistant Attorney General Makan Delrahim said concerns that standard essential patent owners are abusing their monopoly power to block competitors are overstated. He said, “I worry that we as enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators.” He further stated that a “more serious risk” is presented by those who decline to license technologies until certain of their demands are met. Delrahim also noted that standard setting organizations may invite antitrust scrutiny if their fair, reasonable, and not discriminatory (FRAND) terms unfairly benefit licensees. Read more [here](#) and [here](#).
- In a speech before the American Bar Association on Thursday, Department of Justice Antitrust Division head Makan Delrahim said that he finds behavioral remedies in antitrust enforcement generally problematic because, among other issues, they “often fail” to “let the competitive process play out.” He said that, “instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation.” Delrahim said he agrees with skepticism a number of observers have expressed about certain Antitrust Division decisions to enter into “behavioral consent decrees to resolve vertical mergers it determined to be illegal” – naming the Comcast/NBCU, Google/ITA, and LiveNation/TicketMaster mergers as examples. Read the speech [here](#).

III. USPTO Updates:

- The USPTO has issued a final rule setting new patent fees for Fiscal Year 2017. The agency has detailed changes from the initial notice of proposed rulemaking [here](#). Commissioner for Patents Drew Hirshfeld and Chief PTAB Judge David Ruschke discuss the new fee schedule in a Director’s Forum Blog post available [here](#).
- Chief Administrative Trademark Judge Gerard Rogers has written a guest post in the USPTO

Director's Forum Blog about the Trademark Trial and Appeal Board's (TTAB) consideration of potential revisions to its rules to allow streamlined proceedings for a party to seek cancellation of registrations for marks no longer in use or that never were in use. The USPTO is currently seeking further public comment on the matter, and Rogers states that "should the USPTO move forward with Streamlined Proceedings, the next step would be issuance of a notice of proposed rulemaking to set out the specific rule changes needed to implement" them. Read more [here](#).

- The Patent Trial and Appeal Board (PTAB) has revised the 'Standard Operating Procedure 9' directed to procedures for cases remanded from the Federal Circuit. Read more [here](#).

IV. Judicial Updates:

- On Tuesday, November 14th, the U.S. International Trade Commission announced that it is investigating several patent infringement allegations against Apple. The Commission indicated that it is responding to complaints made by Aqua Connect Inc and Strategic Technology Partners of Orange, California. The ITC is investigating several products, including Apple Mac computers, iPhones, iPads, iPods, and Apple TVs. Read more [here](#).
- On Tuesday, November 14th, a Texas jury began hearing arguments in a patent infringement dispute between Josh Malone, the inventor of Bunch O Balloons, and TeleBrands Corp., which is commonly known for its "As Seen on TV" logo. According to Zuru Ltd., which brought Mr. Malone's product to the market, patent infringement lawsuits against the Telebrand balloon toy has cost the company nearly 10 million dollars in legal fees. Stakeholders are using this case to highlight the large costs associated with patent disputes. Mark Lemley (Professor, Stanford Law School) pointed out that these costs can be especially detrimental for small businesses, because even if they ultimately prevail in court, "they might lose some momentum they will never get back." Read more [here](#).

V. International Updates:

- Last weekend, ministers from 11 countries agreed to push ahead with the Trans-Pacific Partnership (TPP) despite the U.S. withdrawal from the pact in January. The nations agreed to suspend just 20 items from the original text. The chapter on intellectual property received 11 of the 20 amendments overall. A copyright extension to 70 years after an author or artist's death was suspended, as well as special protections for biologics. A ban on TPP countries allowing the manufacture of set-top boxes that decode encrypted cable or satellite signals was also dropped. At the request of Canada the countries agreed to change the name from TPP to CPTPP, or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Read more [here](#).
- Members of the Chartered Institute of Patent Attorneys (CIPA) recently joined officials from the UK Intellectual Property Office in meetings with the All China Patents Agents Association (ACPAA), as well as UK companies based in China. The delegation of intellectual property officials reassured Chinese businesses that Brexit will not impact the European patent system. The group also urged Chinese businesses to hire UK attorneys when filing patents and trademarks in Europe. Finally, participants set up a non-disclosure agreement (NDA) to support clarity on IP arrangements. Read more [here](#).

- On Wednesday, Kristin Wall and Corey McClary, intellectual property lawyers at Norton Rose Fulbright law firm in Toronto, Canada wrote a piece in *The Lawyer's Daily* on “How NAFTA renegotiation will affect trademarks and patents.” Read the piece [here](#).

VI. Industry Updates:

- On Saturday, Michael Geist, the Canada Research Chair in Internet and E-commerce Law at the University of Ottawa, penned an op-ed in *The Globe and Mail* titled “No deal is better than a bad deal: Why Canada won the TPP stand-off.” In the piece Geist applauds the work of Prime Minister Trudeau to stand firm on controversial issues within the TPP. One such issue, Geist claims, was the IP chapter, “where the original agreement included patent provisions that would likely increase the cost of pharmaceuticals and copyright rules that would lock down content for decades through the extension of the term of copyright beyond the standard established at international law.” After the U.S. exited the TPP, Geist writes, Prime Minister Trudeau used Canada’s stature as the second largest economy in the deal to renegotiate the IP chapter to suspend the “controversial IP provisions.” Read more [here](#).