

PATENT & TRADEMARK POLICY REPORT

JANUARY 5, 2018



I. Congressional Developments:

- The House was not in session this week. The Senate was in session, but opted not to hold any votes after Wednesday due to a winter storm.
- On Tuesday, Senator Orrin Hatch (R-UT), the longest-serving Senate Republican and the chairman of the Senate Finance Committee, announced he would retire at the end of the year. Read more [here](#).
- With Senator Hatch's retirement, current Judiciary Committee Chairman Chuck Grassley (R-IA) may have the option to become top Republican on the Senate Finance Committee in 2019, being the most senior Republican on the Finance Committee behind Hatch. If that were to happen, Senator Lindsey Graham (R-SC) is likely to become top Republican on the Judiciary Committee, being next in seniority in the Republican Judiciary Committee ranks. Read more [here](#).
- *Politico* reports that the Judiciary Committee seat of former Senator Al Franken (D-MN) will remain vacant until Majority Leader Mitch McConnell (R-KY) and Minority Leader Chuck Schumer (D-NY) finish “discussing whether the number of seats allotted to each party on committees will be adjusted to reflect the smaller GOP majority” resulting from the election of Senator Doug Jones (D-AL). Read more [here](#).

III. USPTO Updates:

- Patent Trial and Appeal Board (PTAB) Chief Administrative Patent Judge David Ruschke has written a blog post about PTAB's recent guidance on the *Aqua Products, Inc. v. Matal*

Headlines and Highlights:

- Senator Orrin Hatch announces retirement.
- Senate Judiciary Committee seat remains vacant following Sen. Franken's departure.
- Saint Regis Mohawk Tribe concerned about bias in PTAB trial.
- Administration report on China IP practices could be released this month.
- China sees 14.2% increase in patent applications in 2017.
- FDA releases draft guidance on generic drug applications; pledges further steps to increase generic competition.

Federal Circuit Court decision. Read more [here](#).

- The USPTO has updated its Fee Schedule with a number of changes to Patent Cooperation Treaty (PCT) fees to foreign offices. Read more [here](#).
- The USPTO will hold a Patent Quality Chat webinar titled ‘Unlocking Open Data for our Patent Customers’ on Tuesday, January 9 at noon ET. Read more [here](#).

IV. Judicial Updates:

- The Saint Regis Mohawk Tribe has filed a motion for discovery in its PTAB proceeding against Mylan, Teva, and Akorn citing concerns about “due process, the impartiality of the merits panel in this case, and whether political or third-party pressure has been asserted.” The motion expresses concern that “Congress has expressed an interest in this specific case and held hearings concerning the proceedings,” and states “there is also a strong possibility that the merits panel has been expanded to include USPTO executives, including Chief Judge David Ruschke, a person who has made prior public comments on the issue of sovereign immunity and this case.” The Tribe also argues that the USPTO “has a direct pecuniary interest in the outcome of this case,” which “could have a non-trivial impact on the fees collected by PTAB for IPRs.” Finally, the motion states that “there is a strong possibility of interested parties (both political and private) that may be seeking to influence the outcome” of the case. Read more [here](#).

V. International Updates:

- *CNBC* [reports](#) that a draft report on Chinese violations of U.S. intellectual property is “circulating among agencies.” The report’s allegedly “muscular” recommendations “are still being discussed, but could be made public this month,” according to an unnamed administration official. The *New York Times* [cites](#) “trade analysts” as suggesting that the administration “might consider restrictions on Chinese investment in the United States, as well as tariffs on Chinese products.” *Axios* [reports](#) that it is “quite likely Trump will use 301 authority [in January] to put tariffs on Chinese consumer electronics as retaliation against” intellectual property theft. *Axios* further notes that although Gary Cohn and Steve Mnuchin “don’t like tariffs, they’re comparatively comfortable with targeted actions against truly bad actors, as in this case.”
- *Reuters* [reports](#) that China’s state council announced on Wednesday that it will improve intellectual property rights protections in the country, but no further details were provided in the *Reuters* report.
- China saw a 14.2 percent increase in patent applications in 2017, with a total of 1.38 million applications, according to *Xinhua*. Shen Changyu, the head of the State Intellectual Property Office, told the outlet that “Protection of IP should be further strengthened to create a favorable market environment, while the application of IP should be strengthened to better support the real economy.” Read more [here](#).

VI. Industry Updates:

- This week, the Food and Drug Administration (FDA) released two documents intended to “streamline and improve aspects of the submission and review of generic drug applications,” as part of the agency’s efforts to encourage generic competition. One document is draft guidance for industry on Abbreviated New Drug Application (ANDA) submission practices, and the other is a manual outlining ANDA assessment practices for FDA staff that “formalizes a more streamlined generic review process, including the introduction of new templates that will make each cycle of the review process more efficient and complete.” The FDA also said that in the coming year it will build on its initiatives to “accelerate generic entry of complex generics,” and “take steps aimed at making it harder for brand companies to sometimes adopt tactics that prevent generics from coming to market in the time frame that the law intended.” That latter effort will include guidance to address “potential abuses of the citizen petition process, companies that restrict access to testing samples of branded drugs, and abuses of the single, shared system REMS negotiation process.” Read more [here](#) and [here](#).
- Writing about the outlook for patent policy in 2018, American Enterprise Institute (AEI) adjunct fellow Michael Rosen highlights the coming Supreme Court decisions in the *Oil States* case; further judicial development of venue law following last year’s *TC Heartland* Supreme Court decision; and a potential revival of patent reform efforts in Congress. As for the latter, however, Rosen notes, “it’s tempting to think that in a midterm election year, with budget and other battles looming, legislative patent reform will remain on the back burner.” Read more [here](#).
- Intellectual property consultant James Edwards has written an *IP Watchdog* article highlighting various conservative perspectives – including from Richard Epstein, Alden Abbott, Philip Hamburger, and Adam Mossoff - on the *Oil States* Supreme Court Case. Read more [here](#).