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PATENT & TRADEMARK POLICY REPORT FEBRUARY 16, 2018



I. Congressional Developments:

- On Monday, Sen. John Cornyn (R-TX), the Senate Majority Whip, gave a speech on the Senate floor on S. 2098, the Foreign Investment Risk Review Modernization Act. The legislation would reform the Committee on Foreign Investment in the U.S. (CFIUS), a committee tasked with scrutinizing business deals that could transfer valuable U.S. technology to China and other hostile powers. During his speech, Cornyn criticized “a very small group of...U.S. firms that are actively opposing CFIUS modernization, having decided that their bottom line is more important than our nation’s security.” [POLITICO reports](#) that Cornyn was likely making reference to Josh Kallmer, Senior Vice President at the Information Technology Industry Council (ITIF), which represents tech giants including Apple and Google, who last month said parts of the bill “would literally paralyze businesses.” Listen to the entire speech [here](#).
- On Wednesday, February 14th, from 9:30 AM-12:00 PM ET, the Senate Commerce Committee held a [nomination hearing](#) on the president’s four nominees to serve as Federal Trade Commissioners. The nominees testifying at the hearing were as follows: [Joseph Simons](#) (to be FTC Chair Designate), [Rohit Chopra](#) (to be FTC Commissioner), [Noah Phillips](#) (to be FTC Commissioner), and [Christine Wilson](#) (to be FTC Commissioner). Issues involving recent data breaches, antitrust enforcement, and to a lesser extent, prescription drug costs were the primary topics of discussion among the nominees and members of the committee, and it appeared that there was a consensus among members of the committee and the nominees that all of these issues were crucial to the overall mission of the FTC. In the area of antitrust enforcement, there appeared to be a great deal of agreement among the nominees that although preventing anti-competitive consolidation was clearly a core

Headlines and Highlights:

- Reps. Brady and Neal send letter to Sens. McConnell and Schumer urging them to quickly confirm USTR leadership.
- Mitt Romney says he will run for US Senate from Utah.
- Gail Slater, former General Counsel for Internet Association, to join Administration.
- DOJ Antitrust Chief visits Europe, holds meetings with EU Counterpart Margrethe Vestager.
- SIIA CEO pens op-ed urging PTO chief to “continue fight for high patent quality.”
- Section 301 investigation of China “bogged down” due to legal concerns, FT reports.
- Next PPAC meeting May 3rd, TPAC meeting May 4th.

function of the FTC, the simple fact a company was large did not by itself mean that the company was engaged in anticompetitive conduct.

- During Wednesday’s Senate Commerce hearing to consider the nominations of four Federal Trade Commissioner nominees, Sen. Blumenthal (D-CT) submitted a statement for the record on behalf of the Congressional Antitrust Caucus, comprised of Democratic Reps. Khanna, Pocan, Nolan, Cicilline, and Ellison. In the statement the Representatives write that “There is mounting economic evidence that an overall decline in antitrust enforcement over the past several decades, coupled with wave after wave of mergers, has resulted in high levels of concentration in numerous industries with clear indicators of monopoly profits in key markets.” The members go on to ask the nominees how the Commission could work to “reverse the decline in monopolization enforcement in recent decades?” Read more [here](#).
- On Wednesday, Reps. Brady (R-TX) and Neal (D-MA), Chairman and Ranking Member of the House Ways and Means Committee, sent a letter to Senate Majority Leader McConnell (R-KY) and Minority Leader Schumer (D-NY) asking them to quickly bring to the Senate floor nominations for senior positions at the Office of the United States Trade Representative (USTR). Read the letter [here](#).
- In a video announcement on Friday morning, former Massachusetts Governor Mitt Romney announced that he will be running to replace retiring Utah Senator Orrin Hatch. "I have decided to run for United States Senate because I believe I can help bring Utah's values and Utah's lessons to Washington," Romney said in his announcement. Read more [here](#).

II. Administration Updates:

- On Tuesday, February 13th, a coalition of judges, former judges, and government officials, legal academic and economists sent a letter to Assistant Attorney General (AAG) Delrahim in support of the recent announcement that the Antitrust Division of the Department of Justice is planning on returning to evidence-based and balanced policymaking. The document attempts to dispel claims that there is a “patent holdup” problem due to opportunistic patent owners of technological standards. Specifically, it claims that the earlier letter from January 24th, 2018, expressing misgivings about the recent announcement, perpetuates what the coalition perceives as “the long-standing misunderstanding” about a “one-sided” patent holdup in high-tech industries. Among other notable individuals, signatories include David Kappos (former Director of the Patent & Trademark Office), Paul Michel (Chief Judge (ret.) of the Federal Circuit), Judge Douglas Ginsburg (D.C. Circuit Court of Appeals), and Joshua Wright (former FTC Commissioner). Read more [here](#).
- The *Financial Times* (FT) reported on Tuesday that the Trump Administration’s Section 301 investigation of China has become “bogged down” amid an “internal debate focused in large part on legal concerns.” The investigation, [announced](#) in August, saw the U.S. allege, among other charges, that China violated intellectual property rights which threatened U.S. companies’ ability to compete. FT reported that the White House is considering invoking the International Emergency Economic Powers Act, a move that would grant Trump “wide powers to respond without congressional approval.” The White House is reportedly concerned that such a move could face backlash from affected U.S. companies. Read more [here](#).

- On Thursday, POLITICO [reported](#) that Grace Koh, special assistant to the president for technology, telecommunications and cybersecurity policy at the National Economic Council, is leaving the White House. They also reported that Gail Slater, previously general counsel of the Internet Association, is joining the administration.

III. USPTO Updates:

- On Wednesday, February 14th, the USPTO published a comment request in the Federal Register for its proposed extension of its information collection: the Patent Prosecution Highway (PPH) Program, 0641-0058. The PPH program allows applications that have been determined to be patentable by an Office of Earlier Examination (OEE) to go through an accelerated examination in an Office of Later Examination. Overall, this program seeks to lower production costs, help applicants to secure stable patent rights around the world, and reduce the search and examination burden. Written comments on the extension of this information collection must be submitted by April 16, 2016. Read more [here](#).
- The next Patent Public Advisory Committee (PPAC) meeting will be May 3rd at USPTO Headquarters in Arlington, VA. The next Trademark Public Advisory Committee (TPAC) meeting will be May 4th.

IV. Judicial Updates:

- On 17 January IPO filed an [amicus brief](#) at the U.S. Court of Appeals for the Federal Circuit in *NantKwest v. Iancu* (originally *NantKwest v. Matel*). IPO's brief in support of NantKwest argues that section 145's provision that "[a]ll the expenses of the proceedings shall be paid by the applicant" in civil actions to obtain a patent, does not provide the 'explicit statutory authority' needed to overcome 'the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose.'" The brief also concludes that the Doctrine of Constitutional Avoidance and basic notions of fairness preclude the USPTO from receiving attorneys' fees. IPO's brief was drafted by Gregory Castanias and Daniel Kazhdan (Jones Day). (*IPO Daily News*)

V. International Updates:

- According to a Department of Justice press release, DOJ Antitrust Chief Makan Delrahim will be in Europe for the next few days, with stops in Paris, Brussels, and Bonn "for a series of meetings, speaking engagements, and workshops with high-level officials and colleagues." On Tuesday, February 20th Delrahim will meet with the EU's Commissioner for Competition, Margrethe Vestager, and other senior members of her team to discuss "international cooperation on enforcement and policy matters." Read more [here](#).

VI. Industry Updates:

- Last Saturday, Ken Wasch, President and CEO of the Software & Information Industry Association (SIIA), a trade association for the software and digital content industry, published an op-ed in *The Hill* titled "New PTO chief must continue fight for high patent quality." Wasch urged the new USPTO Director Andrei Iancu to protect the inter partes review (IPR) process, which he called "enormously successful." Wasch also encouraged Iancu to look at ways to improve the USPTO and suggested "modernizing the patent office's

information technology system” and “examining the extent to which the office’s focus on (and credit for) the number of applications an examiner processes creates perverse incentives to grant poor-quality patents.” Read more [here](#).

- Last week, Justin Smith, Kristen Kilroy and John Norman, lawyers for Canadian law firm Gowling WLG, wrote an article detailing the IP provisions that Canada had suspended in the now-defunct Trans-Pacific Partnership following the U.S.’ departure. The new agreement, dubbed the Comprehensive and progressive Agreement for Trans-Pacific Partnership (CPTPP), no longer has the TPP language on biologics, term of protection for copyright and related rights, and legal remedies and safe harbours. Read more [here](#).