

## PATENT & TRADEMARK POLICY REPORT

### JUNE 28, 2019



#### I. Congressional Developments:

- On Thursday, the Senate Judiciary Committee reported favorably four bills out of Committee seeking to stem rising drug prices, two of which intersect with patent law, including the PACED Act (S. 440) and the Affordable Prescriptions for Patients Act for 2019 (S. 1416). The PACED Act is sponsored by Sens. Ernst (R-IA) and Cotton (R-AK), and seeks to thwart behavior similar to Allergan's controversial patent action in 2017 by prohibiting patent owners from asserting tribal sovereign immunity as a defense in certain proceedings before the USPTO, including patent validity challenges before the Patent Trial and Appeal Board (PTAB). This prohibition would also apply to court actions and proceedings before the International Trade Commission. The PACED Act was reported out of the Committee by a party-line recorded vote, with Democrats opposing the bill. Ranking Member Feinstein (D-CA) explained that she opposes this legislation because the issue has already been resolved in the courts and she is concerned that it is overly broad and would have unintended consequences. Senator Durbin (D-IL) pointed out that the Chairman and the Ranking Member of the Senate Committee on Indian Affairs oppose the bill. A manager's amendment was adopted, and Sen. Ernst explained that the changes made to the legislation were "extremely narrow" and simply clarify that public universities are not captured by the intent of the bill. Read the manager's amendment [here](#).
- The Affordable Prescriptions for Patients Act of 2019 (S. 1416), which is sponsored by Sens. Cornyn (R-TX), Blumenthal (D-CT), Hawley (R-MO), and Kennedy (R-LA), was reported favorably out of committee by a unanimous recorded vote. This legislation seeks to curb certain practices by brand pharmaceutical companies to extend the term of a patent,

#### Headlines and Highlights:

- In an opinion by Justice Kagan, the Supreme Court upholds a Federal Circuit decision that Trademark Act section 1052(a) is invalid under the Free Speech Clause of the First Amendment in *Iancu v. Brunetti*.
- Senate Judiciary Committee reports the PACED Act (S. 440) and the Affordable Prescriptions for Patients Act of 2019 (S. 1416) favorably out of Committee.
- June 2019 update of TBMP now available on the Trademark Trial and Appeal Board webpage.
- Nominations to fill upcoming vacancies for the PPAC and TPAC due July 12<sup>th</sup>.
- President Trump and Chinese President Xi Jinping expected to meet on Saturday, June 30<sup>th</sup>, and announce tariff cease-fire in trade dispute.

which have been dubbed “product hopping” and “patent thicketing.” Sen. Cornyn (R-TX) was pleased to report that the manager’s amendment, which was adopted by the committee, included “important changes” to ensure that the legislation is targeting only bad actors and not meaningful developments in the biopharmaceutical field. Before the Committee voted on the proposal, Senate Judiciary IP Subcommittee Chairman Chris Coons (D-DE) said the bill had “significantly improved” and said he appreciates the opportunity to further refine the bill after the markup to ensure that it has no unintended consequences. Read the manager’s amendment [here](#).

- On Tuesday, a group of 27 freshmen Democrats sent United States Trade Representative (USTR) Robert Lighthizer outlining a number of pending concerns they would like resolved before they will consider voting “yes” on legislation to implement the USMCA. Specifically, the letter urges the administration to axe the provision providing ten years of data exclusivity for biologic drugs, strengthen the text’s labor and environmental standards, and add “swift and certain” enforcement mechanisms. Notably, the letter also calls on the administration to restore the Country of Origin (COOL) meat-labeling program passed by Congress and affirmed by U.S. courts in the final NAFTA 2.0 package. The diverse list of signatories includes progressives such as Alexandria Ocasio-Cortez (D-NY) and Ilhan Omar (D-MN), to more centrist lawmakers like Debbie Mucarsel-Powell (D-FL) and Katie Hill (D-CA). Furthermore, seven of the signatories represent districts Trump won in 2016 and nine are members of the New Democrats Coalition. Read more [here](#).
- During a press conference on Thursday, House Speaker Nancy Pelosi (D-CA) told reporters that although the USMCA might need to be reopened to sufficiently mitigate Democrats’ outstanding concerns, she clarified that “It wouldn’t be like we’re opening it up,” adding “No, it would be surgical.” She also indicated that she thinks the USMCA might only need to be reopened to fix the provision’s enforcement mechanisms. “I could see a scenario where we would just, for the singular purpose of doing enforcement, that we would suggest that they should open,” Speaker Pelosi stated. Read a full transcript of Pelosi’s remarks [here](#).
- On Tuesday, July 23<sup>rd</sup> at 2:30 p.m. ET, the Senate Judiciary Antitrust, Competition Policy, and Consumer Rights Subcommittee will hold a hearing on “Oversight of the Enforcement of the Antitrust Laws.” Chairman Mike Lee (R-UT) said this week that he plans to bring in Makan Delrahim, the Department of Justice’s (DOJ) Assistant Attorney General for the Antitrust Division, and commissioners from the Federal Trade Commission (FTC) to testify. Lee did not specify whether he plans to bring in all five FTC commissioners or just Chairman Joe Simons, who testified at a hearing on a similar topic last October. More info. [here](#).

## **II. Administration Updates:**

- On Wednesday, at a meeting organized by House Speaker Pelosi, Democrats met with USTR Lighthizer to discuss the USMCA. Democrats leaving the hour-long meeting seemed enthusiastic about the possibility of the caucus working with Lighthizer on a solution to some of their outstanding concerns. For instance, Representative Veronica Escobar (D-TX) told reporters that “Both the ambassador and speaker are doing everything they can do address the areas of concern.” Read more [here](#).

- Late last week, senators Amy Klobuchar (D-MN), Corey Booker (D-NJ), Patrick Leahy (D-VT), Richard Blumenthal (D-CT), Tammy Baldwin (D-WI), Ed Markey (D-MA), and Tina Smith (D-MN), sent letters to the Federal Trade Commission (FTC) and the Department of Justice (DOJ) asking for information about the agencies' antitrust probes into big tech companies, beyond what has been leaked by the media. Earlier this month, reports surfaced that the agencies had divided the responsibilities for antitrust oversight over tech behemoths; the FTC is apparently taking the lead on investigating Facebook and Amazon, while the DOJ handles Apple and Google. The letter asserts that while the senators were "encouraged" by the recent media reports about the probes, they were also "somewhat troubled that such inquiries were not already underway." Furthermore, the senators exclaim that they still have not confirmed whether "these investigations have actually been initiated." Read more [here](#).

### III. USPTO Updates:

- On Wednesday, USPTO announced that the June 2019 update for the Trademark Trial and Appeal Board Manual of Procedure (TBMP) is now available on the Trademark Trial and Appeal Board webpage under "Policies and procedures." According to the announcement, the revision describes "current practice and procedure under the applicable authority and relevant case law reported between March 2, 2018, and March 1, 2019." More info. [here](#).
- The USPTO is seeking nominations to fill upcoming vacancies for the Patent Public Advisory Committee (PPAC) and the Trademark Public Advisory Committee (TPAC). Nominations must be postmarked or electronically transmitted by July 12<sup>th</sup>. More info. [here](#).
- On Monday, USPTO Director Andrei Iancu penned a blogpost on the USPTO's Director's Forum blog explaining how providing entrepreneurs, small businesses, and independent inventors with access to IP resources is a priority for the Office. In addition to reduced filing fees it charges small and micro entities, Director Iancu touts that the USPTO oversees several programs to assist with free or reduced-cost help in applying for patents, including the Patent Pro Bono Program, the Pro Se Assistance Program, the Certified Law School Clinic Program, and Patent and Trademark Resource Centers. Additionally, the USPTO has recently added new tools to its website to help users find resources in their area, including a map where users can peruse state-specific resource pages and regional office pages, as well as a regional events filter on its main USPTO events calendar. Read more [here](#).
- On September 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup>, USPTO is holding course on Stakeholder Training on Examination Practice and Procedure (STEPP) at its headquarters in Alexandria, Virginia. Register [here](#).

### IV. Judicial Updates:

- On Monday, the Supreme Court upheld a Federal Circuit decision that Trademark Act section 1052(a) is invalid under the Free Speech Clause of the First Amendment. In the *Iancu v. Brunetti* case, the USPTO had refused to register the trademark "FUCT" to a fashion designer because it is the past tense of a vulgar word and is "therefore scandalous." Federal law permits the government to deny registration of trademarks containing "immoral, deceptive, or scandalous matter." However, the U.S. Court of Appeals for the Federal Circuit reversed the TTAB's holding, finding that the bar on registering scandalous and immoral trademarks is content-based restriction on free speech in violation of the First

Amendment. The Supreme Court affirmed this decision 6-3 in an opinion by Justice Kagan on Monday. Justice Alito filed a concurring opinion; and Chief Justice Roberts filed opinions concurring in part and dissenting in part. Justice Sotomayor also filed an opinion concurring in part and dissenting in part, to which Justice Breyer joined. More info. [here](#).

## **V. International Updates:**

- President Trump and Chinese President Xi Jinping are slated to meet on the sidelines of the G-20 summit on Saturday, June 30<sup>th</sup>. Reports surfaced this week that the leaders plan to announce a tariff cease-fire in their ongoing trade dispute, which would avert the next round of U.S. tariffs on \$300 billion worth of Chinese imports, although the timing and details of any such deal are forthcoming. President Trump previously threatened to impose tariffs on the remaining products that were not covered by the first tranches at a rate as high as 25 percent if talks went poorly with President Xi. However, nothing has officially been confirmed by the Administration and President Trump told reporters on Wednesday that he was still willing to levy these tariffs on Chinese tariffs if talks this weekend were not satisfactory, while adding the caveat that he might opt for a level of ten percent instead of the originally-threatened 25 percent. China and the U.S. are expected to make this announcement in two coordinated press releases following the summit, instead of through a joint statement. Read more [here](#).
- On July 1<sup>st</sup>, the USTPO will again accept new international applications to the IP5 Offices Patent Cooperation Treaty (PCT) Collaboration Search and Examination (CS&E) pilot. The pilot, which was launched by the five largest IP offices in the world (IP5) on July 1<sup>st</sup>, 2018, allows examiners from all five offices, with different working languages, to collaborate on the search and examination of a single international application. More info. [here](#).
- Last week, Senator Rubio (R-FL) filed an amendment to a defense authorization bill that would prevent Huawei Technologies from seeking damages in U.S patent courts or before the International Trade Commission. Senator Rubio anticipates the Commerce Department to find that Huawei poses an “undue risk” to telecommunication systems. Rubio tweeted “Huawei is using the tactics of patent trolls to attack U.S. companies in retaliation for Trump administration national security actions against them.” Huawei chief legal officer Song Liuping fired back on Thursday, saying at a press conference that an IP litigation ban “would be a catastrophe for global innovation” and “break the foundation of IP protection.” Song also pledged that Huawei has “no intention” of weaponizing IP. Read more [here](#).

## **VI. Industry Updates:**

- On Monday, the U.S. Patent Office reopened a conflict between the University of California (UC) and the Broad Institute of MIT and Harvard (The Broad) about the invention of a key component of a patent. The issue at hand is who invented a key CRISPR gene editing technology first between the two institutions, which have been battling each other over CRISPR rights for six years. UC inventor Jennifer Doudna is generally credited among researchers as the leader of the team that invented the technology. However, Broad says that its biologist, Feng Zhang, invented a key application of CRISPR. While the Patent Office awarded an all-encompassing patent to UC Berkeley, experts believed this decision created loose ends. These experts appeared to be correct; the patent office declared an interference between 10 patent applications from UC and 13 patents issued to the Broad, as well as one

pending patent application by the Broad. Furthermore, the UC and Broad CRISPR patent applications predate changes to the “first to file” standard, that moot the issue at hand here—the timing of an invention and the timing of a patent application. Read more [here](#).