



AMERICAN CONTINENTAL GROUP

1800 M Street NW | 5th Floor | Washington D.C. 20036
Tel: (202) 327-8100 | Fax: (202) 327-8101

PATENT & TRADEMARK POLICY REPORT OCTOBER 8, 2021



I. Congressional Developments:

- In an editorial published in *Roll Call* on Tuesday, Senators Dick Durbin (D-IL) and Bill Cassidy (R-LA) called on their colleagues to pass the INFORM Act ([S. 936](#)) to help combat the trafficking of counterfeit and pirated goods through e-commerce platforms, which the senators warn can threaten public health and safety, as well as national security. Reps. Jan Schakowsky (D-IL) and Gus Bilirakis (R-FL) introduced a House version of that bill Tuesday. Read the full op-ed [here](#) and more [here](#).
- Following the debut of the 60-Minutes episode featuring the “Facebook Files” whistleblower on Sunday, on Monday, Facebook, Instagram, and multiple other apps associated with the company were down for much of the day. On Tuesday, the whistleblower testified in front of the Senate Commerce Committee, and Senators expressed their disdain for the Big Tech giant. “Big tech companies have gotten away with abusing consumers for far too long,” Sen. Marsha Blackburn (R-TN), the panel’s Ranking Member, told *Morning Tech* in a statement. “It is clear that Facebook prioritizes profit over the well-being of our children.” The hearing emphasized bipartisan support for regulation on Facebook, with many senators expressing their concern over the online recruitment of teenagers and creating an Instagram targeted at 8-12-year old’s. Senators utilized Ms. Haugen’s testimony and disclosure to exhibit the mental health detriments Facebook’s products engender within pre-adults. Meanwhile, Zuckerberg published a 1,300-word [memo](#) in response to Haugen’s testimony on his Facebook page.

Headlines and Highlights:

- Senators Durbin and Cassidy call on colleagues to advance the INFORM Act.
- Senate Judiciary Committee holds nomination hearing for Jonathan Kanter to serve as Assistant Attorney, Antitrust Division, at DOJ.
- BCLT hosting panel on China’s efforts to stake out its place in plant variety protection.
- Sarah Bianchi sworn in as Deputy United States Trade Representative.
- USPTO publishes final rule to incorporate classification changes adopted by the Nice Agreement.
- Commerce Department accepting nominations for individuals to serve on the National Artificial Intelligence Advisory Committee.

Zuckerberg didn't address calls for him to testify, instead reiterating that the work the platform is doing on itself has been misrepresented. Watch the full hearing [here](#).

- Senate Intelligence Committee Chair Mark Warner (D-VA) urged Secretary of State Antony Blinken to increase international collaboration on emerging tech issues at this week's ministerial meeting hosted by the Organization for Economic Cooperation and Development. In a letter to Blinken on Monday, Chairman Warner urged the Secretary of State "to use the OECD's upcoming ministerial meeting on October 5-6, 2021, to work to establish rules and norms around strategic technology issues, including development and governance strategies and best practices for communications applications, AI-enabled products and services, next-generation networks, Internet of Things devices, blockchain and fintech products, and renewable energies." Read the letter [here](#).
- The top Republicans of the Senate and House Judiciary committees, as well as their respective antitrust panels, wrote to the leaders of the FTC and DOJ antitrust division on Tuesday saying, "We are worried that your agencies appear to be applying the law unequally to similarly situated respondents, raising serious concerns about the fairness of America's antitrust enforcement regime." The signees include Sen. Mike Lee (R-UT), Rep. Ken Buck (R-CO), Sen. Chuck Grassley (R-IA), Rep. Jim Jordan (R-OH). Read the full letter [here](#).

II. Administration Updates:

- On Wednesday, the Senate Judiciary Committee considered multiple nominations including Jonathan Kanter to serve as Assistant Attorney, Antitrust Division, at the Department of Justice (DOJ). During the hearing, Ranking Member Grassley (R-IA) asked questions focused on concentration and consolidation in the agriculture and livestock industry. He also noted that it was encouraging to him that Kanter is "a forceful critic of big tech." Antitrust Subcommittee Chairwoman Klobuchar (D-MN) praised Kanter for his "strong advocacy for vigorous antitrust enforcement." She also asked how Kanter would ensure that companies comply with settlement consent decrees following merger approval. Ranking Member Lee (R-UT) of the Antitrust Subcommittee raised concern with the divergence between the DOJ and FTC's standards of review to mergers and acquisitions under their shared jurisdiction (See his [letter on this topic](#)). He also asked Kanter whether the DOJ will ask merging companies about their ESG policies. Kanter said he was unable to answer that question in his current role. Sen. Blumenthal (D-CT) asked about interoperability and portability while promoting the [Access Act](#). Senator Tillis (R-NC) asked whether Kanter supports patent rights and if his views are consistent with antitrust law. Senator Tillis also asked whether Kanter would withdraw the [DOJ Policy Statement](#) on remedies for Standard Essential Patents subject to voluntary F/RAND Commitments. Finally, Tillis asked whether Kanter would withdraw [the ASCAP and BMI consent Decrees](#). In response to both questions, Kanter said he couldn't prejudge the outcomes. Senator Padilla's (D-CA) questions focused on gig workers' employment status as independent contractors rather than employees. Watch the full hearing [here](#).
- On Monday, Ambassador Tai officially swore Sarah Bianchi in as Deputy United States Trade Representative. Her portfolio will include Asia, Africa, Investment, Services, Textiles, and Industrial Competitiveness. She was confirmed by the United States Senate on September 23, 2021. Also on Monday, USTR Katherine Tai voiced her opposition to

China's unfair trade practices and stated her intent on protecting the U.S. economy from them. "Our objective is not to inflame trade tensions with China, but above all else, we must defend to the hilt our economic interests and that means taking all steps necessary to protect ourselves against the waves of damage inflicted over the years through unfair competition," she asserted. Read more [here](#).

- Following Ambassador Katherine Tai's announcement on October 4th that USTR will start a targeted tariff exclusion process, USTR posted a Federal Register notice inviting public comments on whether to reinstate previously extended exclusions. The public comment period will last for 50 days, from October 12th through December 1st. The text of the Federal Register notice inviting public comment can be viewed [here](#).

III. USPTO Updates:

- On Wednesday, USPTO published a final rule to incorporate classification changes adopted by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. The changes, which become effective on January 1st, 2022, are listed in the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Classification), which is published by the World Intellectual Property Organization (WIPO). More info. [here](#).
- USPTO has extended the deadline for submitting comments on the state of patent eligibility jurisprudence and its effect on investment and innovation in the United States to October 15th. Read more [here](#).
- The next TPAC quarterly meeting will be held on October 15th from 10:00 a.m. – 1:30 p.m. ET. More info. [here](#).
- On Wednesday, October 13th from 1:00 – 4:00 p.m. ET, USPTO is holding a Hispanic Innovation and Entrepreneurship Program. The program will offer participants the opportunity to hear from a successful inventor about how IP can be a key to one's success; learn about building networks and finding mentors; and discover USPTO resources for inventors and entrepreneurs. Find an agenda and register online [here](#).

IV. Judicial Updates:

- On Wednesday, a jury in Waco, Texas found that Google's Nest Hub products do not infringe a patent owned by Profectus Technology LLC related to a picture frame for displaying digital images. The jury also found that the five parts of the patent at issue were not patentable. Profectus has also unsuccessfully sued Apple, Samsung, and Dell over the patent in question. Read more [here](#).

V. International Updates:

- On October 13th, from 5:00 – 6:30 p.m. PT, Berkeley's Center For Law & Technology (BCLT) is hosting a panel to explore public policy implications of China's efforts to become a major force in new plant varieties, the technical aspects of China's emerging plant variety regime, and how these changes fit into China's overall IP practice. The panel will be moderated by Mark A Cohen (BCLT/Berkeley Law) and Michael Ward (Morrison Foerster)

and feature speakers from USPTO, Driscoll's, the American Seed Association, and more. Register online [here](#).

VI. Industry Updates:

- The U.S. Department of Commerce is accepting nominations for individuals to serve on the National Artificial Intelligence Advisory Committee (NAIAC) until October 25th at 5:00 p.m. ET. Committee members will have the unique opportunity to advise and make recommendations to the President and National Artificial Intelligence Initiative Office on matters such as the state of U.S. competitiveness and leadership in AI, as well as opportunities for international cooperation with strategies allies on globally important AI issues. More info. [here](#).