

PATENT & TRADEMARK POLICY REPORT OCTOBER 1, 2021



I. Congressional Developments:

- On Wednesday, Senate Judiciary IP Subcommittee Chairman Patrick Leahy (D-VT) and IP Subcommittee member John Cornyn (R-TX) introduced the *Restoring the America Invents Act*. The bill seeks to reverse the reforms of the Patent Trial and Appeal Board (PTAB) made by former USPTO Director Andrei Iancu, taking aim at discretionary denials of IPR and PGR challenges. Among other changes, the bill would force the discretion of the USPTO to deny institution to be limited to the scenario where “the same or substantially the same prior art or arguments previously were presented to the Office.” Find a press release from Senator Leahy’s office [here](#), the text of the legislation [here](#), and an article from *IP Watchdog* on the bill [here](#).
- On Wednesday and Thursday, the House Judiciary Committee met to mark up a series of bills, including the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act ([H.R. 5374](#)). The SHOP SAFE Act, which seeks to protect consumers by stopping the sale of harmful counterfeit products, was reported favorably out by a 30-8 vote. Among other measures, the bill would establish trademark liability for online marketplace platforms when a third-party sells a counterfeit product that poses a risk to consumer health and safety and that platform does not follow certain best practices. Although no amendments were offered besides the [substitute from Chairman Jerrod Nadler](#) (D-NY), several members raised concern about the bill’s definitions of health and safety, insisting that they should be tightened up before it heads to the floor. The following members voted

Headlines and Highlights:

- Senators Leahy and Cornyn introduce the *Restoring the America Invents Act*.
- House Judiciary Committee reports out the SHOP SAFE Act and several drug pricing/competition bills.
- Senate Commerce Consumer Protection Subcommittee considers social media’s impact on kids’ mental health.
- House Judiciary Antitrust Subcommittee holds hearing on “Antitrust Reforms and the American Worker.”
- Senate Judiciary Committee to hold nomination hearing for Jonathan Kanter to be Assistant Attorney General, Antitrust Division, next Wednesday.
- Federal Circuit decides that Cisco is liable for at least \$56.9 million in damages and attorneys’ fees due to willful patent infringement.

against the bill: Reps. Lofgren (D-CA), Gohmert (R-TX), Buck (R-CO), Tiffany (R-WI), Massie (R-KY), Fischbach (R-MN), Spartz (R-IN), and Biggs (R-AZ). Watch the full markup [here](#).

- The House Judiciary Committee also approved numerous drug pricing and competition bills. The Stop Stalling Access to Affordable Medications ([H.R. 2883](#)) was reported favorably out, as amended by a [substitute amendment](#) offered by Chairman Nadler, by a 31-9 vote. The bill would create a rebuttal presumption that a citizen petition is a “sham” and thus a violation of the FTC Act if the FDA first determines that a petition was “submitted with the primary purpose of delaying approval” of a generic or biosimilar drug. The Preserve Access to Affordable Generics and Biosimilars Act ([H.R. 2891](#)) was reported favorably out, as amended by a [substitute amendment](#), by a 28-13 vote. Most members of the committee expressed support for the bill and the need for increased enforcement against pay-for-delay agreements. A few members expressed concern over the amount of power it would give the FTC. Next, the Affordable Prescriptions for Patients Through Promoting Competition Act of 2021 ([H.R. 2873](#)) was reported favorably out as amended by a substitute amendment by a 27-16 vote. Chairman Nadler offered an [amendment in the nature of a substitute](#) that is a compromise with the Committee’s Senate counterpart. It conforms the text of H.R. 2873 with [S. 1435](#), which was advanced favorably by the Senate Judiciary Committee on a unanimous basis on July 29th. Among other changes, the substitute amendment defines a follow-on product as one that treats a condition that is identical or substantively similar to the reference product. Finally, the Affordable Prescriptions for Patients Through Improvements to Patent Litigation Act ([H.R. 2884](#)) was reported favorably out, as amended by a [substitute amendment](#), by a voice vote. Watch the full markup [here](#).
- On Thursday, the Senate Commerce Consumer Protection Subcommittee held a hearing titled “Protecting Kids Online: Facebook, Instagram, and Mental Health Harms.” The main concern presented throughout the hearing was on the ethics and concerns surrounding Instagram Youth, a new product on pause by Facebook tailored for children 8-12 years old. Senators utilized the recent *Wall Street Journal* “[Facebook files](#)” as evidence that Facebook and its products like Instagram have longstanding mental health effects on today’s youth. According to the report, Facebook has been aware of the detriments of its service for several years and has not acted because certain changes may reduce the engagement of users and thereby the profit of Facebook. Antigone Davis, the head of global safety at Facebook, explained that internal research pointed to Instagram and Facebook improving the mental health of teens as it provides a community for people struggling with mental health issues and enables them to express their concerns and receive help through natural engagements online. She noted that Facebook is in favor of regulation that would protect children from harmful content and that Instagram youth will enable parents to better monitor the content their children view. Watch the full hearing [here](#).
- On Tuesday, the House Judiciary Antitrust Subcommittee held a [hearing](#) titled: Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker. Witnesses included: [Mr. Eric A. Posner](#), Kirkland and Ellis Distinguished Service Professor of Law Arthur and Esther Kane Research Chair, University of Chicago Law School; [The Honorable Christine S. Wilson](#), Commissioner, Federal Trade Commission; [Dr. Brian Callaci](#), Chief Economist, Open Markets Institute; [Mr. Bruce H. Kobayashi](#), Paige V. and Henry N. Butler Chair in Law and Economics, Antonin Scalia Law School, George Mason University; Mr. Daniel Gross, Feed Driver, United Parcel Service, Member, Teamsters Local 177; and Ms.

Nila Payton, Medical Administrative Assistant, University of Pittsburgh Medical Center. In his opening statement, full Committee Chairman Nadler argued that the U.S. Economy has become highly concentrated in recent decades. Specifically, he stated that “a small number of firms dominate a variety of markets that Americans rely on, including pharmaceuticals, airlines, broadband, online platforms, and meatpacking.” He focused on how, in his view, consolidation has led to high levels of concentration in labor markets. Chairman Nadler praised President Biden’s Executive Order on competition ([14036](#)) and called on Congress to enact comprehensive legislation to guarantee equal pay for equal work, prohibit forced arbitration agreements in employment contracts and worker misclassification, establish a living wage, and strengthen unions. Watch the full hearing [here](#).

II. Administration Updates:

- The Senate Judiciary Committee is scheduled to hold a nomination hearing for Jonathan Kanter to be Assistant Attorney General, Antitrust Division, next Wednesday, October 6th, at 10:00 a.m. ET. More info. [here](#).

III. USPTO Updates:

- 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](#).
- This week, USPTO issued an order granting a one-year interim extension of the term of U.S. Patent No. 6,406,699 (‘699 patent). The ‘699 patent claims a method of using a veterinary biological product in the cancer immunotherapy treatment known by the tradename ECI® (ELIAS Cancer Immunotherapy). The application for interim patent term extension indicates that an application for a license for the veterinary biological product was submitted under the Virus-Serum-Toxin Act and is currently undergoing regulatory review by the United States Department of Agriculture, Center for Veterinary Biologics. 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 Tuesday, a three-judge Federal Circuit panel decided that Cisco Systems Inc is liable for at least \$56.9 million in damages and attorneys’ fees for willfully infringing SRI International Inc patents related to network security. The panel reinstated a 2016 jury finding that Cisco’s infringement was willful and a Delaware federal judge’s decision that this justified enhanced damages. A spokesperson for Cisco told *Reuters* that the company is disappointed that the Federal Circuit disagreed with a lower court’s decision “despite the strong evidence that Cisco presented in an unremarkable patent infringement case.” Read more [here](#).

V. Industry Updates:

- A coalition of 11 progressive groups are calling on Attorney General Merrick Garland to give Jonathan Kanter, “sufficient independence and discretion” in his role as the antitrust chief at DOJ. “Independence includes making decisions on who to sue, when and how to settle, and who to hire. And, in particular, that means limiting interference from officials at DOJ who have histories representing Big Tech companies,” they wrote in a letter Wednesday. As noted above, Kanter’s nomination hearing is scheduled for next Wednesday in the Senate Judiciary Committee. Read more [here](#).