

## PATENT & TRADEMARK POLICY REPORT JANUARY 7, 2022



### I. Congressional Developments:

- Next Thursday, January 13<sup>th</sup>, the Senate Judiciary Committee is slated to consider President Biden's nomination for Kathi Vidal to serve as the Director of the USPTO and Under Secretary of Commerce for Intellectual Property. The Committee was originally slated to consider her nomination this week, but the executive session was postponed. More info. [here](#).
- Shortly before the holiday break, Revolving Door Project sent a letter to Democratic leadership requesting that Rep. Zoe Lofgren recuse (D-CA) herself from oversight of the Justice Department and FTC because of her financial investments in tech companies and her daughter's employment at Google. The full letter can be found [here](#). Rep. Lofgren defended herself in a statement saying, "It is sad, yet telling, when outside groups and/or colleagues turn to personal attacks and fear-based tactics when they cannot advance a policy matter." She continued, "When it comes to tech policy, I share the same desire as many of my colleagues to reform digital markets and increase competition, however, most of the bills that passed the House Judiciary Committee back in June are poorly-drafted, extreme and go beyond legitimate, real-world concerns with big tech companies."

### II. Administration Updates:

- The National Institute of Standards and Technology (NIST) is doing a [study](#) on emerging technology and is seeking input about the public and private sector marketplace trends, supply chain risks, and legislative,

### Headlines and Highlights:

- Senate Judiciary Committee to consider Kathi Vidal's nomination to serve as USPTO Director next week.
- USPTO to implement a pilot program to evaluate the effects of permitting applicants to defer responding to SME.
- USITC rules that Google infringed on Sonos speaker technology,
- USPTO establishes an administrative process for investigating submissions filed with the Office in trademark matters that appear to violate the Trademark Rules of Practice.
- Nike Inc. files a patent infringement lawsuit against Lululemon Athletica Inc.
- Allele Biotechnology and Pharmaceuticals Inc resolves patent dispute with Pfizer Inc and BioNTech SE over technology used in developing Covid vaccine.

policy and future investment needs of eight emerging technology areas, including artificial intelligence. The deadline to submit comments is January 31<sup>st</sup>.

### III. USPTO Updates:

- USPTO is implementing a pilot program to evaluate the effects of permitting applicants to defer responding to subject matter eligibility (SME) rejections in certain patent applications. Under this pilot program, applicants may receive invitations to participate if their applications meet the criteria for the program as specified in this notice, including a criterion that the claims in the application necessitate rejections on SME and other patentability-related grounds. Read more about the conditions, eligibility requirements, and guidelines of the pilot program [here](#).
- On January 26<sup>th</sup>, from 2:00 – 3:15 p.m. ET, USPTO is hosting a virtual event titled “Together in Innovation: Inner space and outer space.” The program will feature remarks from the award-winning Nanodropper team and the Inspiration4 crew. More info. [here](#).
- On Tuesday, USPTO announced that it has established an administrative process for investigating submissions filed with the Office in trademark matters that appear to violate the Trademark Rules of Practice. The action is part of a broader effort by USPTO to improve the integrity of the U.S. trademark register amid a surge in fraudulent filings. The notice explains that USPTO will now identify a potentially fraudulent application based on communication from “internal sources, such as examining attorneys and data analytics personnel, or through external sources, such as Letters of Protest, the TMScams@uspto.gov mailbox, law enforcement, or media reports.” If an investigation ends without sanctions, all deadlines would be reset and the applications will be returned to the examination process. Read more [here](#) and [here](#).

### IV. Judicial Updates:

- On Thursday, the United States International Trade Commission (USITC) ruled that Google infringed on five audio technology patents held by Sonos and is not allowed to import products that violate Sonos’ IP, effective in 60 days. The products in question include Google Home smart speakers, Pixel phones and computers, and the Chromecast streaming video device. The decision will be subject to a presidential review before it takes effect. Eddie Lazarus, the chief legal officer at Sonos, called the decision an “across-the-board win that is surpassingly rare in patent cases.” Read more [here](#).
- News surfaced this week that Nike Inc. has filed a patent infringement lawsuit against Lululemon Athletica Inc. The lawsuit, which was filed in the Southern District of New York, claims that Lululemon’s Mirror Home Gym and applications infringe on Nike’s portfolio of patents. In a statement, a Lululemon spokesperson asserted that the patents in question “are overly broad and invalid.” Nike didn’t immediately respond to *The Wall Street Journal*’s request for comment. Read more [here](#).
- *Reuters* reports that Allele Biotechnology and Pharmaceuticals Inc has resolved its patent dispute with Pfizer Inc. and BioNTech SE over technology allegedly used in developing their COVID-19 vaccine. In a suit filed in 2020, Allele claimed that Pfizer and BioNTech used its patented fluorescent protein without permission in researching, developing and

testing their vaccines. In a joint statement released on Monday, the companies announced that they had resolved the dispute “in a mutually satisfactory manner.” Read more [here](#).

- On Wednesday, Snap Inc. filed a complaint in Los Angeles federal court claiming that USPTO’s Trademark Trial and Appeal Board (TTAB) was wrong to deny federal trademark protection for the company’s Spectacles smart glasses. Specifically, the complaint insists that the TTAB’s decision that the term “Spectacles” is a generic term for smart glasses is incorrect. Instead, Snap argues that the name “evokes an incongruity between an 18th century term for corrective eyewear and Snap’s high-tech 21st century smart glasses.” Furthermore, it claims that the name carries a double meaning by “encouraging users to make ‘spectacles’ of themselves.” USPTO formally refused Snap’s federal trademark application for the name in 2020, and the TTAB affirmed the decision in November. Snap is now asking the court to reverse the TTAB’s decision and direct USPTO to accept its trademark application. Read more [here](#).

## V. International Updates:

- A recently published European Parliament think tank study aimed to provide both an overview of the current state-of-play as well as a set of policy recommendations with respect to cross-border enforcement of intellectual property rights (IPRs) in the European Union (EU), with a particular emphasis on the enforcement of copyright and related rights in the online environment. The study provides a detailed analysis of the current situation of cross-border IPR enforcement and formulates various policy recommendations to improve current IPR enforcement options. Overall, the study concluded that cross-border enforcement in the EU is a rare phenomenon. “Despite the cross-border nature of most infringements occurring online, stakeholders in some sectors reported no instances of/no experience with cross-border enforcement.” Read the full report [here](#).

## VI. Industry Updates:

- On January 1<sup>st</sup>, *IP Watchdog* published an article titled, “Only in Your Dreams: Patent Stakeholders Share Their IP Wishes for the New Year.” ACG’s Marla Grossman was featured saying, “My IP wish for 2022 is that Congress finally ends the decades-long loophole that has enabled AM/FM radio broadcasters to use the music of hard-working performers without compensating them for their work. The failure of terrestrial radio to compensate the performing artists, whose sound recordings drive the success of broadcast radio, remains one of the few remaining injustices in music law. Hopefully this will be the year that Congress recognizes the value of the creators of the music that provides the soundtrack of our lives.” Read the full article [here](#).
- Advocacy groups Demand Progress and Public Citizen sent a letter to the White House shortly before Christmas asking President Biden to clarify his Administration’s stance on the European Union’s antitrust rules such as the Digital Markets and Digital Services Act. The confusion comes after Commerce Secretary Gina Raimondo criticized the proposed regulations and the US warned they could threaten companies’ intellectual property and trade secrets. Read more [here](#). The business community also shared their concerns with companies such as Yelp, Genius, Felt, Patreon, Beeper, and REX, writing that they support the Digital Markets Act and the Digital Services Act.