

## PATENT & TRADEMARK POLICY REPORT SEPTEMBER 6, 2019



### I. Congressional Developments:

- Next Wednesday, September 11<sup>th</sup>, at 2:30 p.m. ET, the Senate Judiciary IP Subcommittee is holding a hearing titled “Innovation in America: How Congress can make our patent system STRONGER.” Members will consider the bipartisan and bicameral STRONGER Patents Act of 2019 ([S. 2082/H.R.3666](#)), which Subcommittee Ranking Member Chris Coons introduced on July 10<sup>th</sup> alongside five of his colleagues in the Senate, including subpanel members Mazie Hirono (D-HI) and Richard Durbin (D-IL). This legislation seeks to strengthen the U.S. patent system through a myriad of reforms, such as harmonizing the Patent Trial and Appeal Board (PTAB) burden of proof standard with that used in district courts; allowing the USPTO to initiate review only once per patent claim; and restoring the presumption of injunctive relief upon a finding that a patent is valid and infringed. The following witnesses are slated to testify before the Subcommittee: Professor Tom Cotter (Briggs And Morgan Professor Of Law, The University of Minnesota School of Law); Bradley N. Ditty (Vice President, General Patent Counsel, InterDigital Holdings, Inc.); Dan Lang (Vice President, Intellectual Property, Cisco Systems); Professor Adam Mossoff (Professor Of Law, Antonin Scalia Law School, George Mason University); Josh Landau (Patent Counsel, Computer and Communications Industry Association); and Eb Bright (President, ExploaMed). More info. [here](#).
- Senate Judiciary Antitrust Subcommittee Chairman Mike Lee (R-UT) and Ranking Member Amy Klobuchar (D-MN) announced this week plans to convene a hearing on September 24<sup>th</sup> to examine “concerns relating to acquisitions of nascent or potential competitors by digital platforms.” In a statement, Chairman Lee explained that the subcommittee will field information from policy analysts, market participants, and other

### Headlines and Highlights:

- Senate Judiciary IP Subcommittee to hold hearing on STRONGER Patents Act (S. 2082) next Wednesday, September 11<sup>th</sup> at 2:30 p.m. ET.
- USPTO seeks public input on patent-related issues regarding AI by October 11<sup>th</sup>.
- Speaker Pelosi updates Democrats on status of USMCA negotiations with UTSR in conference call.
- USPTO to release proposal to change trademark fees “on or about” September 9<sup>th</sup>.
- U.S. and Japan announce trade deal “in principle” on the margins of the G-7 Summit.
- U.S. and China agree to convene in-person trade negotiations in DC in October.
- PPAC holds third quarterly meeting.

stakeholders on whether legislative action relating to such mergers is needed to ensure digital markets remain competitive. Ranking Member Klobuchar said she has observed a “record number of mergers that have raised serious competition issues” in recent years, and warned that “with virtually no meaningful pushback from our government, these companies have reshaped the meaning of American privacy, the purchasing of goods and services, and the workings of our elections and democracy.” The subpanel is also holding an oversight hearing on the enforcement of U.S. antitrust laws on September 17<sup>th</sup> featuring Federal Trade Commission (FTC) Chairman Joseph Simons and Department of Justice (DOJ) Assistant Attorney General (AAG) for the Antitrust Division Makan Delrahim. More info. [here](#) and [here](#).

- According to *Reuters*, the House Judiciary Antitrust Subcommittee will hold a hearing next Thursday, September 12<sup>th</sup>, to consider big technology companies’ potential impact on consumer data protection. The subpanel is expected to hear from FTC Commissioner Rohit Chopra, as well as experts from Harvard Kennedy School and the American Enterprise Institute. Read more [here](#).
- Speaker of the House Nancy Pelosi (D-CA) and other top House Democrats hosted a caucus-wide call on Tuesday to discuss the status of USMCA negotiations, which continued at a staff-level during the Congressional recess. House Ways & Means Committee Chairman Richard Neal (D-MA) apparently informed members that the House trade working group has yet to receive concrete proposals from USTR on how the Administration plans to mitigate Democrats’ four focal concerns: labor standards, environmental standards, enforcement mechanisms, and the biologics exclusivity provision. That being said, the Chairman reportedly told Democrats that he expects the pace of negotiations to increase this month. Read more [here](#).

## II. Administration Updates:

- On August 13<sup>th</sup>, FTC Chairman Joseph Simons indicated that, although messy, breaking up major technology platforms could be a remedy to rein in dominant companies and restore competition. “If you have to, you do it,” Chairman Simons said during an interview about breaking up tech companies. He added, “It’s not ideal because it’s very messy. But if you have to you have to.” Chairman Simons is overseeing a [task force](#) dedicated to monitoring competition in U.S. technology markets and investigating any potential anticompetitive conduct in those markets. Sources told *Bloomberg* that the Commission has opened a broad investigation into Facebook, “including whether the company acquired startups to thwart competition.” Some stakeholders have encouraged antitrust enforcers to unwind Facebook’s previously approved acquisitions of Instagram and WhatsApp. More info. [here](#).

## III. USPTO Updates:

- On August 22<sup>nd</sup>, the USPTO published a request for comments in the Federal Register seeking information on patent-related issues regarding artificial intelligence (AI) inventions. The USPTO will use this public feedback to evaluate whether further examination guidance is needed to promote the reliability and predictability of patenting AI inventions. The notice includes twelve questions for stakeholders to answer no later than October 11<sup>th</sup>. More info. [here](#).

- The USPTO is slated to release a proposal to change trademark fees “on or about” September 9<sup>th</sup>. As required under the Leahy-Smith America Invents Act (AIA), the Trademark Public Advisory Committee (TPAC) is holding a public hearing on the proposed trademark fees on September 23<sup>rd</sup> at 2:00 p.m. ET. Individuals interested in presenting oral testimony at the hearing must request an opportunity to do so by September 16<sup>th</sup>. Individuals may also submit written comments to the TPAC by September 30<sup>th</sup>. More info. [here](#).
- The USPTO has released a new examination guide titled "Requirement of U.S.-Licensed Attorney for Foreign Trademark Applicants and Registrants." The guide explains examination procedures in light of the USPTO’s rule, finalized July 2<sup>nd</sup>, requiring applicants, registrants, or parties to a trademark proceeding whose domicile is not located in the U.S. or its territories to be represented by an attorney who is an active member in good standing of the bar of the highest court of a state in the U.S. Read more [here](#).
- Effective September 1<sup>st</sup>, the USPTO decreased the Patent Cooperation Treaty Fee 1709: International search (Korean Intellectual Property Office) from \$1,169 to \$1,101. More info. [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](#).
- On September 19<sup>th</sup>, the USPTO his hosting a free, day-long seminar titled “Trending Issues in Trade Secrets: 2019.” The program will be livestreamed for participants who cannot attend the event at USPTO headquarters in Alexandria, Virginia. More info. [here](#).

#### **IV. Judicial Updates:**

- On Wednesday, reports surfaced that popstar Ariana Grande sued clothing retailer Forever 21 for \$10 million, accusing the retailer of trademark infringement. The complaint alleges that Forever 21 and Riley Rose beauty company published “at least 30” unauthorized images and videos misappropriating her name, image, likeness and music to deceive consumers that the company had Ariana Grande’s endorsement. Grande and her legal team also accuse Forever 21 of hiring a model who looks “strikingly similar” and using audio and lyrics from one of Grande’s recent hit singles. More info. [here](#).

#### **V. International Updates:**

- On the margins of the G-7 Summit on August 25<sup>th</sup>, President Donald Trump and Japanese Prime Minister Shinzo Abe announced that the two nations have reached a trade deal “in principle,” and are planning to sign a formal deal on the sidelines of the September United Nations General Assembly meeting in New York. USTR Lighthizer has said that the deal addresses industrial tariffs, agriculture, and digital trade. The preliminary agreement does not eliminate the existing 2.5 percent tariffs on the importation of Japanese vehicles or major auto parts. However, Japan has maintained that it will not sign a deal unless it secures an exemption from the U.S’ potential Section 232 tariffs on autos and auto parts. Negotiators from both countries are now working to get documents drawn up for Trump and Abe to sign next month. Read more [here](#).

- Following a phone call on Thursday between China’s top trade negotiator Vice Premier Liu, U.S. Treasury Secretary Steven Mnuchin, and USTR Lighthizer, news broke that the U.S. and China have agreed to resume trade talks in Washington, DC next month. Deputy-level officials are expected to convene discussions this month to prepare for the October meeting. This was welcome news after weeks of rising tensions in the tit-for-tat trade dispute, culminating in President Trump ordering domestic companies to “immediately start looking for an alternative to China” via [tweet](#) on August 23<sup>rd</sup>.
- Tensions rose quickly after USTR outlined the U.S.’ plan to impose 10% tariffs on approximately \$300 billion worth of Chinese goods through two tranches, with \$112 billion worth of Chinese goods being hit on September 1<sup>st</sup>, and the imposition of tariffs on another \$160 worth of Chinese goods being delayed to December 15<sup>th</sup> to offer some reprieve for certain products during the holiday season. China retaliated with tariffs of 5% or 10% on about \$75 billion worth of U.S. goods—effective September 1<sup>st</sup>. Shortly after China unveiled these retaliatory plans, President Trump ratcheted up his trade actions against China in a [series of tweets](#) on August 23<sup>rd</sup>. First, Trump announced plans to raise the existing tariffs on the imports of \$250 billion worth of Chinese goods from the existing 25% level to 30% on October 1<sup>st</sup>. Second, the President announced that the U.S. would increase the rate on the \$300 billion tariff bundle from 10% to 15%. Finally, the President [declared](#) that American companies are “hereby ordered to immediately start looking for an alternative to China,” suggesting that companies instead produce products in the USA. The Federal Register notices from the USTR executing these actions can be found [here](#) and [here](#).

## VI. Industry Updates:

- On August 8<sup>th</sup>, the USPTO and the PPAC held its third quarterly meeting. At this PPAC meeting, Director Iancu and other USPTO officials addressed: section 101, fee adjustment, IT modernization, the SUCCESS Act, PTAB proceedings, international developments, recent congressional hearings, and the USPTO budget. On section 101, Director Iancu emphasized its importance and lauded the USPTO’s efforts in this area. Director Iancu and Sean Mildrew (Acting Chief Financial Officer) noted that the notice of fee rulemaking is the result of a comprehensive biannual review and necessary to conduct patent operations, including implementing the USPTO’s strategic plan. Jamie Holcombe (CIO) discussed new agile pilot teams to develop initiatives to improve security. Kimberly Alton (Deputy Director, Office of Government Affairs) discussed SUCCESS Act outreach, briefly recapped recent congressional hearings, and delivered the USPTO’s legislative priorities. Scott Boalick (Chief Judge, PTAB) detailed new decisions that were deemed precedential. Mark Powell (Deputy Commissioners for International Patent Cooperation) highlighted the USPTO’s collaboration with international patent offices and attachés. And lastly, Sean Mildrew provided a status update of the FY2019 budget, discussed the FY2020 budget, and acknowledged that the USPTO is working on its 2021 OMB budget submission. More info. [here](#).