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PATENT & TRADEMARK POLICY REPORT JUNE 7, 2019



I. Congressional Developments:

- This week, the Senate Judiciary IP Subcommittee heard from thirty witnesses testifying on behalf of various bar associations, trade associations, and interest groups, during the first two hearings in its series on patent eligibility. The purpose of this series is to collect feedback on the [draft legislation](#) to address concerns about the uncertainty surrounding patent eligibility recently released by Sens. Thom Tillis (R-NC) and Chris Coons (D-DE), Chairman and Ranking Member of the Senate Judiciary IP Subcommittee, and their colleagues Reps. Doug Collins (R-GA), Ranking Member of the House Judiciary Committee, Hank Johnson (D-GA), Chairman of the House Judiciary IP Subcommittee, and Steve Stivers (R-OH). During the first hearing on Tuesday, the majority of witnesses favored the draft proposal, while noting some areas they believe need additional assessment and critiquing. Specifically, several witnesses raised concerns with the potential confusion that could arise from defining “technology” in Section 100 (k) and with some ambiguity in Section 112(f). Judge Paul Michel noted in his testimony that even as an experienced judge, he could no longer make a strong determination on what is patent subject matter eligible. Former USPTO Director David Kappos had strong words for the state of play, calling current patent eligibility law a “mess.” On the other hand, Alex Moss from the Electronic Frontier Foundation was the most outspoken opponent of the draft proposal, claiming that *Alice* has protected small businesses from what she categorized as baseless patent licensing demand and litigation threats. More info. [here](#).
- During the second hearing on Thursday, Chairman Tillis explained that he invited several large tech companies to testify before the Subcommittee, but they declined his invitation and

Headlines and Highlights:

- Senate Judiciary IP Subcommittee holds first two hearings in patent eligibility series, collects industry feedback on lawmakers’ discussion draft seeking to increase certainty in this area.
- Final hearing in the Senate Judiciary IP Subcommittee’s series on patent eligibility scheduled for next Tuesday, June 11th, at 2:30 p.m. ET.
- House Judiciary Committee lawmakers announce antitrust probe of tech behemoths.
- New Democrat Coalition outlines priorities for USMCA.
- Director Iancu and Chairman Johnson underscore the threats posed by counterfeits to brands and consumers.
- FTC and DOJ reportedly reviewing potential antitrust concerns surrounding certain big tech companies.

instead decided to only be represented through the High Tech Inventors Alliance. Chairman Tillis reminded stakeholders that “silence is consent” in the legislative drafting process and urged all interested parties to provide their input. Several witnesses, including all of the bar associations represented on the panels, were either optimistic or explicitly offered their support for the piece of the discussion draft that amends Section 101 of the U.S. Patent Act, suggesting that this reform would increase certainty in patent eligibility in the U.S., which they claim has been muddled by a slew of federal court decisions over the last decade. However, these witnesses also reiterated the previous day’s concerns about sections 112(f) and 100(k) in the discussion draft. Witnesses who expressed their opposition to the legislation were mainly concerned that it was overly broad and would have unintended consequences. Several witnesses raised concern that the discussion draft would allow for the patenting of business methods, fundamental scientific principles, and mathematical equations. For instance, David Jones with the High Tech Inventors Alliance (HTIA) cautioned that the legislative proposal would erase barriers to patenting non-technological subject matter by overruling the rule against patenting abstract ideas. Additionally, some critics—most notably Ms. Kate Ruane with the American Civil Liberties Union (ACLU)—warned that the new discussion draft would allow for the patenting of laws of nature, including naturally occurring correlations and processes and products of nature, like human genes. Chairman Tillis and Ranking Member Coons both pushed back on this claim, pointing out that the human genome has already been mapped. More info [here](#).

- The third and final hearing in the Senate Judiciary IP Subcommittee’s series on patent eligibility is scheduled for next Tuesday, June 11th, at 2:30 p.m. ET. The Subcommittee will once again hear from three panels of five witnesses. More info. [here](#).
- On Monday, House Judiciary Committee lawmakers announced plans to conduct a bipartisan antitrust review of Facebook, Google, and other technology behemoths. Rep. David Cicilline (D-RI), who chairs the House Judiciary Antitrust Subcommittee, explained to reporters that his subpanel will lead a “broad investigation” of these platforms “with an eye toward developing kind of a deeper understanding of how the market is failing why the internet is broken and why it’s not functioning well.” Chairman Cicilline also noted that the group of lawmakers will then consider legislative actions to mitigate any concerns arising from the probe. Read more [here](#).
- On Tuesday, June 11th, at 2:00 p.m. ET, the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law will hold a hearing titled “Online Platforms and Market Power: Part I: The Free and Diverse Press.” No witness list has yet been announced. More info. [here](#).
- On Wednesday, June 12th, at 2:30 p.m. ET, the Senate Judiciary Antitrust Subcommittee will hold a hearing titled “Your Doctor/Pharmacist/Insurer Will See You Now: Competitive Implications of Vertical Consolidation in the Healthcare Industry.” More info. [here](#).
- On Wednesday, June 12th, at 10:00 a.m. ET, the Senate Commerce Committee will hold an oversight hearing of the Federal Communications Commission (FCC). The hearing will feature all five FCC Commissioners. More info [here](#).
- On Thursday, the New Democrat Coalition released its three priorities for the United States–Mexico–Canada Agreement (USMCA). First, the coalition wants to “restore confidence in

the U.S.’ trade relationship with our North American allies.” This includes President Trump rescinding the unilateral tariffs on Mexico, maintaining the removal of Section 232 tariffs on steel and aluminum from Canada and Mexico, eliminating the U.S.’ threat to withdraw from the North American Free Trade Agreement (NAFTA), and reauthorizing the Export-Import Bank. Second, the coalition identifies strengthening enforcement, labor, and environmental commitments in the new agreement as a priority, and supports the establishment of working groups among House Democrats to iron out these potential concerns. Finally, the group wants to use the momentum behind updating NAFTA to advance a bipartisan domestic priority, such as an infrastructure package, a bill to close the workforce skills and opportunity gap, or increasing the federal minimum wage. Support from House Democrats for the USMCA will be critical to sending legislation to implement the new pact to the President’s desk. Read more [here](#).

- In her weekly press conference on Thursday, Speaker of the House Nancy Pelosi maintained her primary concern with the USMCA is whether the agreement is enforceable, and insisted that this issue must be addressed as part of the agreement and not “as part of a sidebar letter or bills that we might pass in each country.” Read a full transcript of Speaker Pelosi’s remarks online [here](#).

II. Administration Updates:

- Reports surfaced this week that the Federal Trade Commission (FTC) and the Department of Justice (DOJ) are also reviewing potential antitrust concerns surrounding technology behemoths. Sources told *Reuters* that the FTC is reviewing Amazon and Facebook, while the DOJ is looking into Apple and Google. Read more [here](#).
- After President Trump threatened to impose tariffs on all Mexican goods last Thursday, representatives from Mexico visited Washington this week to meet with the administration. President Trump has linked the 5% tariff to his immigration agenda, calling on Mexico to stem the flow of migrants at the U.S.-Mexico Border. Mexican Foreign Secretary Marcel Ebrard met with senior White House officials on Wednesday to discuss what Mexico was doing to address the issue and to come up with a joint strategy. Those close to the meeting reported that the White House focused on what Mexico needed to handle the situation. So far, the administration has called on Mexico to secure its own southern border with Guatemala, but has offered no metric to determine if Mexico was doing enough. After the meeting, Foreign Minister Ebrard said that he was “optimistic” that the U.S. and Mexico could reach an agreement. President Trump took to [Twitter](#) on Wednesday to show his displeasure with current Mexican efforts stating, “Progress is being made, but nearly enough!” Absent a deal, the tariffs are slated to take effect on Monday, June 10th. Read more [here](#).

III. USPTO Updates:

- On Friday, USPTO Director Andrei Iancu and Chief Information Officer Jamie Holcombe penned a blog in the USPTO Director’s Forum titled “Continuing to improve our IT infrastructure.” In the post, they announced that over Memorial Day weekend, the USPTO transitioned a critical part of the Patent Application Locating and Monitoring (PALM) application to a new, more modern, stable and resilient server platform. Read more [here](#).

- On Thursday, the USPTO, in conjunction with the McCarthy Institute, held a forum on [Brand Protection and Anti-counterfeiting Strategies](#) featuring over twenty prominent voices from both academia and industry. USPTO Director Andrei Iancu opened the forum, and House IP Subcommittee Chairman Johnson gave the keynote address. During his opening remarks, Director Iancu said reports suggest that counterfeited goods make up three percent of global trade and warned that the digital marketplace allows nefarious actors to use new deceptive tactics to sell counterfeited goods. Next, Chairman Johnson highlighted how counterfeit goods erode consumer trust and devalue brands. Johnson charged the IP community with proactively recruiting the legislature, the president, relevant regulatory bodies, and the public, into a unified front to restore brands and prevent counterfeiting. More info. [here](#).
- On Wednesday, the EFF-Web and Private PAIR became unavailable until further notice. More info. [here](#).
- On September 9th, 10th, and 11th, 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 Tuesday, International Trade Commission (ITC) Administrative Law Judge MaryJoan McNamara ruled that Comcast's receivers infringe patented technology, deciding that the cable-giant must pay licensing fees to the patent holder, TiVo, if it wants to offer some DVR features to its customers. Judge McNamara's ruling must be reviewed by the full ITC Commission before a formal exclusion order would be levied against Comcast. Additionally, McNamara dismissed TiVo's infringement claims for two other patents. Read more [here](#).

V. International Updates:

- At the International Trademark Association (INTA) Annual Meeting last month, Christian Archambeau, Executive Director of the European Union IP Office (EUIPO), told reporters that IP rights face "a challenging future." Archambeau cited the obstacles posed by Brexit, international cooperation, artificial intelligence tools, and blockchain, as some of his primary concerns. Archambeau was pleased to report that EUIPO is working on projects to promote IP systems outside of Europe, notably in southeast Asia, Latin America, and Africa. Archambeau stated that the Office is enthusiastic to partner with other patent offices in this initiative, including the USPTO. More info. [here](#).

VI. Industry Updates:

- In the latest turn events in a feud between the two exercise bike class companies, reports surfaced this week that the Patent Trial and Appeal Board (PTAB) has agreed to take a second look at the validity of three of Peloton's patents after finding that Flywheel has established a "reasonable likelihood" of winning its argument that the patents cover old ideas. Read more [here](#).