

## PATENT & TRADEMARK POLICY REPORT

### MAY 17, 2019



#### I. Congressional Developments:

- On Tuesday, May 21<sup>st</sup>, at 10:00 a.m. ET, the Senate Judiciary Committee is slated to hold a hearing on “Digital Advertising Ecosystem and the Impact of Data Privacy and Competition Policy.” No witnesses are listed yet. More info. [here](#).
- On Tuesday, May 21<sup>st</sup>, at 2:30 p.m. ET, the Senate Commerce Subcommittee on Communications, Technology, Innovation, and the Internet will convene a hearing on “Optimizing for Engagement: Understanding the Use of Persuasive Technology on Internet Platforms.” The hearing will examine “how algorithmic decision-making and machine learning on internet platforms influence the public.” The witnesses are: Dean Eckles (Assistant Professor of Marketing, MIT Sloan School of Management), Tristan Harris (Co-Founder and Executive Director, Center for Humane Technology), Jason Hreha (Former Head of Behavioral Science, Walmart), and Maggie Stanphill (Director, Google User Experience, Google, Inc.). More info. [here](#).
- On Tuesday, May 21<sup>st</sup>, at 10:30 a.m. ET, the House Energy & Commerce Health Subcommittee will hold a hearing titled “Improving Drug Pricing Transparency and Lowering Prices for American Consumers.” Witnesses have yet to be announced. More info. [here](#).
- On Wednesday, May 22<sup>nd</sup>, at 10:00 a.m. ET, the House Ways & Means Trade Subcommittee is scheduled to hold a hearing on “Enforcement in the new NAFTA.” No witnesses are listed yet. On April 25<sup>th</sup>, House Ways & Means Committee Democrats sent United States Trade Representative (USTR) Robert Lighthizer a letter highlighting their concerns with enforcement provisions in the United States–Mexico–Canada Agreement

#### Headlines and Highlights:

- Next Tuesday, the House Energy & Commerce Health Subcommittee will hold a hearing on improving drug pricing transparency.
- House Leadership discusses the USMCA with USTR.
- Members on the Senate Judiciary Committee discuss importance of SEPs for critical technology, including 5G and IoT.
- High Tech Inventors Alliance re-invigorates federal lobbying presence to weigh in on efforts to reform Section 101 and IPR proceedings.
- USPTO Director’s Forum blog provides spotlight on Charles Kim, Director of the Office of Petitions.
- Supreme Court holds that Apple app buyers can sue the company for allegedly using monopoly power to drive up prices.

(USMCA). More info. [here](#).

- After the House Leadership met with United States Trade Representative (USTR) Robert Lighthizer to discuss the USMCA Wednesday afternoon, Chair of the House Democratic Caucus Hakeem Jeffries told reporters that USTR Lighthizer understood the lawmakers' concerns, and the need to reach a resolution with Democrats to advance legislation to implement the pact through Congress. Despite this apparently productive discussion, Jeffries explained that Lighthizer would not speak "one way or the other about the mechanics of reopening the text," and the group did not discuss a timeline for putting implementation legislation to a vote. Notably, Jeffries also told *POLITICO* that "the desire of the overwhelming majority of the Democratic caucus is to try and get to a yes." Read more [here](#).
- On Tuesday, the Senate Judiciary Committee held a hearing titled "5G: National Security Concerns, Intellectual Property Issues, and the Impact on Competition and Innovation." The Committee heard from two panels of witnesses representing the federal government, academia, and industry about the deployment of 5G in the U.S. and the risks associated with using global vendors, particularly with Chinese firms such as Huawei. There seemed to be a consensus among panelists and members on both sides of the aisle that relying on Chinese equipment firms to deploy and maintain 5G technology would pose a significant threat to the United States' telecommunications network. Several senators, including Amy Klobuchar (D-MN), Chris Coons (D-DE), and Marsha Blackburn (R-TN), were also concerned that China has attempted to control the international standard setting process for key technologies such as 5G and the internet of things (IoT). Sen. Coons underscored that standards-essential patents (SEPs) will be critical for wins the race for 5G. He cautioned that China and South Korea are outpacing the U.S. in SEPs, which will determine who sets the standard and who benefits from them. Read more [here](#).
- Several members on the Senate Judiciary Committee announced bills that seek to address some of the issues discussed during the hearing. First, Sen. Josh Hawley (R-MO) announced that he introduced the "[China Technology Transfer Control Act](#)" earlier in the day, which calls for placing China's core technologies on the Commerce Department's export control list and for sanctions on foreign entities and individuals who help U.S. businesses skirt these export controls. Second, Sen. Marsha Blackburn (R-TN) was pleased to announce that she introduced legislation with Sen. John Cornyn (R-TX) to address and better understand the supply chain threats in 5G networks, titled the [SUPPLY CHAIN Act](#).

## II. Administration Updates:

- On Wednesday, President Trump issued an executive order declaring a national emergency and delegating authority to the Secretary of Commerce to prohibit U.S. companies from buying foreign-made telecommunications equipment deemed a national security risk. Read more [here](#).
- On Monday, in a proposal to modify the action being taken in its Section 301 investigation of the acts, policies, and practices of the Government of China related to technology transfer, IP, and innovation, the USTR begun the necessary process for initiating an additional *ad valorem* duty of up to twenty-five percent on products from China with an annual trade value of approximately \$300 billion. The Administration has apparently not yet reached a final

decision on whether to levy these tariffs, and has scheduled a public hearing on this matter at the U.S. International Trade Commission (USITC) on June 17<sup>th</sup>. Read more [here](#).

### III. USPTO Updates:

- As part of its Spotlight on Commerce series highlighting the contributions of Department of Commerce employees in honor of Asian American and Pacific Islander (AAPI) Heritage Month, the USPTO published a spotlight on Charles Kim, Director of the Office of Petitions, in its Director's Forum blog. Director Kim oversees a group of petitioners, examiners, attorneys, and paralegals that review over 45 different types of petitions and issue approximately 40,000 petition decisions annually. Kim was born in Seoul, South Korea and immigrated to the U.S. when he was four years old. He reflects on the sacrifices his parents made to give him the opportunity to have a brighter future. Kim writes that he views AAPI Heritage month as an "opportunity to reflect on the perseverance, sacrifice, and hard work of the many Asian American and Pacific Islanders that came before me to help build the foundation for future Asian American and Pacific Islander generations to become successful leaders across business and government, and to continue to advance our great nation." Read more [here](#).
- Last week, the USPTO [announced](#) that the Trademark Status and Document Retrieval (TSDR) system would be unavailable starting May 7<sup>th</sup> for at least two weeks. TSDR, which allows users to check the status of trademark applications and registrations, runs on a software called *Feathers!*. The creator of the software, Carl Oppedahl, posted on his blog last week that Commissioner of Trademarks Mary Boney Denison called to inform him that the USPTO would have to pull the plug on TSDR because data miners have been making so many high volume queries to the USPTO's systems that "Examining Attorneys are not able to do their jobs because they cannot look things up in their own internal trademark database systems." Read more [here](#).
- EFF-Web, Private PAIR, and Public Pair will be unavailable from Friday, May 24<sup>th</sup>, at 11:50 p.m. ET to Monday, May 27<sup>th</sup>, at 5:00 p.m. ET. More info. [here](#).
- The USPTO is hosting a free, full-day conference on brand protection and anti-counterfeiting strategies at its headquarters in Alexandria, Virginia, on June 6<sup>th</sup>. Experts from the government and private sector are expected to participate and the event will be livestreamed for participants who cannot attend in person. Featured speakers will include Director Andrei Iancu and other USPTO executives. More info. [here](#).
- The USPTO is holding a virtual instructor lead (vILT) course titled "Claim Interpretation" on June 4<sup>th</sup> and 5<sup>th</sup>. Interested participants must sign up by May 19<sup>th</sup> to attend. 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](#).

### IV. Judicial Updates:

- In a 5-4 decision announced Monday, the Supreme Court upheld the Ninth Circuit Court of Appeals' decision in *Apple v. Pepper* that Apple app buyers could sue the company for

allegedly using monopoly power to drive up prices. In an unusual court alignment, Justice Brett Kavanaugh, who wrote the majority opinion, was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan and Sonia Sotomayor. The class-action lawsuit focuses on the cut of fees that Apple takes from its App store sales. App makers and other consumers have long complained that the fees and other practices are unfair. Apple could be subject to massive damages if it loses the lawsuit, and a ruling that forces Apple to reduce its share of app sales would likely have an even longer-term effect on the company. Read more [here](#).

- On Monday, the U.S. Court of Appeals for the Federal Circuit ruled that a CEO cannot ask the government to cancel a trademark because he/she declined to hire a counsel to defend allegations of infringement. Read more [here](#).

## **V. International Updates:**

- On Monday, in response to the U.S. tariff hike on \$200 billion worth of Chinese products from ten percent to twenty-five percent that took effect on May 10<sup>th</sup>, China announced that it will increase tariffs imposed on approximately \$60 billion of U.S. goods on June 1<sup>st</sup>. These retaliatory tariffs will be imposed at the following levels, twenty-five percent tariffs on 2,493 items from current ten percent; twenty percent tariffs on 1,078 items from current ten percent; ten percent tariffs on 874 items from current five percent; and five percent tariffs to continue on 595 items. Read more [here](#).

## **VI. Industry Updates:**

- Reports surfaced this week that Adobe, Amazon, Cisco, Dell, Google, Intel, Oracle, and Salesforce have organized under a coalition called the High Tech Inventors Alliance. The coalition launched several years ago but recently brought on board its first executive director David Jones, formerly Assistant General Counsel for IP Policy at Microsoft. It also hired the Franklin Square Group to lobby on its behalf. According to *POLITICO*, the group is lobbying on potential changes to Section 101 and the inter partes review process. Read more [here](#).
- Gopher Protocol, a company that specializes in the development of IoT and artificial intelligence (AI) technologies, announced today that it has filed for international patent protection for its database sharing management patent. This technology is targeted to work with Gopher's private, secured communication protocol. This database also adds a significant layer of cyber security to Gopher's network. Gopher's CTO, Danny Rittman, stated that "By filing an international patent application under the PCT, we simultaneously seek protection for our database invention in a very large number of countries." Read more [here](#).