

## PATENT & TRADEMARK POLICY REPORT

### MAY 24, 2019



#### I. Congressional Developments:

- On Thursday, Sens. Thom Tillis (R-NC) and Chris Coons (D-DE), Chairman and Ranking Member of the Senate Judiciary IP Subcommittee, joined 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), in releasing draft legislation to reform Section 101 of the Patent Act. The members held a series of stakeholder roundtables to solicit feedback on how this statute can be revised to increase clarity in court decisions surrounding patent eligibility. The draft bill is based on the framework released by the group of lawmakers in April, and is still subject to change pending stakeholder feedback. Read more [here](#).
- On Wednesday, the House Ways & Means Trade Subcommittee held a hearing titled “Enforcement in the new NAFTA.” As expected, Democrats used the hearing to drill down on their concerns regarding the lack of enforcement mechanisms in the United States–Mexico–Canada Agreement (USMCA), and particularly with respect to the labor and environment standards included in the new pact. Democrats, whose support in the House will be essential to sending legislation to President Trump’s desk to implement the new trade agreement this year, seemed to agree that policymakers must iron out these enforcement concerns before many members of the caucus will consider endorsing the proposal. To mitigate their concerns, witnesses cited frameworks from previous trade agreements, such as the forestry annex added to the United States’ free trade agreement with Peru, in addition to Sens. Ron Wyden (D-OR) and Sherrod Brown’s (D-OH) proposal to equip countries with tools to address labor violation concerns. Democrats were also highly critical of the Trump Administration’s suggestion that

#### Headlines and Highlights:

- Sens. Tillis, Coons, and Reps. Collins, Johnson, and Stivers, release draft legislation to reform Section 101 of the Patent Act.
- House Democrats drill down on enforcement concerns in USMCA hearing.
- Trump Administration lifts steel and aluminum tariffs from Mexico and Canada.
- U.S. District Judge Lucy H. Koh rules in favor of the FTC in its suit against Qualcomm.
- Supreme Court rules that a bankruptcy debtor’s rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy.
- Director Iancu discusses apparent increase in bad-faith trademark applications originating from overseas at INTA’s annual meeting.

Section 301 investigations and tariffs could be used to hold countries accountable to the USMCA's standards. Republicans, on the other hand, appeared united in their sentiment that all provisions in the USMCA must be enforceable, including the labor and environment standards. Overall, there was little discussion about the IP standards in the new pact, although several members, including Ranking Member Vern Buchanan (R-FL) and Rep. George Holding (R-NC), touted the USMCA's elevated IP standards while listing the agreement's many perceived benefits. Watch online [here](#).

- On Wednesday, Senator Ron Wyden (D-OR), Ranking Member of the Senate Finance Committee, said in a letter to United States Trade Representative (USTR) Robert Lighthizer that he still had concerns about USMCA's mechanisms for resolving investor state disputes. Sen. Wyden wrote that the renegotiated trade agreement with Canada and Mexico had "some improvements" for resolving disputes but "essentially replicates" the failings of the original North American Free Trade Agreement (NAFTA). Sen. Wyden also reiterated concerns expressed by some Democrats regarding skepticism of Mexico's ability and willingness to enforce the new labor commitments in the deal. He concluded his letter by stating that "the Administration's justification for this mechanism has only increased my worry that the new Agreement will not be enforced." Read more [here](#).

## **II. Administration Updates:**

- Last Friday, President Trump announced plans to lift steel and aluminum tariffs imposed on imports from Canada and Mexico, easing the passage to approval of the new North American trade pact. In addition to lifting the tariffs, the U.S. is expected to not impose quotas in their place. As outlined by the USTR's joint statements with Canada and Mexico, the tariffs of 25 percent on steel and 10 percent on aluminum were eliminated within two days of the announcement. In exchange, Canada and Mexico lifted retaliatory tariffs they had imposed a slew of U.S. goods, including agricultural products. The deal came together quickly after months of deadlock between the U.S. and its two trading partners. Canadian Foreign Affairs Minister Chrystia Freeland met with USTR Robert Lighthizer last Wednesday, and was presented with an amenable deal- no tariffs, no quotas, and a promise to create a mechanism to limit Chinese steel imports. The USTR called the details of the deal "great news" for American farmers and industries, and Canada and Mexico were similarly upbeat about the agreement. Read more [here](#).

## **III. USPTO Updates:**

- 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](#).
- 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:

- U.S. District Judge Lucy H. Koh ruled in favor of the Federal Trade Commission (FTC) in its suit against Qualcomm this week. The FTC had filed a complaint in federal district court charging the chipmaker's alleged "no license, no chip" practice of pegging patent royalties to the price of a device is anti-competitive. Read more [here](#) and read *WSJ* Editorial [here](#).
- On Monday, in an 8-1 decision, the U.S. Supreme Court ruled in *Mission Product Holdings Inc. v. Tempnology, LLC* that a bankruptcy debtor's rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy; such an act thus cannot rescind rights that the contract previously granted. Tempnology developed cooling fabrics for athletic apparel in accessories and granted a license to Mission Product Holdings to sell its patented products and use its trademark in connection with that activity. When Tempnology later filed for bankruptcy, it rejected the license in hopes that it could relicense the technology and trademark at a higher price. Mission Product, on the other hand, claimed that Tempnology's rejection of the contract did not rescind Mission Product's rights to sell the products in question and use Tempnology's mark. In a majority opinion delivered by Justice Kagan, the Supreme Court agreed with Mission Product's assessment of the bankruptcy code. Justice Sotomayor filed a concurring opinion and Justice Gorsuch filed a dissenting opinion. The International Trademark Association previously called the issue presented by this case "the most significant unresolved legal issue in trademark licensing." Read more [here](#).

#### V. International Updates:

- According to a document obtained by *The Wall Street Journal*, the Competition Commission of India is assessing the domestic e-commerce sector. The document indicates that Ernst & Young is conducting the study to understand the evolution of the industry, firms' methods and strategies, business practices, and "implications for competition." An official from India's Ministry of Corporate Affairs, which oversees the Competition Commission, told *The Wall Street Journal*, "What if tomorrow Amazon takes over Walmart-controlled Flipkart or vice versa? Wouldn't there be a complete monopoly? This needs to be checked." However, it should be noted that a disclaimer in the document explains that the study is "purely a fact-finding exercise." Read more [here](#).

#### VI. Industry Updates:

- On Monday, USPTO Director Andrei Iancu spoke at the International Trademark Association's (INTA) 141<sup>st</sup> Annual Meeting. According to his prepared remarks, Director Iancu highlighted that studies indicate that businesses leveraging the power of brands and brand protection grow faster than comparable firms. For instance, new firms that file for a trademark registration tend to experience faster employment growth than similar firms that do not file upon formation. Furthermore, Director Iancu touted that trademark-intensive industries generate significant growth for the U.S. economy, citing that these industries accounted for 23.7 million jobs in 2014 and \$6.1 trillion in value added to the U.S. economy. Speaking about opportunities for improvement to the U.S. trademark system, Director Iancu said the USPTO has observed a surge in improper submissions and bad faith behavior, and noted that a "significant and increasing number" of these submissions are apparently come from overseas. To mitigate this issue, the USPTO recently issued a proposed rule that those

with a foreign-domicile must have a lawyer licensed to practice law in the U.S. to represent them in any trademark matter at the USPTO. The USPTO also established a working group to devise changes to its practices to defend against various threats. Read more [here](#).