

## PATENT & TRADEMARK POLICY REPORT

### NOVEMBER 15, 2019



#### I. Congressional Developments:

- On Wednesday, the House Judiciary Antitrust Subcommittee held a hearing titled “Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies.” Witnesses included [Makan Delrahim](#) (Assistant Attorney General, Antitrust Division) and [Joseph Simons](#) (Chairman, Federal Trade Commission). During the Q&A portion of the hearing, Chairman Cicilline asked AAG Delrahim about the role that behavioral data collection plays in antitrust enforcement inquiries. Delrahim responded that behavioral data collection tends to fall outside antitrust inquiries. Chairman Cicilline argued, “Google’s proposed acquisition of Fitbit would threaten to give it yet another way to surveil users and entrench its monopoly power online.” In highlighting the prospective merger, Cicilline asked Delrahim whether he thinks the DOJ needs to consider a merger moratorium for large online platforms. Delrahim rejected the idea of such a moratorium, warning it could hurt consumers. However, Delrahim seemed to entertain the changing the burden of proof for large mergers when Cicilline suggested a “qualified moratorium — a moratorium unless it was demonstrated to be pro-competitive.” Delrahim responded “I don’t have a clear administration on that, but we’d be delighted to explore that with you.” More info. [Here](#).
- On Thursday, the House Committee on Small Business held a hearing titled “A Fair Playing Field? Investigating Big Tech’s Impact on Small Business.” Panel 1 featured testimony from the following witnesses: [Mr. Dharmesh M. Mehta](#) (Vice President, Customer Trust and Partner Support, Amazon), [Ms. Erica Swanson](#) (Head of Community Engagement, Grow with Google, Google), and [Dr. Joe Kennedy](#) (Senior Fellow, Information Technology & Innovation Foundation). Panel 2 featured

#### Headlines and Highlights:

- PPAC holds its final meeting of the year
- House Judiciary holds fourth hearing on Online Platforms and Market power featuring testimony from FTC Chairman Joe Simons and AAG Makan Delrahim
- House Small Business Committee holds a hearing on Big Tech’s impact on Small Business
- Senate Judiciary Hearing on Copyright Office Modernization set for the second week of December
- House Judiciary Panel to Hold Hearing on November 19<sup>th</sup> to examine the recent Federal Circuit decision in the *Anthrax* case
- Speaker of the House Nancy Pelosi indicates that USMCA deal between House Democrats and the Trump Administration is “imminent.”

Testimony from the following witnesses: [Ms. Allyson Cavaretta](#) (Principal and Owner, Meadowmere Resort), [Mr. Molson Hart](#) (CEO, Viahart Toy Co.), [Mr. Harold Feld](#) (Senior Vice President, Public Knowledge), [Ms. Theo Prodromitis](#) (Co-Founder and CEO, Spa Destinations), [Mr. Jake Ward](#) (President, Connected Commerce Council), and [Mr. Graham Dufault](#) (Senior Director for Public Policy, ACT | The App Association). Throughout the hearing, the platforms emphasized the market access and educational assistance that their services provide to small businesses. From Fulfillment by Amazon, to Google's free Business Profiles, the platforms tried to illustrate the increase in business and growth potential that their services provide. Lastly, while intellectual property was not a large component of the hearing, both companies' arguments that their platforms help protect customers and brands by validating the authenticity of products were supported by representatives and witnesses alike. More info. [Here](#).

- Next Tuesday at 2pm, the House Judiciary IP Subcommittee will hold a hearing titled "The Patent Trial and Appeal Board and the Appointments Clause: Implications of Recent Court Decisions." The IP subcommittee members will examine the recent Federal Circuit decision that PTAB administrative judges were unconstitutionally approved. The hearing will discuss how the ruling in *Arthrex v. Smith & Nephew* affects litigants and attorneys filing challenges at the PTAB. The subcommittee has yet to release the slate of witnesses. More info. [Here](#).

## II. Administration Updates:

- On Tuesday, President Trump stated that negotiations with China on a preliminary trade deal are moving forward and a deal may be imminent. At remarks given at the Economic Club of New York, President Trump stated "We're close. A significant phase one trade deal with China could happen, could happen soon." These comments indicate that the Trump Administration is progressing on the phase one deal announced last month. Despite the progress, President Trump warned that "If we don't make a deal we're going to substantially raise those tariffs." POLITICO reported that in return for Chinese concessions, President Trump is expected to suspend the 15 percent tariffs on roughly \$160 billion worth of Chinese goods slated to take effect December 15<sup>th</sup>. More info. [here](#).

## III. USPTO Updates:

- On Thursday, the Patent Public Advisory Committee (PPAC) held its final meeting of the year. PPAC Chair Marylee Jenkins moderated the meeting, USPTO Director Andrei Iancu delivered opening remarks, and several other USPTO officials delivered updates and presentations. Director Iancu's opening remarks largely resembled his speech at the most recent TPAC meeting and remarks given at recent events. Iancu remarked that the Agency has achieved its pendency goals- under 24 months for total pendency and under 15 for first action pendency. This marks the lowest pendency time since 2002, despite a huge spike in the volume of applications. Iancu noted that the Agency has now accomplished one of its primary tenants in its 2018-2020 strategic plan- processing applications in a timely manner. Team actions have led to a decrease in average processing time from 26.2 days down to 6.8 days. Director Iancu also remarked that he is proud of the USPTO's efforts to improve section 101 subject matter eligibility guidance. This guidance has synthesized the law in a way that makes sense and can be applied in a consistent manner by employees. Director

Iancu concluded his opening remarks by providing an update on the Agency’s “critically important” IT modernization efforts. Lastly, Director Iancu was asked about the recent Federal circuit decision in the *Anthrax* case, but did not comment.

- On Wednesday, the USPTO issued a federal register notice inviting comments on the extension of an existing information collection, as required by the Paperwork Reduction Act of 1995. The collection of information covers the submission of issue fee payments to the USPTO. Written comments must be submitted on or before January 13, 2020. More info. [Here](#).

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

- On Tuesday, a New Jersey company filed a lawsuit against Italian Coffee maker Lavazza for allegedly wrongful IP infringement claims. The plaintiff, Berditchev Co. of New Jersey, accused Lavazza of stifling competition by making false reports to Amazon that resellers are violating its intellectual property rights. The plaintiff contends that it is lawfully permitted to resell Lavazza products without violating the company’s intellectual property rights under the first sale doctrine. While the producer of the brand name goods is usually the plaintiff, the case draws parallels to the 2018 Williams-Sonoma lawsuit against Amazon. The judge in this case denied Amazon’s motion to dismiss after it first cited the first sale doctrine. More info. [Here](#).

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

- On Thursday, Speaker of the House Nancy Pelosi (D-CA) indicated that House Democrats and the Trump Administration could soon announce a deal on United States–Mexico–Canada Agreement (USMCA) ratification. “I do believe that if we can get this to the place it needs to be — which is imminent — that this can be a template for future trade agreements,” the Speaker told reporters during a weekly press conference. She also said that she would like to see the trade agreement pass the House this year, which matches the Trump Administration’s goal for congressional ratification. Speaker Pelosi said that lawmakers will need to see a copy of the implementing legislation “as soon as we come to a conclusion” with United States Trade Representative (USTR) Robert Lighthizer, although Democrats “already have an idea” of what the implementing bill will look like. [According to POLITICO](#), although not required by statute, the Senate Finance Committee and the House Ways and Means Committee plan to hold hearings and a mock conference on the draft implementation bill. The Trump Administration will also need to get any revisions to the pact approved by both Canada and Mexico. In what has also been considered a sign of progress, news surfaced that Democrats scheduled a full-caucus meeting Thursday afternoon focused on economic issues and the USMCA. Read more [here](#).

#### **VI. Industry Updates:**

- On Wednesday, Reuters reported that Jay-Z and Iconix Brand Group Inc. have settled a series of legal disputes arising from transactions between the rapper and the clothing licensing company dating back to 2017. As part of the settlement, Iconix agreed to sell some of its intellectual property assets to Jay-Z’s Roc Nation and membership interest in his Marcy Media Holdings affiliate in exchange for \$15million. The lawsuit ends a settlement

in the SDNY in which Iconix accused Jay-Z of infringing on its trademarks it acquired a decade earlier in a purchase of Jay Z's Rocawear clothing brand. More info. [Here](#).

- On Friday, the Wall Street Journal published a report revealing that Google interferes with its search algorithms to change search results. The Journal conducted over 100 interviews and did its own testing of Google's search results. The report has several key findings. The report finds that Google made algorithmic changes to its search results that favor big businesses over smaller ones. Furthermore, Google engineers regularly made behind the scenes adjustments to other information the company is increasingly layering on top of its basic search. Despite publicly denying such behavior, the report finds that Google keeps blacklists to remove certain sites or prevent others from surfacing in certain types of results. Read the report [here](#).