

## PATENT & TRADEMARK POLICY REPORT

### SEPTEMBER 13, 2019



#### I. Congressional Developments:

- On Wednesday, the Senate Judiciary IP Subcommittee held a hearing to consider the bipartisan and bicameral STRONGER Patents Act of 2019 ([S. 2082](#)/ [H.R. 3666](#)), which seeks to strengthen the U.S. patent system through a myriad of reforms. The panel of witnesses were evenly split between supporters of the bill, including Bradley N. Ditty (Vice President, General Patent Counsel InterDigital Holdings, Inc); Adam Mossoff (Professor Of Law, Antonin Scalia Law School, George Mason University); Earl “Eb” Bright II (President, ExploraMed); and opponents, including Tom Cotter (Briggs And Morgan Professor Of Law, The University of Minnesota School of Law); Dan Lang (Vice President, Intellectual Property, Cisco Systems); and Josh Landau (Patent Counsel, Computer and Communications Industry Association, CCIA). Chairman Thom Tillis (R-NC) and Ranking Member Chris Coons (D-DE) were present and asked questions. Although he was hesitant to endorse certain aspects of the bill, including the restoration of the presumption of injunctive relief and the “one bite at the apple” provision, Chairman Tillis indicated that he would be open to codifying Director Iancu’s reforms to PTAB proceedings. However, the Chairman thought it would be prudent to wait to see whether these reforms are effective before taking congressional action. On the other hand, Ranking Member Coons—who is the lead Senate sponsor of the bill—defended against criticism from Prof. Cotter and the witnesses representing Cisco and CCIA. In particular, he challenged the notion that the bill would entirely overturn the Supreme Court *eBay* decision. In one interesting exchange, Ranking Member Coons asked Prof. Cotter whether he would be comfortable with the injunctive relief provision in the bill if it had more details about the considerations that might lead a court to override that presumption in favor of injunctive relief, such as the demonstration of the risk of hold-up. Prof.

#### Headlines and Highlights:

- Senate Judiciary IP Subcommittee considers STRONGER Patents Act (S. 2082) at hearing.
- Senate Judiciary Antitrust Subcommittee to hold oversight hearing on the enforcement of U.S. antitrust laws next Tuesday.
- House Judiciary Committee data competition hearing postponed.
- Fulfilling the next step in negotiations, USTR Lighthizer sends proposals to House trade working group to assuage Democrats’ four primary concerns with the USMCA.
- USPTO Director Andrei Iancu delivered remarks at the Standard-Essential Patents Strategy Conference in Brussels.
- USPTO to hold seminar next Thursday on “Trending Issues in Trade Secrets: 2019.”

Cotter responded that such a revision might assuage some of his concerns, although he would have to review the updated language. Finally, one provision in the STRONGER Patents Act that seemed to enjoy unanimous support from the panel is the one that would allow the USPTO to eliminate fee diversion. More info. [here](#).

- Next Tuesday, September 17<sup>th</sup>, at 2:30 p.m. ET, the Senate Judiciary Antitrust Subcommittee will hold an oversight hearing on the enforcement of antitrust laws in the U.S. Federal Trade Commission (FTC) Chairman Joseph Simons and Department of Justice (DOJ) Assistant Attorney General (AAG) for the Antitrust Division Makan Delrahim are slated to testify before the Subcommittee. More info. [here](#).
- On Tuesday, September 23<sup>rd</sup>, at 2:30 p.m. ET, the Senate Judiciary Subcommittee on Antitrust will hold a hearing on "Competition in Digital Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms." The following witnesses are slated to testify before the Subcommittee: Bruce Hoffman (Director Of The Bureau Of Competition, FTC); Dr. Diana Moss (President, American Antitrust Institute); Professor John Yun (Director, Economic Education At The Global Antitrust Institute, George Mason University); and Patricia Nakache (General Partner, Trinity Ventures). More info. [here](#).
- The scheduled hearing in the House Judiciary Committee this week to consider the competitive (or anti-competitive) effects of digital platforms controlling large amounts of consumer data was postponed. No new date has been listed yet. More info. [here](#).

## II. Administration Updates:

- United States Trade Representative (USTR) Robert Lighthizer sent House Democrats proposals to ease their four primary concerns with the United States-Mexico-Canada Agreement (USMCA) on Wednesday. Democrats have called on USTR to submit these proposals since returning from the summer recess, insisting that this step was necessary to move forward with the otherwise stalled negotiations between the House trade working group and USTR Lighthizer. House Agriculture Committee Collin Peterson (D-MN) has said that when he spoke with House Ways & Means Committee Chairman Richard Neal (D-MA) this week, Neal told him he was "pretty confident we're going to get a vote in the next month or two." Lighthizer is expected to meet with the full trade working group next week. Read more [here](#).
- Bruce Hoffman, Director of the FTC's Bureau of Competition, told reporters this week that the Commission's tech task force has focused its antitrust investigation on specific types of business conduct and possible harms, moving past the lead generation phase. "The tech task force's focus has turned primarily to actual investigations, rather than what you might think of as 'lead generation,'" Hoffman stated, while clarifying that the FTC is "always looking for leads." Additionally, Bilal Sayyed, Director of the FTC's Office of Policy Planning, said at a conference in DC earlier this week that it is the "highest priority" to come up with new guidelines for how the U.S.' antitrust laws apply to tech giants, indicating that the forthcoming guidance "is an enforcement document." Reports surfaced this spring that the FTC is reviewing Amazon and Facebook, while the DOJ is looking into Apple and Google. Read more [here](#) and [here](#).

### III. USPTO Updates:

- On Tuesday, USPTO Director Andrei Iancu delivered remarks at the Standard-Essential Patents Strategy (SEP) Conference in Brussels. Director Iancu called standards an “increasingly powerful force” behind the development and commercialization of new technology. In particular, the Director stated that voluntary consensus standards play vital roles as society looks for interoperability for technologies such as self-driving cars and artificial intelligence. Director Iancu stated that patents and other forms of IP are “critically important” to the development of standards. Because of this, he continued, the U.S. IP systems must be “carefully balanced” so that they spur innovation and ensure the development of standards-based technology. Director Iancu also addressed the 2013 joint USPTO and DOJ Antitrust Division’s Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary/FRAND commitments, to which the DOJ withdrew its commitment to in December 2018. The Director acknowledged that the USPTO is “carefully studying the issue and discussing it internally, with our stakeholders, and with other relevant government agencies.” He stated that if the USPTO is to develop a new policy, it should be “balanced” and incentive the growth of standards-based industries. With regards to FRAND-encumbered SEPs, Director Iancu stated that any policy statement “should incentivize good faith negotiations and dis-incentivize threats of either patent hold-up or patent hold-out.” More info. [here](#).
- On September 19<sup>th</sup>, the USPTO is 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:

- Google and Facebook are both facing bipartisan scrutiny from two separate investigations led by coalitions of state attorneys general. Late last week, New York State Attorney General Letitia James announced a state-led antitrust investigation of Facebook. Additionally, on Monday, Texas Attorney General Ken Paxton formally announced an antitrust investigation into Google. During Monday’s announcement, Paxton echoed concerns addressed by James. Paxton stated that Google’s business practices may have “undermined consumer choice, stifled innovation, violated users’ privacy and put Google in control of the flow and dissemination of online information.” Both investigations are backed with substantial support. James leads a group of 8 attorneys general, while Paxton’s group includes support from 48 states, excluding California and Alabama. Read more [here](#).

### V. International Updates:

- On Tuesday, incoming European Commission President Ursula von der Leyen unveiled her decision to name Margrethe Vestager as the executive VP overseeing a new portfolio called “Europe fit for the digital age.” Vestager will also retain her competition portfolio, which she has handled since 2014. Vestager has emerged as a fierce critique of big tech in this influential post, handing out more than 8 billion euros in fines to Google and spearheading a crackdown on tax avoidance by multinationals, targeting Apple, Starbucks, Amazon, McDonalds, and others. Vestager must secure the approval of the full European Parliament before beginning her five-year term on November 1<sup>st</sup>. Read more [here](#).

- On Wednesday, President Trump announced plans to delay the planned tariff hike from 25% to 30% on the imports of approximately \$250 billion worth of Chinese goods from October 1<sup>st</sup> to October 15<sup>th</sup>. President Trump called this a “gesture of good will” in a tweet announcing the delay. The U.S. and China are expected to resume trade talks in Washington, DC next month. Read more [here](#).

## **VI. Industry Updates:**

- On Friday, Bloomberg posted an article on the difficulties of patenting in the legal marijuana industry. Kristine Owram of Bloomberg highlighted the story of Canopy Growth Corp’s acquisition of Ebbu Inc., a cannabis research firm. While Canopy touted Ebbu’s IP as the primary reason for the transaction, it has struggled to turn that IP into patents. Owram wrote that one of Ebbu’s first applications was rejected three times, even after it modified the application after previous rejections. Owram noted that the struggles Ebbu faced in securing patents suggest a “broader issue in the pot sector where companies tout IP but few have successfully obtained exclusive rights to their intellectual property.” The struggle of securing patents in the cannabis sector has led to a race to secure IP to appeal to investors. Brad White, an IP partner at Toronto-based Osler, Hoskin & Harcourt LLP, suggested that the end result could be more amalgamation among pot companies “as they seek to protect themselves by building robust patent portfolios.” More info. [here](#).