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PATENT & TRADEMARK POLICY REPORT
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I. Congressional Developments:

- On Wednesday, the Senate approved a $2 trillion COVID-19 response package, the *CARES Act*, by a 96-0 vote. The third package provides emergency supplemental funding to help federal agencies and states combat the spreading virus and provides economic relief through loans and loan guarantees for affected businesses and direct payments to taxpayers. The House of Representatives is expected to pass the legislation, which is the largest economic rescue package in U.S. history, soon. Section 12004 of the bill, titled "Temporary Authority of Director of the USPTO," provides the USPTO Director the authority to "toll, waive, adjust, or modify, any timing deadline established by title 35, United States Code, the Trademark Act, section 18 of the Leahy-Smith America Invents Act … or regulations promulgated thereunder." In order to take such an action, the USPTO Director must determine that the COVID-19 emergency "(1) materially affects the functioning of the Patent and Trademark Office; (2) prejudices the rights of applicants, registrants, patent owners, or others appearing before the Office; or (3) prevents applicants, registrants, patent owners, or others appearing before the Office from filing a document or fee with the Office." The Director's temporary authority will take effect upon enactment of the bill and will end 60 days following the end of the emergency. The section also includes a sunset provision which states that the authority provided under this section expires two years after the date of enactment. More info. here.

II. Administration Updates:

- In statements last week, the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) said that while the agencies have implemented changes

Headlines and Highlights:

- Third $2 trillion COVID-19 response package includes provision providing the USPTO Director the authority to toll, waive, adjust, or modify timing deadlines under Trademark Act and AIA.
- Full Federal Circuit rejects *en banc* review of *Arthrex* decision that PTAB judges are unconstitutionally appointed.
- USPTO to waive original handwritten signature requirements for certain correspondence.
- EU and 15 other WTO Members announce Multiparty Interim Appeal Arbitration Arrangement.
- Baltimore Ravens quarterback Lamar Jackson files lawsuit against Amazon alleging that the platform allows the sale of unlicensed clothing using his likeness.

adjusting to COVID-19 circumstances, both enforcers will be carrying out their missions without interruption. However, in an article posted by *Protocol* on Wednesday, former FTC Chairman William Kovacic stated that he expected the workplace changes to result in long delays complicating any actions against large tech companies. Kovacic stated that "It's just impossible for FTC lawyers and economists to work at the same pace from home — and that's necessarily going to slow the progress of the inquiries down." Furthermore, he added that he expected the timetables that the agencies developed to be "stretched out." Tad Lipsky, former Director for the FTC's Bureau of Competition, stated that courts move to "virtual" proceedings could further limit civil procedures, citing the DOJ's move to postpone depositions as part of the impact of this move. Read more here.

III. USPTO Updates:

- On Monday, as part of Women's History Month, USPTO launched the Expanding Innovation Hub. The new online platform provides resources for inventors and practitioners to encourage greater participation in the patent system. In a blog post announcing the Hub, Director Andrei Iancu touted that it builds upon USPTO's 2019 SUCCESS Act report to Congress and its Progress and Potential report on women investors. Resources on the Hub include a Demystifying the Patent System Toolkit to help innovators understand the process of obtaining a patent; a Mentoring Toolkit to assist organizations in establishing an infrastructure to connect experienced innovators with the next generation in their organization; and Community Group Resources to connect groups of employees with shared characteristics, interest, and goals. Find the Hub here.

- USPTO strongly encourages customers to file via EFS-Web. Find more information about filing patent documents here.

- In a Federal Register notice scheduled to be published on Monday, USPTO will waive its only regulatory requirements for an original handwritten signature personally signed in permanent dark ink or equivalent for certain correspondence with the Office of Enrollment and Discipline and certain payments by credit card. In both instances, USPTO will accept copies of handwritten signatures. More info. here.

IV. Judicial Updates:

- On Monday, the Federal Circuit rejected petitions for *en banc* review by Arthrex Inc., Smith & Nephew Inc., and the federal government, leaving intact the October decision. In this decision, the Federal Circuit found that the structure of the PTAB violates the appointments clause of the U.S. Constitution because the USPTO Director does not have sufficient control over the board's decisions. The majority decided that there is no need to review either the holding or the panel's decision to provide the necessary control by removing the protection from termination that the APJs previously enjoyed. Judge Kimberly Moore, concurring with the decision to deny *en banc* rehearing, wrote that the *Arthex* panel "followed Supreme Court precedent in reaching its decision." Furthermore, Judge Moore wrote "The severance provided has minimized disruption and preserved Congress' intent as best possible while ensuring that the Constitution's structural protections are minded." Four judges filed a total of three separate dissenting opinions, arguing that APJs were not unconstitutionally appointed and that taking away the judges' employment protections is the wrong solution. Judge Todd Hughes wrote in his dissenting opinion that the USPTO Director has "significant

control over the activities of the Patent Trial and Appeal Board" so they were properly appointed. Judge Dyk wrote that the *Arthrex* panel's approach to remedying the Appointments Clause was not consistent with Supreme Court precedent. Judge Dyk also added that Congress and the USPTO should be given a chance to fix the problem of removal protections for APJs. He called the panel's decision to remove APJ's employment protection a "draconian remedy" that is "performing major surgery to the statute that Congress could not possibly have foreseen or intended." Read more here and here.

- On Wednesday, Baltimore Ravens quarterback and reigning NFL MVP Lamar Jackson filed a lawsuit against Amazon, alleging that the platform allows the sale of unlicensed clothing using Jackson's image, slogans, or likeness. The complaint accused Amazon of facilitating the sale of unlicensed shirts using slogans such as "Lamarvelous," "Action Jackson" and "Not bad for a running back." According to the lawsuit, Jackson alleged that Amazon willfully infringed on his publicity rights and deceived customers who might believe the star quarterback agreed to promote the apparel on its site. Jackson's suit claimed that Amazon's actions level "significant damage" to his brand and his own personal clothing company, Era8Apparel. The complaint asked the court to order Amazon to calculate sales it generated from this allegedly unlicensed merchandise and award Jackson compensation for argued damages. More info here and here.

V. International Updates:

- On Friday morning, the EU and 15 other World Trade Organization (WTO) members announced that they have reached a deal that will allow participants to bring appeals and solve disputes despite the current paralysis of the WTO Appellate Body. According to a statement from the European Commission, the Multiparty Interim Appeal Arbitration Arrangement mirrors the usual WTO appeal rules and can be used between any members of the Organization willing to join, as long as the WTO Appellate Body is not fully functional. The following countries signed onto the agreement: Australia; Brazil; Canada; China; Chile; Colombia; Costa Rica; the European Union; Guatemala; Hong Kong, China; Mexico; New Zealand; Norway; Singapore; Switzerland; and Uruguay. Washington froze the WTO's appellate body by blocking appointments for over two years. Read more here.

- The *Financial Times* reported this week that the coronavirus crisis is forcing the EU to redraw its digital strategy and will likely delay legislation on the matter. Brussels set out its strategy for AI and data last month, calling for the EU to boost data sovereignty and even suggesting that EU AI algorithms should be trained on European data. The consultation of the AI white paper is due at the end of May, but will now likely be pushed back, depending how the situation developments. Beyond these process disruptions, some EU officials have indicated that the limitations of the policy are being exposed by the coronavirus pandemic as well. "The EU is not backtracking yet on its position but it is thinking more actively about the unintended consequences of what they have proposed in the white paper on AI," one person with direct knowledge of the European Commission's thinking told the *Financial Times*. Read more here.

VI. Industry Updates:

- USPTO is seeking nominations for the 2020 National Medal of Technology and Innovation (NMTI). Bestowed by the President of the United States, NMTI is the nation's highest

honor for technological achievement. The USPTO extended the deadline for nominations to May 1st. More info. here and here.