

PATENT & TRADEMARK POLICY REPORT MAY 15, 2020



I. Congressional Developments:

- On Tuesday, House Democrats released the *HEROES Act*, a \$3 trillion economic relief package. Find the bill text [here](#), a section-by-section summary [here](#), and a one-pager [here](#). Nearly \$916 billion would go to state and local governments to deal with lost revenue. Other core areas include: \$100 billion for emergency rental assistance; \$10 billion to cover increased participation in the food stamps program; \$5.5 billion to emergency home internet and creation of wi-fi hotspots; \$100 billion for hospitals for pandemic-related costs and another \$75 billion for virus testing; an expanded unemployment insurance benefit of \$600 per week extended through January 2021; \$200 billion “Heroes Fund” for “essential workers” hazard pay; and another round of direct payments up to \$1,200 per adult and \$1,200 per dependent up to three dependents (credit starts phasing out after \$75,000 of adjusted gross income. The House is poised to pass the bill on Friday, although it is expected to stall in the upper chamber as Senate Republicans contend that not enough time has passed since the *CARES Act* was enacted to determine whether additional relief is necessary.
- On Tuesday, the Senate Judiciary Committee held a hearing on “Examining Liability During the COVID-19 Pandemic.” The following witnesses offered testimony: [Mr. Kevin Smartt](#) (Chief Executive Officer, Kwik Chek Convenience Stores), [Mr. Anthony “Marc” Perrone](#) (International President, United Food and Commercial Workers International), [Ms. Rebecca Dixon](#) (Executive Director, National Employment Law Project), [Mr. Leroy Tyner, Jr.](#) (General Counsel, Texas Christian University), [Professor David Vladeck](#) (A.B. Chettle Chair in Civil Procedure, Georgetown University Law Center), Ms. Helen Hill (Chief Executive Officer, Explore Charleston).

Headlines and Highlights:

- House Democrats unveil \$3 trillion economic relief package, the *HEROES Act*.
- Senate Judiciary Committee considers liability concerns surrounding COVID-19 at hearing.
- USPTO announces a COVID-19 Prioritized Examination Pilot Program for small and micro entities.
- Supreme Court rules in favor of Lucky Brand in a nearly two decade long trademark dispute with Marcel Fashion Groups, Inc.
- House Minority Leader Kevin McCarthy launches Republican task force focused on investigating various issues relating to China.
- Berkeley Center for Law and Technology and U.S.-China Business Council cohost series of webinars on China and IP.

The hearing produced a collective agreement on the existence of conflicting guidance from Federal, State, and local authorities. Members also discussed the need for the federal government, including the Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control and Prevention (CDC), to issue safety protocol guidance across industries. Ranking Member Dianne Feinstein (D-CA) declared that Congress should not provide businesses with protection from liability without the federal government enacting workplace guidelines to protect employees. To that point, Chairman Lindsey Graham (R-SC) signaled support for a framework which ties limited liability for employers to compliance with OSHA safety protocols. Chairman Graham emphasized that “the primary goal following this hearing is to get standards in place” and stressed that such “standards need to be out there, so people can know what's expected of them, so if they do what's expected, then they don't have to worry about being sued.” Watch the full hearing [here](#).

- Last week, House Minority Leader Kevin McCarthy (R-CA) unveiled a Republican task force focused on investigating various issues relating to China. The group will work to develop a legislative strategy regarding China’s influence inside the U.S., foreign investment screening, export control, presence in American universities, and more. The committee was originally supposed to include Democratic members, but the party reportedly withdrew from the effort in February. The group is led by Rep. Michael McCaul (R-TX), the Ranking Member on the House Foreign Affairs Committee, and is comprised of the following members: Republican Conference Chairwoman Liz Cheney (R-WY) and Reps. Jim Banks (R-IN), Andy Barr (R-KY), John Curtis (R-UT), Mike Gallagher (R-WI), Anthony Gonzalez (R-OH), John Joyce (R-PA), Adam Kinzinger (R-IL), Darin LaHood (R-IL), Guy Reschenthaler (R-PA), Denver Riggleman (R-VA), Elise Stefanik (R-NY), Chris Stewart (R-UT), and Michael Waltz (R-FL). Read more [here](#).

II. Administration Updates:

- In an editorial published in the *New York Times* on Monday, United States Trade Representative (USTR) Robert Lighthizer claims that the Trump Administration’s aggressive trade enforcement, renegotiation of “job-destroying” trade deals, and effort to take on China’s predatory trade and economic policies has helped reverse the trend of outsourcing. USTR Lighthizer observes that many companies have realized that the risks associated with offshoring outweigh the incremental efficiencies it may deliver. He cites that since President Trump first imposed duties on Chinese imports in July 2018, Apple, Whirlpool and Stanley Black & Decker have either scrapped offshoring plans or announced decisions to move production to the United States. Furthermore, as a result of the new United States-Mexico-Canada Agreement (USMCA), Lighthizer touts that automotive companies have announced \$34 billion in new U.S. investment. Read the full editorial [here](#).

III. USPTO Updates:

- Late last week, USPTO announced a new COVID-19 Prioritized Examination Pilot Program, under which the Office will grant requests for prioritized examination to applicants that qualify for small and micro entity status without payment of typical fees associated with other prioritized examination. Furthermore, the USPTO will endeavor to reach final disposition of applications in the program within six months if applicants respond promptly to USPTO communications. In a statement announcing the pilot program, Director Andrei

Iancu said, “Independent inventors and small businesses are often the difference makers when it comes to cutting-edge innovation and the growth of our economy.” Read more [here](#).

IV. Judicial Updates:

- On Thursday, the Supreme Court ruled in favor of Lucky Brand in a nearly two decade long trademark dispute with Marcel Fashion Groups, Inc. Marcel filed suit in 2001 claiming that Lucky Brand had infringed his trademark on the phrase “Get Lucky.” While the two parties settled that suit out of court in 2003, Lucky Brand filed suit less than two years later accusing Marcel of granting another wholesaler a license for the mark and thereby infringing its own “Lucky” marks. Marcel filed a countersuit claiming that the Lucky Brand’s continued use of “Get Lucky” violated the earlier settlement. By way of final judgement issued in 2005, the district court permanently enjoined Lucky Brand from using the “Get Lucky” mark. Marcel filed a third lawsuit in 2011, which was dismissed by a district court, and revived by the U.S. Court of Appeals for the Second Circuit. Justice Sonia Sotomayor, writing for a unanimous court, overturned the Second Circuit’s 2018 decision that precluded Lucky Brand from raising a defense in the trademark infringement case, stating that because the trademark action at issue challenged different conduct – and thus, involved different claims – from an earlier action between the same two parties, Marcel cannot preclude Lucky Brand from raising new defenses, including a defense that Lucky Brand failed to present in an earlier proceeding. The court concluded “Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times.” They thus did not share a “common nucleus of operative facts.” Read more [here](#) and the full opinion [here](#).

V. International Updates:

- On Thursday, World Trade Organization (WTO) director-general Roberto Azevêdo told officials in Geneva that he will step down a year before his term ends in September 2021. Instead of appointing a deputy to serve as acting director-general after he departs, Azevêdo suggested that the WTO should begin the selection process for a full-time replacement as soon as possible. *POLITICO* reports that the selection process “is very likely to lay bare stark international fault lines,” as the trade world monitors whether candidates are aligned to heavyweights like the U.S., China, and the EU. President Trump has been a fierce critic of the WTO and has paralyzed the trade court by blocking the appointment of new judges. Nevertheless, USTR Lighthizer said that the United States “looks forward to participating in the process of selecting a new director general.” Read more [here](#) and [here](#).
- Ahead of the World Health Assembly [next week](#), *POLITICO* reports that several World Health Organization (WHO) members – the EU, UK, and Australia – have reached an agreement on a resolution addressing The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The final text reportedly calls for “the universal, timely and equitable access to and fair distribution of all quality, safe, efficacious and affordable essential health technologies and products including their components and precursors required in the response to the COVID-19 pandemic as a global priority.” The resolution also calls for the “urgent removal of unjustified obstacles thereto,” stating that this is “consistent with the provisions of relevant international treaties including the provisions of the TRIPS agreement and the flexibilities as confirmed by the Doha Declaration on the TRIPS Agreement and Public Health.” *POLITICO* reports that the road to an agreement was “far

from smooth,” as negotiators were deadlocked by disagreements over the wording on TRIPS flexibility. Read more [here](#).

VI. Industry Updates:

- The Berkeley Center for Law and Technology is co-hosting a series of short webinars with the U.S.-China Business Council on China’s ongoing judicial reforms, the real-world impacts of the Phase 1 U.S.-China Trade Agreement, and current issues in the development of China’s IP law including patentability, pharmaceutical IP issues, trade secret issues, licensing, and antitrust. Session 3 on May 20th is titled, “Following the Data: What the Latest Research Says about China’s Legal and IP Environment,” and registration is free. More info. [here](#).