

PATENT & TRADEMARK POLICY REPORT NOVEMBER 13, 2020



I. Congressional Developments:

- The CEOs of Facebook and Twitter are reportedly slated to appear before the Senate Judiciary Committee on November 17th. The Committee voted last week to authorize Chairman Lindsey Graham (R-SC) to subpoena Facebook CEO Mark Zuckerberg and Twitter CEO Jack Dorsey to testify about allegations of anti-conservative bias. In a [Tweet](#) after the vote, Senate Judiciary IP Subcommittee Chairman Thom Tillis (R-NC) declared that it is “past time” that the Big Tech CEOs “answer for not only their censorship of conservative voices but also their willingness to allow for rampant online piracy and copyright infringement.” Read more [here](#).
- On Tuesday, the Senate Appropriations Committee released twelve Fiscal Year (FY) 2021 appropriations bills. These bills are not expected to be marked up by the subcommittees in the upper chamber, but rather kickstart negotiations in pursuit of an omnibus to fund the government through FY2021 when the continuing resolution (CR) expires on December 11th. Senate Majority Leader Mitch McConnell (R-KY) said last week that he and Speaker of the House Nancy Pelosi (D-CA) “agree that we ought to do an omnibus appropriation bill and do it in December, no matter who wins the election.” As a reminder, the House passed two appropriations packages in July encompassing all but the Legislative Branch and Homeland Security bills. The Senate Financial Services and General Government (FSGG) [FY2021 bill](#) provides \$1.8 million for the Office of the Intellectual Property Enforcement Coordinator (IPEC), an increase from the \$1.3 million

Headlines and Highlights:

- Senate Judiciary Committee to hear testimony from Big Tech CEOs on November 17th.
- USPTO seeks comments on trademark infringement liability in the e-commerce setting.
- USPTO announces David L. Berdan as its new General Counsel.
- Next PPAC meeting November 19th.
- AAFA asks USTR to include Facebook, Instagram, and Amazon in Special 301 notorious markets report.
- Biden-Harris transition team releases agency review teams.
- Senate Appropriations Committee releases FY2021 bills, kickstarting negotiations in pursuit of an omnibus.

included in the [House-passed bill](#).

- In an editorial published in the *Washington Post* on Wednesday, Senator Elizabeth Warren (D-MA) outlined her vision for what a Biden-Harris Administration should do on its first day. Of note, Senator Warren calls for the Biden-Harris Administration to lower drug prices by “producing key drugs like insulin, naloxone, hepatitis C drugs and EpiPens at low costs using existing compulsory licensing authority that allows the federal government to bypass patents for pressing public health needs.” Read the full op-ed [here](#).

II. Administration Updates:

- The Biden-Harris transition team released its agency review teams on Tuesday afternoon. These teams are responsible for understanding the operations of each agency, ensuring a smooth transfer of power, and preparing for President-elect Biden and Vice President-elect Harris and their cabinet to hit the ground running on Day One. Members include volunteers, full-time transition employees, and detailees. Find the full list of agency review team members [here](#).

III. USPTO Updates:

- On Friday, USPTO published a request for comments from IP rights holders, online third-party marketplaces and other third-party online intermediaries, and private sector stakeholders, on the application of the traditional doctrines of trademark infringement to the e-commerce setting. Specifically, USPTO is seeking input on the application of contributory and/or vicarious trademark infringement liability (secondary infringement liability) to e-commerce. USPTO will use the feedback to implement the ninth action item in the Presidential Memorandum on “[Combating Trafficking in Counterfeit and Pirated Goods](#).” Comments are due to USPTO by December 28th. More info. [here](#).
- On Tuesday, USPTO announced the appointment of David L. Berdan as the Office’s new General Counsel. Berdan is a graduate of the U.S. Military Academy at West Point, where he earned a Bachelor of Science in engineering and co-captained the Army football team as a defensive back. He is a combat veteran of Operation Desert Storm and is the recipient of numerous military awards, including a Bronze Star. Mr. Berdan has a Juris Doctor from Drake University Law School, where he was a founding member and President of the Drake Intellectual Property Law Society. Berdan has served in a variety of important legal positions over the past 25 years, most recently as General Counsel and Compliance Officer of Gaming Arts. “With his leadership experience and knowledge of so many aspects of technology and the law, Mr. Berdan will help guide the USPTO as we endeavor to expand innovation and support a growing and dynamic U.S. economy,” USPTO Director Andrei Iancu said. Read more [here](#).
- The next Patent Public Advisory Committee (PPAC) quarterly meeting will be held virtually next Thursday, November 19th, from 11:00 a.m. to 4:10 p.m. ET. More info. [here](#).

IV. Judicial Updates:

- On Thursday, Amazon filed a lawsuit against two influencers and nearly a dozen third-party merchants for allegedly participating in a scheme to skirt Amazon’s anti-counterfeit tools by

promoting knockoff goods via Instagram, Facebook, and TikTok accounts. According to the lawsuit, the sellers and influencers fueled purchases of knockoff purses, bags, belts and wallets beginning in November. One of the influencers named in the suit, Kelly Fitzpatrick, explained on her website that a “hidden link” would allow her followers to order the knockoff without the item getting taken by Amazon or the orders being canceled. The company is seeking unspecified damages from the influencers, as well as an injunction to stop both of them from selling or promoting any products sold on Amazon. Read more [here](#).

V. International Updates:

- On Thursday, a group of 165 companies and industry bodies sent a letter urging EU antitrust chief Margrethe Vestager to take a tougher line against Google for allegedly favoring its own services on its web searches. The group includes companies from the U.S., UK, and 21 EU countries. “While we compete amongst ourselves for the best consumer experience, there is one common competitor that does not compete fairly - Google,” the letter asserts. *Reuters* reports that the letter was signed by Yelp, Expedia, Trivago, Kelkoo, Stepstone, and Foundem. Read more [here](#).
- Leaders from China, Japan, South Korea, Australia, New Zealand, and 10 members of the Association of Southeast Asian Nations (Asean) are expected to sign the Regional Comprehensive Economic Partnership (RCEP) this weekend. The deal will be the most ambitious trade agreement ever struck by population and GDP. RCEP will eliminate as much as 90% of the tariffs imposed on imports between its signatories within 20 years of the deal’s effective date. It will also establish common rules for e-commerce, trade, and intellectual property. India pulled out of the trade negotiations last year due to concerns that the trade pact would devastate its local industries. *SCMP* reports that China has viewed the new FTA as an “opportunity to write regional trade rules and diversify its avenues of trade amid declining economic relations with the United States.” Read more [here](#) and [here](#).

VI. Industry Updates:

- This week, the American Apparel & Footwear Association (AAFA) asked the Office of the U.S. Trade Representative (USTR) to include Facebook, Instagram, and Amazon in a special report identifying sites of large-scale counterfeiting. Specifically, AAFA said the platforms should be listed in USTR’s upcoming Special 301 Review of Notorious Markets, a list identifying physical and online markets where substantial counterfeiting is present. USTR listed Amazon’s foreign domains in its [last report](#). Although Amazon has taken some action since AAFA urged USTR to include the e-commerce site in last year’s report, the association claims that “the number of counterfeits on the platform and the systems developed to address them remain mismatched.” Further, the group says that shopping options on Facebook and Instagram blur the line between e-commerce and social media. In Amazon’s own set of [comments to USTR](#), the company says it “has never been and will never be a notorious market,” outlining steps it has taken to combat counterfeit items on its website since its foreign domains were listed in last year’s report. More info. [here](#).