

PATENT & TRADEMARK POLICY REPORT OCTOBER 2, 2020



I. Congressional Developments:

- House Democrats passed a scaled back version of their COVID-19 relief bill the *HEROES Act* last night. The bill contains an additional \$95 million for the U.S. Patent and Trademark Office, and because it is an emergency appropriation, the USPTO would not be required to pay it back. However, there are several steps remaining for this bill to be enacted into law, namely Speaker Pelosi (D-CA) coming to an agreement with Secretary Mnuchin. Beyond that, it remains to be seen if Senate Majority Leader Mitch McConnell (R-KY) would bring the bill up for a vote. Read the text [here](#).
- On Thursday, the House Judiciary Antitrust Subcommittee held a hearing titled, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online.” Witnesses included [William Baer](#) (Visiting Fellow – Governance Studies Brookings Institution); [Zephyr Teachout](#) (Associate Professor of Law Fordham University School of Law); [Michael Kades](#) (Director of Markets and Competition Policy Washington Center for Equitable Growth); [Sabeel Rahman](#) (President Demos); [Christopher Yoo](#) (John H. Chestnut Professor of Law, Communication, and Information Science University of Pennsylvania Carey Law School); [Rachel Bovard](#) (Senior Director of Policy Conservative Partnership Institute); [Tad Lipsky](#) (Antonin Scalia Law School George Mason University); and [Sally Hubbard](#) (Director of Enforcement Strategy Open Markets Institute). Although the committee is [reportedly](#) planning to release the report from its big tech antitrust probe next week, Chairman David Cicilline’s (D-RI) testimony may shed insight into what the forthcoming report will include. Reforms discussed during the hearing fell into five areas: changing some antitrust statutes to shift the burden of proof, separating the lines of business, more rigorous

Headlines and Highlights:

- Ahead of releasing the Big Tech antitrust probe report, House Judiciary Antitrust Subcommittee holds hearings on proposals to strengthen antitrust laws.
- Sonos files another patent infringement lawsuit against Google for allegedly infringing five wireless audio patents across the entire line of Nest and Chromecast products.
- House Committee on Oversight and Reform considers rising drug prices at two-part hearing featuring testimony from the CEOs of major drug companies.
- USTR seeks public comment on its 2020 Review of Notorious Markets for Counterfeiting and Piracy.
- Dr. Marian Croak is added to the USPTO’s inventor card series.

enforcement of antitrust law, a reversal of court decisions that have allegedly misinterpreted the intent of Congress, and provisions to prohibit discriminatory behavior. Rep. Ken Buck (R-CO) has emerged as the leader on the Republican side in calling for bipartisan antitrust reforms. While defending the consumer welfare standard, he acknowledged that there is a breakdown in the digital economy as a small number of tech giants are using anticompetitive means to grow their market dominance and control the channels of distribution. As such, Buck signaled support for moderate changes, such as increasing the resources given to antitrust enforcers and possibly “shifting the burden of proof” on what constitutes an anticompetitive merger. Watch the full hearing [here](#).

- On Wednesday, the House Energy & Commerce Subcommittee on Oversight held a hearing on “Pathway to a Vaccine: Ensuring a Safe and Effective Vaccine People Will Trust.” The following participants testified before the subpanel: [Dr. Helene Gayle, M.D., MPH](#) (Co-Chair, Committee on Equitable Allocation of Vaccine for the Novel Coronavirus, National Academies of Sciences, Engineering, and Medicine); [Dr. Ashish K. Jha, M.D., MPH](#) (Dean, School of Public Health, Brown University); [Dr. Mark McClellan, M.D., Ph.D.](#) (Founding Director, Duke-Margolis Center for Health Policy Duke University); and [Dr. Paul A. Offit, M.D.](#) (Director, Vaccine Education Center, Children’s Hospital of Philadelphia). Democratic lawmakers repeatedly asked the witnesses whether they were prioritizing safety, given the politicization of vaccine development. Chairwoman Diana DeGette (D-CO) cited that the public’s trust has dramatically decreased, citing that half of the population would not get a vaccine before the election if one became available. She asked the panel if the existing guardrails are sufficient to stop undue politicization of the vaccine. Witnesses responded that there are strong guardrails in place. The question of pricing was also raised by several committee members. Representative Jan Schakowsky (D-IL), who Chairs the Consumer Protection Subcommittee, explained that public plans like Medicare and Medicaid will be harmed by the drug companies if they are allowed to use monopolizing power to charge whatever they want. She added that taxpayers have already paid for vaccine R&D, but Americans will face copays once the public health emergency is over. Watch the full hearing [here](#).
- The House Committee on Oversight and Reform held two hearings in a series to consider rising drug prices this week, featuring testimony from the CEOs of major drug companies. Chair Carolyn Maloney (D-NY) claimed that drug companies spend some funds on R&D, but nowhere near the windfall profits they are bringing in as a result of massive price increases. She cited a Congressional Budget Office (CBO) report which indicated that Medicare negotiating power could lower spending on brand name drugs by about half a trillion dollars. Meanwhile, Representative Thomas Massie (R-KY) insisted that while some people think patents are the reason that drug prices are so high, the patent terms on most of the drugs in question have ended. Instead of focusing on patents, he urged his colleagues to consider other potential impediments that might be keeping generics from coming to market. During the second hearing, which featured testimony from the CEOs of [Amgen](#), [Mallinckrodt Pharmaceuticals](#), and [Novartis AG](#), several members focused their lines of questioning on patents and innovation. Representative Gary Palmer (R-AL) expressed support for extending the length of patents to lower drug prices. All three of the executives supported his claim, citing a high-failure, high-risk industry. Representative Virginia Foxx (R-NC) mentioned that CBO estimates that H.R. 3 would result in 38 fewer cures created over the next decade. Mr. Bradway with Amgen agreed that H.R. 3 would be devastating to the economy and patients. Watch part I [here](#) and part II [here](#).

- On Wednesday, the Senate Commerce Committee unanimously approved authorizations to issue subpoenas to compel testimony of Jack Dorsey (Chief Executive Officer, Twitter); Sundar Pichai (Chief Executive Officer, Alphabet Inc., Google); and Mark Zuckerberg (Chief Executive Officer, Facebook). A statement from the committee explains that the CEOs had not agreed to repeated requests to testify at a hearing on Section 230 of the Communications Decency Act (CDA). “Technology companies argue that their broad liability shield should remain in place,” Chairman Roger Wicker (R-MS) declared. “However, they disproportionately suppress and censor conservative views online. Public testimony from these CEOs is critical as the Committee considers several proposals to reform the Communications Decency Act.” Read the full statement [here](#).

II. Administration Updates:

- On Thursday, the Office of the United States Trade Representative (USTR) published a request for comments identifying online and physical markets to be considered for inclusion in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (Notorious Markets List). The Notorious Markets List identifies examples of online and physical markets that reportedly engage in and facilitate substantial copyright piracy or trademark counterfeiting. The issue focus for the 2020 Notorious Markets List will examine the use of e-commerce platforms and other third-party intermediaries to facilitate the importation of counterfeit and pirated goods into the United States. Written comments are due by November 22nd. Read the Federal Register notice [here](#).

III. USPTO Updates:

- Speaking at the U.S. Chamber of Commerce Equality of Opportunity in the Innovation Economy conference, USPTO Director Andrei Iancu honored the accomplished inventor Dr. Marian Croak with the unveiling of her national USPTO “inventor card.” “I think the more role models that people have, the more inspired they are to understand that they are capable of doing anything,” Dr. Croak said while discussing her pathway to success for a Journeys of Innovation [interview](#) with the USPTO. Dr. Croak is the latest inventor to be added to the USPTO’s collectable inventor card series and is the first African American woman to receive this honor. Read more [here](#).

IV. Judicial Updates:

- On Tuesday, Sonos filed another patent infringement lawsuit against Google for allegedly infringing five wireless audio patents across the entire line of Nest and Chromecast products. Sonos filed a slew of patent infringement cases against the search giant, but the case filed this week in the Western District of Texas represents a more aggressive approach. During a House Judiciary Antitrust Subcommittee hearing earlier this year, Sonos CEO Patrick Spence raised alarm that tech giants routinely copy technology because the expected penalties are lower than the expected benefits of flooding the market with cheap products and gaining market share. Spence called this tactic “efficient infringement.” Google spokesperson Jose Castaneda vigorously denied the claims in the lawsuit and insisted that the internet giant “will be defending against them.” Read more [here](#).

- On Monday, the federal judge presiding over the antitrust lawsuit between Apple and Epic Games repeatedly slammed Epic on its legal theories and tactics. Epic – the maker of the video game Fortnite – is seeking a temporary court order to force Apple to unblock the video game from its iOS App Store. Apple removed Fortnite this summer after Epic pushed a software update allowing players to circumvent Apple’s proprietary in-app payment system. Judge Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California did not offer a timeframe for a decision on the injunction, but indicated that given her schedule, the case is not likely to go to trial until July 2021. She also said that she would prefer the case to be tried before a jury. Read more [here](#).

V. International Updates:

- Reports surfaced this week that China is preparing to launch an antitrust probe into Google over allegations that the search company has leveraged the dominance of its Android mobile operating system to stifle competition. Sources told *Reuters* that the case was proposed by Huawei last year and has been submitted by China’s top market regulator to the State Council’s antitrust committee for review. The investigation comes as the country embarks on a major revamp of its antitrust laws, with potential dramatic increases in maximum fines and expanded criteria for judging a company’s control of the market. The States Administration for Market Regulation and the State Council did not immediately respond to *Reuters’* requests for comments. Furthermore, Google did not provide immediate comment, and Huawei declined to comment. Read more [here](#).
- The *South China Morning Post* reports that despite a summer spending spree, China is not on track to meet the purchase commitments agreed upon under the limited “phase one” trade deal signed earlier this year. Specifically, analyzing data through August, researchers found that China had bought less than one-third of U.S. exports that President Donald Trump pledged that it would purchase this year under the “historic” deal. Nevertheless, figures suggest that China is making a good faith effort to bolster purchases and keep the trade deal alive. Sales of corn to China soared 513% in August compared with June, while soybean sales surged 432% and car sales were up 97%. Of particular interest were China’s imports of U.S. cotton, which rose 44% in the two months leading to August, despite the U.S. placing Chinese apparel and garment companies on an Entity List, banning them from accessing U.S. goods. Read more [here](#).

VI. Industry Updates:

- On October 8th, at 8:00 p.m. ET, the Asia Society Northern California will host a discussion titled “Fact and Fiction in the U.S.-China Intellectual Property Trade War,” featuring data provided by the Berkeley Center for Law and Technology Asia IP Project. The following speakers are slated to participate in the discussion: Mark Cohen (Senior Distinguished Research Fellow and Lecturer in Law at Berkeley Law and Asia Society Northern California Board); Sharon Barner, (Vice President, General Counsel and Corporate Secretary for Cummins Inc.); Jing He (Founder, GEN Law Firm); James Mendenhall, (Partner, Global Arbitration, Trade and Advocacy Group at Sidley); and Judge Randall R. Rader (Former), (United States Court of Appeals for the Federal Circuit). More info. [here](#).
- On October 7th and 8th, the Center for the Protection of Intellectual Property (CPIP) and the National Security Institute (NSI) at George Mason University Antonin Scalia Law School

will host its eighth annual fall policy conference virtually. The conference seeks to address fast-emerging IP, antitrust, and technology leadership issues in the 5G and “Internet of Things” innovation ecosystem. Coverage includes standard-essential patents (SEPs) along with established and emerging markets on a regional and global basis. The two-day event will feature speakers from the academic, industry, and policymaking communities. More info. [here](#).