

PATENT & TRADEMARK POLICY REPORT OCTOBER 9, 2020



I. Congressional Developments:

- On Tuesday evening, the majority staff of the House Judiciary Antitrust Subcommittee issued their final report in the Big Tech investigation, titled “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations.” Finding that Apple, Amazon, Google, and Facebook have abused their market power, the 449-page memo proposes many sweeping legislative reforms to combat their alleged monopolistic practices. This includes proposals to impose structural separations and prohibit dominant platforms from entering adjacent lines of businesses; change the presumption for mergers by dominant platforms; prevent dominant platforms from preferencing their own services; and to increase the Federal Trade Commission (FTC) and Department of Justice Antitrust Division budgets. Of note, the report also claims that Amazon favors its retail products over products offered by third-party sellers. The report accuses Amazon of engaging in “strategic mismanagement of its platform by (1) allowing the proliferation of counterfeit and unsafe goods; (2) using its ability to control the flow of counterfeits as leverage; and (3) putting in place ineffective counterfeit prevention tools that result in the suspension of a large number of innocent sellers.” The report concludes that although the proliferation of dangerous and counterfeit products has grown on Amazon’s marketplace, the company’s approach has been “ineffective”, and the problem persists. Read the full report [here](#).
- Following the release of the Democratic antitrust report, House Judiciary Committee Republicans released two reports of their own. First, the minority staff, led by Ranking Member Jim Jordan (R-OH), issued a memo titled “[Reining in Big Tech’s Censorship of Conservatives](#).” Reps. Doug Collins (R-GA),

Headlines and Highlights:

- House Judiciary Antitrust Subcommittee majority staff release Big Tech report.
- House E&C Democrats demand in letter to Bezos details on how Amazon notifies customers of counterfeit products.
- USPTO releases report on “Public Views on Artificial Intelligence and Intellectual Property Policy.”
- Moderna vows to not sue companies that use its patented technologies to make vaccines to combat the coronavirus pandemic.
- Cisco hit with a \$1.89 billion judgment in a 2018 patent infringement suit brought by Centripetal Networks.
- EU competition czar Vestager indicates that she might pursue injunctions in future cases after reaching settlement with Broadcom.

Ken Buck (R-CO), Matt Gaetz (R-FL), and Greg Steube (R-FL) signed onto the memo, which expressed concern about bias, censorship, and “cancel culture.” The memo claims that antitrust laws do not need to be updated and instead calls on Congress to reconfigure liability protections under Section 230 of the Communications Decency Act (CDA). Additionally, Reps. Buck, Collins, Gaetz, and Andy Biggs (R-AZ) released a memo titled “[The Third Way](#).” The memo outlines areas where the members agree with the majority. Specifically, the Republicans agree that more resources should be allocated for federal antitrust agencies, as long as this is not coupled with “a new regulatory agency or other harmful rulemaking that will only serve to further benefit Big Tech.” Furthermore, they urge conservatives to consider supporting “very limited” legislative changes to provide consumers with a data portability standard “that is similar to transferring cell phone numbers.” Finally, Rep. Buck and his colleagues assert that it would be appropriate for Congress to remind the antitrust agencies and the courts of the original Congressional intent behind antitrust laws, namely that enforcement agencies should be able to bring cases based on potential competition doctrine without facing impossible evidentiary burdens.

- News surfaced this week that the Senate Commerce Committee is planning to hear testimony from the CEOs of Facebook, Google, and Twitter on October 28th. The Committee voted last week to authorize subpoenas for Mark Zuckerberg, Sundar Pichai, and Jack Dorsey to force them to testify if they did not agree to do so voluntarily. A [statement](#) from Chairman Roger Wicker (R-MS) suggests that CDA Section 230 will be the main focus of the hearing. Read more [here](#).
- On Wednesday, House E&C Chairman Frank Pallone Jr. (D-NJ) and Consumer Protection and Commerce Subcommittee Chair Jan Schakowsky (D-IL) wrote to Amazon CEO Jeff Bezos urging him to investigate why AmazonBasics products have been exploding and starting fires. “We have long been concerned with the proliferation of recalled, defective, mislabeled, counterfeit, and fundamentally unsafe products sold on Amazon.com,” the letter declares. Furthermore, while AmazonBasics products often garner “Amazon’s Choice” or “Bestseller” labels, the lawmakers note that many of these products are manufactured in China. The letter provides a series of questions on the matter for Amazon to answer by October 21st. For instance, it asks for details on how Amazon notifies customers who have purchased products later recalled, or found to be counterfeit, mislabeled, or otherwise unsafe. Read the full letter [here](#).
- *Morning Consult* reports that Reps. Michael Burgess (R-TX), Bob Latta (R-OH), and Cathy McMorris Rodgers (R-WA) are all vying to step into Rep. Greg Walden’s (R-OH) post as top Republican on the House Energy & Commerce Committee after he retires at the end of the year. *Morning Consult* spoke with each of the candidates about their tech priorities and how they would lead the wide-reaching committee. Rep. Burgess, the most senior, eligible Republican member for the E&C post, explained that the increased reliance on internet access and connectivity across the U.S. is informing his approach to legislating on tech. He would work to ensure that medical providers and patients can access telehealth. Rep. Latta, on the other hand, is well known for his work in the communications sector, as well as his continued push for autonomous vehicle legislation. Looking ahead, Rep. Latta said he would focus on pursuing “light-touch regulations” to help entrepreneurs pursue emerging technologies, while also weighing potential consumer protection ramifications. Finally, Rep. McMorris Rodgers said that one of the “big disappointments” of this Congress has been the lack of progress on a national privacy standard. Read more [here](#).

II. Administration Updates:

- On Thursday, the Office of the U.S. Trade Representative (USTR) published two Federal Register notices initiating an investigation into Vietnam's acts, policies, and practices surrounding timber that is illegally harvested or traded, as well as those that may contribute to the undervaluation of its currency. Comments on both probes are due to USTR by November 12th. Find the full timber notice [here](#) and the currency valuation [here](#).
- [Data released](#) by the Commerce Department on Tuesday revealed that the monthly U.S. trade deficit in goods hit a record high of \$83.9 billion in August. In a [statement](#) addressing the trade figures, USTR Lighthizer claimed that the trade deficit increased in August because America's economy has recovered more quickly from the coronavirus shock than those of our trading partners. Lighthizer also highlighted that the year-to-date goods deficit with China is down 16.5%, with Japan 34.7%, the EU 7.7%, and Korea 7%. "Overall, the Trump trade policy is working in spite of the virus," Lighthizer declared.

III. USPTO Updates:

- On Tuesday, USPTO released a report titled "Public Views on Artificial Intelligence and Intellectual Property Policy." The USPTO does not take a position on AI and IP in the report, but rather summarizes the 197 submissions it received on the topic from a wide cross-section of organizations and individuals, from academia to trade associations and even foreign patent offices. The majority of public commenters, while not offering definitions of AI, agreed that the current state of the art is limited to "narrow" AI. Narrow AI systems are those that perform individual tasks in well-defined domains (e.g., image recognition, translation, etc.). The majority viewed the concept of artificial general intelligence (AGI)—intelligence akin to that possessed by humankind and beyond—as merely a theoretical possibility that could arise in a distant future. Based on the majority view that AGI has not yet arrived, the majority of comments suggested that current AI could neither invent nor author without human intervention. Finally, across all IP topics, a majority of public commenters expressed a general sense that existing U.S. IP laws are calibrated correctly to address the evolution of AI. However, commenters appear split as to whether any new classes of IP rights would be beneficial to ensure a more robust IP system. Read the full report [here](#).
- On Friday, USPTO published a request for comments on proposed guidelines regarding continuing legal education (CLE). Registered patent practitioners and individuals granted limited recognition to practice before the USPTO in patent matters will be required to biennially submit a mandatory registration statement beginning on March 1st, 2022. Practitioners may have to state whether they have completed 6 credits of CLE within the previous 24 months on the registration statement. Comments are due by January 7th, 2021. Read more [here](#).
- On Tuesday, October 20th, from 10:00 – 11:30 a.m. ET, the USPTO is hosting a webinar titled "How the U.S. government can help companies protect and enforce their IP in China." The program will feature specialists drawn from a number of U.S. government agencies, including: USPTO's China IP Team and its IP Attaché Program; International Trade Administration; U.S. Department of State's Intellectual Property Rights Center; U.S.

Department of Justice's Global Law Enforcement Network; and U.S. Customs and Border Protection, Office of Trade. Register online [here](#).

IV. Judicial Updates:

- On Monday, Cisco Systems Inc. was hit with a \$1.89 billion judgment in a 2018 patent infringement suit filed by Centripetal Networks, a small cybersecurity firm in Virginia. The court found that Centripetal had suffered \$755.81 million in actual damages due to Cisco infringing four of its patents. However, because the infringement was “willful and egregious,” the reward was enhanced by a factor of 2.5x to equal \$1.89 billion. “We are disappointed with the trial court’s decision given the substantial evidence of non-infringement, invalidity and that Cisco’s innovations predate the patents by many years,” Cisco spokesperson Robyn Blum said in a statement. “We look forward to the Federal Court’s review on appeal.” Read more [here](#).

V. International Updates:

- Late last week, India and South Africa sent a proposal to the World Trade Organization (WTO) urging for certain provisions in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement to be waived so that medical products can be more easily accessed, especially by low-income countries. The proposal states reports that IP rights are “hindering or potentially hindering timely provisioning of affordable medical products” to patients. As such, India and South Africa requested a waiver from the implementation, application, and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement in relation to the prevention, containment, or treatment of COVID-19 until widespread vaccination is in place globally, and the majority of the world’s population has developed immunity. The TRIPS Council is [slated to consider](#) the letter when they meet on October 15th and 16th. Read the full letter [here](#).
- EU competition czar Margrethe Vestager indicated this week that she would make more use of injunctions moving forward after successfully forcing Broadcom to change its alleged anticompetitive practices. On Wednesday, the European Commission announced that it closed its investigation into Broadcom in exchange for a legally binding commitment from the chipmaker to refrain from any exclusivity arrangements for the chips used in television set-top boxes and internet modems over the next seven years. The decision comes a year after Vestager revived interim measures to order Broadcom to suspend contested agreements while the investigation was ongoing. “If you have taken out a tool out of a toolbox and have some experience in using it, it’s more likely that you’ll use it again,” Vestager said, indicating that she might use this power in her antitrust probes into Google, Apple, Amazon, and Facebook. Read more [here](#).
- Yoo Myung-hee from South Korea and Ngozi Okonjo-Iweala from Nigeria are the last two candidates left in the race for the World Trade Organization’s (WTO) top job, paving the way for the first female global trade chief. Okonjo-Iweala is an economist and former finance minister of Nigeria who served at the World Bank for 25 years, rising to become the organization’s director of operations. She was also named to the board of Twitter in 2018. Yoo Myung-hee is the first woman to serve as South Korea’s trade minister. She presents herself as a “bridge” candidate who can help overcome the divide between the United States

and China, as well as between rich countries and developing nations. The WTO hopes to have a final candidate for the top post by November 7th. Read more [here](#).

VI. Industry Updates:

- On Thursday, Moderna vowed to not sue companies that use its patented technologies to make vaccines to combat the pandemic. The biotechnology company also committed to licensing its IP to help companies develop COVID-19 vaccines after the pandemic is over. Moderna President Stephen Hoge told *POLITICO* in an interview that not enforcing that patents was the “right thing to do morally and ethically.” The federal government has invested more than \$2 billion in Moderna’s potential vaccine as part of Operation Warp Speed. Moderna is poised to fully enroll its late-stage clinical trial to 30,000 participants within the next two weeks, putting it on a path to know whether the vaccine works by the end of November at the earliest. Read more [here](#).