

PATENT & TRADEMARK POLICY REPORT SEPTEMBER 11, 2020



I. Congressional Developments:

- On Wednesday, the House Judiciary Committee reported the *TM Act of 2020* ([H.R. 6196](#)) favorably out by a voice vote. Chairman Nadler (D-NY) offered [an amendment in the nature of a substitute](#). Nadler explained that in addition to technical revisions to enhance clarity, the substitute amendment limits the period during which new ex parte expungement petitions may be brought and adds a new section clarifying the authority of the USPTO Director to re-consider decisions of the TTAB, including those that result from new ex parte proceedings created by the bill. Rep. Louie Gohmert (R-TX) was the only member to speak against the bill – raising concern that it was brought up without a hearing. In addition to Chairman Nadler, IP Subcommittee Chairman Johnson (D-GA) and Reps. Cline (R-VA) and Correa (D-CA) spoke in favor of the bill. Senate Judiciary IP Subcommittee Chairman Tillis (R-NC) and Ranking Member Coons (D-DE) introduced a companion bill ([S. 3449](#)) in the upper chamber on March 11th, although it has yet to clear the Senate Judiciary Committee.
- On September 15th, at 2:00 p.m. ET, the Senate Judiciary Antitrust Subcommittee will hold a hearing titled “Stacking the Tech: Has Google Harmed Competition in Online Advertising?” Subcommittee Chairman Mike Lee (R-UT) hopes that the hearing will “reaffirm the wisdom of focusing on better enforcement rather than the radical transformation of the antitrust laws demanded by the extreme left.” A notice announcing the hearing asserts that “recent consumer complaints and investigations by law enforcement have raised questions about whether Google has acquired or maintained its market power in online advertising in violation of antitrust laws.” More info. [here](#) and [here](#).

Headlines and Highlights:

- House Judiciary Committee reports the *Trademark Modernization Act of 2020* reportedly out by a voice vote.
- Senate Judiciary IP Subcommittee to examine cyber-attacks and counterfeits during the pandemic at upcoming hearing.
- Senate Judiciary Antitrust Subcommittee to hold hearing on Google and the online advertising market next week.
- USPTO to host inaugural meeting for the National Council for Expanding American Innovation next week.
- Innovation Alliance to host three-day webinar with world’s leading experts in licensing, featuring a fireside chat with USPTO Director Iancu and Qualcomm General Counsel Don Rosenberg.

- On Wednesday, September 23rd, at 2:30 p.m. ET, the Senate Judiciary IP Subcommittee will hold a hearing titled, “Examining Threats to American Intellectual Property: Cyber-attacks and Counterfeits During the COVID-19 Pandemic.” The following witnesses are slated to testify before the Subcommittee: Mr. Adam Hickey (Deputy Assistant Attorney General National Security Division, Department of Justice); Mr. Clyde Wallace (Deputy Assistant Director, Cyber Operation Branch, Federal Bureau of Investigation); Mr. Steve Francis (Assistant Director, HSI Global Trade Investigations, Division Director, National Intellectual Property Rights Center, U.S. Immigration and Customs Enforcement, Department of Homeland Security); and Mr. Bryan S. Ware (Assistant Director For Cybersecurity Cyber Security And Infrastructure Security Agency, Department of Homeland Security). Read more [here](#).

II. Administration Updates:

- U.S. Customs and Border Protection (CBP) announced that it seized 2,000 counterfeit Apple Airpod Earbuds from Hong Kong destined for Nevada at an air cargo facility located at John F. Kennedy International Airport in late August. Per the press release, the merchandise’s Manufacture’s Suggested Retail Price (MSRP) would be \$398,000 if it were genuine. Read more [here](#).
- This week, the Cybersecurity and Infrastructure Security Agency (CISA) responded to Senators Tillis (R-NC) and Cornyn’s (R-TX) [letter](#) inquiring about recent NetWalker attacks on education systems, medical facilities, businesses, and government agencies. Senators wrote the agency on July 30th raising concern that NetWalker threatens users with the publication of their data and adds an encryption that makes it impossible for users to cover their data without paying the ransom. Tillis and Cornyn also noted that according to public reports, NetWalker has been traced back to Russian government-affiliated hackers. In its response, CISA confirmed that it is tracking actors who are utilizing the NetWalker ransomware specifically to capitalize on COVID-19. In response to the question about which other foreign actors, besides Russia, are conducting attacks using RaaS similar to the NetWalker attacks, CISA stated “Criminal actors that are not necessarily tied to traditional APT Groups/Nation-States have been conducting RaaS attacks.” Finally, on the question of how Congress can bolster CISA’s ability to effectively combat sophisticated actors such as NetWalker, CISA pointed to the Cybersecurity Vulnerability Identification and Notification Act (CVINA), which was included in both the House and Senate versions of the National Defense Authorization Act (NDAA).

III. USPTO Updates:

- USPTO will host the inaugural meeting for the National Council for Expanding American Innovation (NCEAI) on Monday, September 14th from 1:00 – 2:30 p.m. ET. NCEAI will work with USPTO to develop a comprehensive national innovation strategy that builds a diverse and inclusive ecosystem. Director Iancu told *Bloomberg* that the council will identify ways to promote an interest in science and technology among children, encourage investments in small businesses, and expand the geographic map. “For the U.S. to maintain our technological edge, we really do need all hands on deck,” Director Iancu asserted. Read more [here](#) and [here](#).

- USPTO announced that the following people will serve on members of its Performance Review Board (PRB): Laura A. Peter, Chair (Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the USPTO); Frederick W. Steckler, Vice Chair (Chief Administrative Officer, USPTO); Andrew H. Hirshfeld (Commissioner for Patents, USPTO), David S. Gooder (Commissioner for Trademarks, USPTO); Dennis J. Hoffman (Chief Financial Officer, USPTO); Henry J. Holcombe (Chief Information Officer, USPTO); Nicholas T. Matich IV (Acting General Counsel, USPTO); and Shira Perlmutter (Chief Policy Officer and Director for International Affairs, USPTO). The following people will serve as alternates: Meryl L. Hershkowitz (Deputy Commissioner for Trademark Operations, USPTO); Andrew I. Faile (Deputy Commissioner for Patents, USPTO). The PRB reviews and makes recommendations concerning proposed performance appraisals, ratings, bonuses, pay adjustments, and other appropriate personnel actions for incumbents of Senior Level and Senior Executive Service positions within USPTO. More info. [here](#).

IV. Judicial Updates:

- *POLITICO* reported late last week that the nearing election has heightened partisan dimensions of disputes on whether and when to bring an antitrust case against Google. The Department of Justice (DOJ) announced in July 2019 that it was investigating whether and how market-leading online platforms “have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers.” The DOJ reportedly [began collaborating](#) with state attorneys general who have also opened an inquiry into Google earlier this year. According to the *Wall Street Journal*, Attorney General William Barr is [preparing](#) to bring a case against Google as soon as this summer, although some DOJ staffers have [expressed internally](#) that they need more time to develop a camera-ready case. Sources told *POLITICO* that some Democratic AGs are also holding up the case’s launch as well, and the DOJ will hold meetings in the coming weeks in an attempt to smooth over these disagreements. Read more [here](#).

V. International Updates:

- On Monday, the UK Intellectual Property Office (UKIPO) launched a consultation for input on the future of AI and IP policy. To ensure that the UK remains “one of the best IP environments in the world,” officials want to ensure that the UK’s IP environment accommodates the challenges future technologies will bring. “In short, we want the UK to remain at the forefront of the AI and data revolution,” the consultation description states. The consultation closes on November 30th. More info. [here](#).
- This week top Democrats warned that they would not support a U.K.-U.S. trade agreement if UK Prime Minister Boris Johnson moves forward with an EU exit plan that would imperil the Good Friday Accord. As part of its initial withdrawal plan with the EU, Britain agreed to give Northern Ireland the same rules as the EU to avoid customs checks at the land border between Northern Ireland, upholding the agreement that ended years of bloodshed. Speaker of the House Nancy Pelosi (D-CA), House Ways & Means Committee Chairman [Richard Neal](#) (D-MA), and Biden campaign advisor [Antony Blinken](#) all implored the UK to prevent the return of a hard border in statements on Wednesday. “If the UK violates that international treaty and Brexit undermines the Good Friday accord, there will be absolutely no chance of a U.S.-UK trade agreement passing the Congress,” Speaker Pelosi declared. This controversy comes as the two nations [kicked off](#) their fourth round of negotiations in

pursuit of a Free Trade Agreement (FTA) this week. Read more [here](#).

- Former Latvia Prime Minister Valdis Dombrovskis was named the European Commission's new trade commissioner on Tuesday. Dombrovskis outlined his goals for an investment deal with China in his first appearance in the top trade role. "It needs to be an ambitious agreement and address challenges and imbalances we're facing in our investment relations with China," Dombrovskis said. The EU's new trade lead has extensive economic and crisis management experience, *POLITICO Europe reports*, but is a relative newcomer to the world of trade. However, he has been a [proponent](#) of establishing an EU digital services tax, which angered Silicon Valley and Trump Administration trade officials. Read more [here](#).
- On Tuesday, the European Commission published a Staff Working Document evaluating its Vertical Guidelines and the vertical block exemption regulations (VBER). Regulators found that while both are still relevant, updates are needed to address changes to the market, including growing sales and the entrance of new players such as online platforms. The evaluation notes that changes to the market have been accompanied by changes to distribution models, including increased direct sales by suppliers and a greater use of selective distribution systems. "New types of vertical restrictions, such as restrictions regarding sales through online marketplaces and restrictions on online advertising, as well as retail parity clauses, have become more widespread," regulators found. The Commission will launch an impact assessment in the coming weeks to investigate the issues identified during the evaluation and revise the rules before they expire in May 2022. Read more [here](#).

VI. Industry Updates:

- On September 21st, 24th, and 29th, the Innovation Alliance is hosting a webinar with the world's leading experts in licensing "to discuss the methodology used for collecting economic data on licensing and whether it sufficiently highlights its growing contribution to the U.S. economy." The webinar will kick off on Monday, September 21st, with a fireside chat between USPTO Director Andrei Iancu and Don Rosenberg, General Counsel, Qualcomm Incorporated. Find more info. and register [here](#).
- *The Hill* reports that TechNet, a trade group with members such as Google, Apple, eBay, DoorDash, and Nasdaq hosted a three-day virtual fly-in this week to connect tech executives with powerful members of Congress. The fly-in agenda reportedly includes meetings with Speaker Pelosi, Senate Minority Leader Charles Schumer (D-NY), House Minority Leader Kevin McCarthy (R-CA), and House Majority Leader Steny Hoyer (D-MD). Participants were also slated to meet with Sens. Amy Klobuchar (D-MN), Jacky Rosen (D-NV) Deb Fischer (R-NE), and Steve Daines (R-MT). Read more [here](#).