

## PATENT & TRADEMARK POLICY REPORT APRIL 23, 2021



### I. Congressional Developments:

- On Wednesday, the Senate Judiciary IP Subcommittee held a hearing on “Improving Access and Inclusivity in the Patent System: Unleashing America’s Economic Engine.” The following witnesses testified before the subpanel: [Ms. Georgia Grace Edwards](#), Co-Founder, SheFly; [Ms. Mallun Yen](#), Founder and Partner, Operator Collective; [Ms. Angela Grayson](#), Founder and Principal Member, Precipice IP PLLC, American Intellectual Property Law Association; and [Mr. Lateef Mtima](#), Professor of Law, Howard University School of Law. During his opening statement, Chairman Patrick Leahy (D-VT) asserted that America’s innovation engine still needs to be fully unleashed, raising concern that we have not done enough to tap into the diverse segments of our society. Although the Leahy–Smith America Invents Act (AIA) sought to boost accessibility to the patent office through multiple initiatives, such as by creating satellite PTO offices around the country, lowering fees for small businesses, and creating a patent pro bono program, Chairman Leahy seemed to think that Congress could take further action to boost participation in the patent system from underrepresented groups. Chairman Leahy said he was a proud cosponsor of Senator Hirono’s (D-HI) bipartisan IDEA Act, which would allow the PTO to collect demographic data from patent applications on a voluntary basis. Similarly, Ranking Member Thom Tillis (R-NC) reiterated his commitment to increasing diversity in our nation’s IP system, and said he was proud to be part of the recent re-introduction of the IDEA Act. In addition to the Chairman and Ranking Member, Senators Hirono and Blackburn (R-TN)

### Headlines and Highlights:

- Senate Judiciary IP Subcommittee considers ways to increase participation in patent system from historically underrepresented groups at hearing.
- Senate Judiciary Antitrust Subcommittee considers competition in app stores at hearing.
- Senate Commerce Committee holds hearing on strengthening the FTC’s authority to protect consumers.
- Senate Judiciary tech subpanel to hold hearing on algorithms next week.
- EU proposes new AI rules.
- Elizabeth Baltzan appointed as a Senior Advisor to USTR.
- Commissioner for Trademarks Gooder details what brand owners need to know about the TMA in blog post.

participated in the Q&A session with the panelists. Watch the full hearing [here](#).

- On Wednesday, Senators Chris Van Hollen (D-MD) and Ben Sasse (R-NE) reintroduced the Protecting American Intellectual Property Act, legislation to mandate strong economic penalties on firms and individuals involved in stealing American intellectual property. Specifically, the bill requires sanctions on individuals and firms found to engage in, benefit from, or enable the significant and serial theft of U.S. intellectual property. The Senators' legislation was passed unanimously by the Senate in December 2020. Read more [here](#).
- On Wednesday, the Senate Judiciary Antitrust Subcommittee held a hearing titled "Antitrust Applied: Examining Competition in App Stores." The hearing featured testimony from the two big app store platforms— Google and Apple— and three companies who have banded together to critique the tech platforms' market power in the mobile software market. The predominant focus of the hearing was the app stores of Google and Apple and the alleged "gatekeeper" role they play in allowing other companies to reach consumers on their mobile phones. Specifically, the hearing covered the app companies' and senators' concerns over alleged anticompetitive behavior, including their payment processing fees, retaliation by Apple and Google, data privacy, and self-preferencing. Witnesses at the hearing included [Kyle Andeer](#) (Chief Compliance Officer, Apple), [Wilson White](#) (Senior Director Public Policy & Government Relations, Google Inc.), [Horacio Gutierrez](#) (Head Of Global Affairs & Chief Legal Officer, Spotify), [Mr. Mark Cooper, Ph.D.](#) (Director Of Research, Consumer Federation of America), [Kirsten Daru](#) (General Counsel, Tile, Inc), and [Jared Sine](#) (Chief Legal Officer & Secretary, Match Group, Inc.). During her opening statement, Chairwoman Amy Klobuchar (D-MN) indicated that she is particularly focused on the app store's payment processing policies which can come with a 30% digital transaction fee. Klobuchar said that she is concerned that payment processor commissions for digital services could suppress competition when they raise the cost of app developers that directly compete with Apple or Google. Watch the full hearing [here](#).
- On Tuesday, the Senate Commerce Committee held a hearing titled "Strengthening the Federal Trade Commission's Authority to Protect Consumers." The hearing focused on the Commission's consumer redress authority; the Commission's efforts to fight fraud during the pandemic, including its new first-time civil penalty authority for COVID-related scams; and the Commission's tools and capabilities in the information age, including \$30.4 million in funding for consumer protection matters that Congress provided in the American Rescue Plan Act. Testifying on behalf of the Commission, Acting FTC Chairwoman Rebecca Kelly Slaughter along with Commissioners Noah Joshua Phillips, Rohit Chopra, and Christine S. Wilson [detailed](#) the FTC's work to protect consumers through law enforcement actions and consumer and business education aimed at dispelling misinformation and warning about the latest COVID-19-related scams. The Commissioners also urged lawmakers to ensure the agency has the authority it needs to prohibit illegal conduct and return money to consumers who have been victims of unlawful conduct. Watch the full hearing [here](#).
- On Thursday, the Senate Finance Committee held a hearing titled "U.S.-China Relations: Improving U.S. Competitiveness Through Trade." The hearing featured testimony from four witnesses: [Clete Willems](#), Partner at Akin Gump Straus Hauer & Feld LLP; [David Baer](#), COO and General Counsel at Element Electronics; [Aynne Kokas](#), Associate Professor of Media Studies and Senior Faculty Fellow at Miller Center for Public Affairs at the University of Virginia; and [Michael R. Wessel](#), Commissioner, U.S.-China Economic and

Security Review Commission. The hearing focused on how the U.S. can fight the rise of China both geopolitically and economically. There was particular attention paid to Chinese theft of American IP, forced technology transfers, data privacy, and exposing Chinese investment in U.S. companies and vice versa. Of note, Ranking Member Crapo (R-ID) asked a question about the World Trade Organization (WTO) proposal to waive IP rights related to COVID-19. Clete Willems said he was very concerned about the Biden Administration's consideration of the waiver, asserting that "the notion that IP is causing problems is wrong and is a part of a longstanding effort by India to undermine IP at the WTO." Watch the full hearing [here](#).

- Next Tuesday, April 27<sup>th</sup>, at 10:00 a.m. ET, the Senate Judiciary Privacy and Technology Subcommittee will hold a hearing on "Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds." No witnesses have been listed yet. More info. [here](#).
- On Wednesday, seven House Republicans announced that they are no longer accepting donations from major tech companies or their top executives. House Judiciary Antitrust Subcommittee Chairman Ken Buck (R-CO) led the pledge, which was also signed by Reps. Chip Roy (R-TX), Greg Steube (R-FL), Dan Bishop (R-NC), Ralph Norman (R-SC), Andy Biggs (R-AZ), and Burgess Owens (R-UT). In a letter announcing the move, the lawmakers claimed that the major tech companies had limited the reach of conservative voices and abused their market power. Read more [here](#) and [here](#).

## **II. Administration Updates:**

- News surfaced this week that Elizabeth Baltzan has been appointed as a Senior Advisor to the United States Trade Representative (USTR). "Beth Baltzan has a wealth of trade and economic policy experience that will be a huge benefit to USTR and the Biden-Harris administration as we work to expand economic opportunity and increase American competitiveness," USTR Katherine Tai said in statement. Tai went on to say, "Having previously served two stints at USTR, the Public Accounting Oversight Board during the financial crisis, and the United States House Ways and Means Committee, she understands the connective tissues in our economy." Read her full statement [here](#).

## **III. USPTO Updates:**

- On Thursday, in USPTO's Director's Forum Blog, David Gooder, Commissioner for Trademarks at the USPTO, outlined what brand owners need to know about the Trademark Modernization Act (TMA). Gooder explains that the TMA, which was signed into law in December 2020, includes key provisions to give the USPTO and trademark owners additional tools to better protect and strengthen the integrity of the federal trademark register. The deadline to implement the TMA is December 27<sup>th</sup>, 2021, but Gooder touted that efforts to implement the statute are already "well underway." Read more [here](#).

## **IV. Judicial Updates:**

- On Thursday, in a unanimous opinion delivered by Justice Stephen Breyer, the U.S. Supreme Court ruled that Section 13(b) of the FTC Act does not authorize the agency to seek monetary relief for violations of the law. The high court noted that the statute does not

explicitly authorize the FTC to obtain such a remedy, but instead allows the federal agency to seek a “a permanent injunction” pending administrative proceedings. FTC Chairwoman Rebecca Slaughter decried the ruling in a statement, claiming that the Supreme Court “ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior.” Read more [here](#).

- Reports surfaced on Wednesday that a federal jury in Waco, Texas, ruled that Intel Corp. did not infringe two patents held by VLSI Technology LLC that make chips faster using less energy. The ruling comes after another Texas jury last month ordered the chip maker to pay \$2.18 billion to VLSI in a dispute involving different patents. Read more [here](#).

## **V. International Updates:**

- On Wednesday, the European Union’s executive arm proposed a bill that would create a list of high-risk uses of Artificial Intelligence (AI) that would be subject to new supervision and standards for their development and use. Areas that would be subject to the new standards include critical infrastructure, college admissions, and loan applications. Other practices would be banned outright, including AI systems that use “subliminal techniques” or take advantage of people with disabilities to “materially distort a person’s behavior” in a way that could cause physical or psychological harm. Officials have insisted that most uses of AI, such as videogames and spam filters, would have no new rules under the bill. In order to become law, the proposal would need to be approved by both the European Council and the European Parliament, a process that could take years. Read more [here](#).

## **VI. Industry Updates:**

- In a keynote at the PTAB masters this week, Senate Judiciary IP Subcommittee Ranking Member Thom Tillis called for the reforms rolled out under former USPTO Director Andrei Iancu to be codified into U.S. law. Specifically, Ranking Member Tillis suggested that changes such as harmonizing the PTAB claim construction standard with that of the district courts and making significant changes to the PTAB’s Standard Operating Procedures have helped to provide more certainty for inventors. “These changes have helped to ensure all rights holders, from individual inventors to innovative startups, to industry titans, all receive equitable treatment,” Ranking Member Tillis asserted. Read more [here](#).