

## PATENT & TRADEMARK POLICY REPORT

### AUGUST 6, 2021



#### I. Congressional Developments:

- On Thursday, the Senate Judiciary Committee met for an executive session. The State Antitrust Enforcement Venue Act of 2021 ([S. 1787](#)) was on the agenda, but was held over. Sens. Lee (R-UT), Klobuchar (D-MN), Hawley (R-MO), Blumenthal (D-CT), Leahy (D-VT) are cosponsors of the bill, which seeks to ensure that state attorneys general are able to remain in the court they select rather than having their cases moved to a court the defendant prefers. Read more [here](#).

#### II. Administration Updates:

- The Federal Trade Commission (FTC) said Tuesday that it is tweaking merger reviews to account for a surge in filings. In the first seven months of 2021, companies reported more than 2,000 mergers to the FTC and Justice Department for antitrust review — roughly the same number as the agencies reviewed during all of 2020. Holly Vedova, acting director of the commission's Bureau of Competition said that, due to capacity constraints, the FTC [will send warning letters](#) when the agency hasn't finished its review of a merger within the statutory deadline, telling the companies that if they proceed with their merger prematurely, they "do so at their own risk." Read more [here](#).

#### III. USPTO Updates:

- On Monday, Drew Hirshfeld, performing the functions and duties of the Under Secretary of Commerce for Intellectual Property and USPTO Director, issued the first two decisions in cases in which parties requested

#### Headlines and Highlights:

- Acting USPTO Director issues first two responses to parties requesting Director review, per the interim *Arthrex* procedures.
- Department of Commerce files for federal registration of USPTO marks as part of effort to protect consumers from trademark filing scams.
- U.S. Court of Appeals for the Federal Circuit denied Apple's bid to escape patent infringement claims over its Apple Watch technology that measures heart rates.
- London's High Court dismisses Oatly's trademark infringement case against a family farm over its PureOaty drink.
- The Honorable Alan D. Albright, District Court Judge for the U.S. Federal District Court for the Western District of Texas, to deliver opening remarks at IPWatchdog conference in Texas next month.

Director review. In light of the *Arthrex* decision, USPTO issued an interim procedure on June 29<sup>th</sup> whereby review of review of a Patent Trial and Appeal Board (PTAB) final written decision in an inter partes, post-grant, or covered business method review may be initiated sua sponte by the Director or requested by a party to a PTAB proceeding. On Monday, Hirshfeld denied the request for Director review in both cases ([IPR2020-00081](#) and [IPR2020-00320](#)), stating that “the Patent Trial and Appeal Board’s Final Written Decision in this case is the final decision of the agency.” Read more [here](#).

- In a Director’s Forum blogpost published on Thursday, Commissioner for Trademarks David Gooder announced that, in an effort to protect trademark customers from filing scams, the Department of Commerce has filed for federal registration of USPTO marks. “Like any other brand owner facing infringement by third parties, if we have federal trademark registrations, they will help us take appropriate legal action as needed to protect the USPTO brand from improper use by those trying to impersonate or falsely claim affiliation or endorsement with the USPTO,” Commissioner Gooder explained. He also pointed out that many federal agencies own trademark registrations, including the Internal Revenue Service, the Environmental Protection Agency, and the Food and Drug Administration. Read more [here](#).
- On September 10<sup>th</sup>, from 1:00 – 4:00 p.m. ET, USPTO’s Legal Experience and Advancement Program (LEAP) and the American Intellectual Property Law Association (AIPLA) will host an America Invents Act (AIA) mock argument practicum. The practicum offers an opportunity for practitioners to hone their oral argument skills by presenting an AIA Trials argument to and obtaining feedback from a panel of sitting administrative patent judges. Register by August 6<sup>th</sup> online [here](#).
- USPTO is hosting a free online event titled “Invention-Con 2021” from August 18<sup>th</sup>-20<sup>th</sup>. The August 18<sup>th</sup> event will feature Gitanjali Rao, inventor and TIME magazine’s 2020 Kid of the Year, and other young innovators who will share their experiences and insights. Invention-Con 2021 will also include a wide range of virtual resource booths from the USPTO and other federal government agencies. More info. [here](#).

#### **IV. Judicial Updates:**

- On Monday, the U.S. Court of Appeals for the Federal Circuit denied Appel’s bid to escape patent infringement claims over its Apple Watch technology brought by a University of Michigan professor’s biomedical laser company. The divided three-judge panel decided that the employment agreement between Professor Islam and the university did not automatically assign his patents to it, and Apple could not escape the case based on a lack of standing by his company Omni MedSci Inc. Omni filed suit in 2018 alleging that the technology in Apple Watches that measures heart rates infringed four of its patents. Read more [here](#).
- In a Friday update on a lawsuit filed by DOJ and states that accused Google of abusing its place at the forefront of the online search market, lawyers for Google claimed that Microsoft was stalling on handing over millions of documents about its efforts to compete with Google’s search engine. Google argued that Microsoft — which has been identified as Google’s “most significant competitor in online search” by DOJ and the states, and which Google referred to as the “central” third party in the case — has slow-walked producing

documents from 19 former and current Microsoft employees about whether Google’s dominance “restrained” Microsoft from competing with it, “or whether [Microsoft] simply failed to compete successfully on the merits,” according to the subpoena. Read more [here](#).

## **V. International Updates:**

- The *Financial Times* reports that London’s High Court has dismissed Oatly’s trademark infringement case against a family farm over its PureOaty drink. Judge Nicholas Caddick dismissed Oatly’s claims that Cambridgeshire-based Glebe Farm Foods infringed Oatly’s trademarks by using the Swedish company’s brand name and pack design to pass off as the Oatly beverage. Judge Caddick said that the visual similarity of the names were “very modest” and decided that there was no evidence that consumers were confused about the two products. Oatly announced that it fully accepted the court’s decision and would not file an appeal. Read more [here](#).

## **VI. Industry Updates:**

- On September 12<sup>th</sup> – 13<sup>th</sup>, IPWatchdog is hosting an in-person conference in Texas. The Honorable Alan D. Albright, District Court Judge for the U.S. Federal District Court for the Western District of Texas, is scheduled to deliver opening remarks. The two-day event will feature panels on a wide array of issues, including the monetization landscape and the future of the PTAB post *Arthrex*. Read more [here](#) and find the full agenda [here](#).