



AMERICAN CONTINENTAL GROUP

1800 M Street NW | 5th Floor | Washington D.C. 20036
Tel: (202) 327-8100 | Fax: (202) 327-8101

PATENT & TRADEMARK POLICY REPORT JUNE 4, 2021



I. Congressional Developments:

- On Wednesday, House Judiciary IP Subcommittee Chairman Hank Johnson (D-GA) and Ranking Member Darrell Issa (R-CA) sent a letter asking the Government Accountability Office (GAO) to review recent developments involving the *Arthrex* case. The Supreme Court recently granted certiorari in an appeal from a Federal Circuit decision that determined that PTAB Administrative Patent Judges (APJs) were “primary officers of the United States” and, thus, unconstitutionally appointed without Senate confirmation. In the appeal, the government argues that APJs are instead “inferior officers” who do not require Senate confirmation because they are subject to significant oversight and control by the USPTO Director. The letter raises concern that if the government’s arguments are accurate, PTAB cases may have been decided based on factors outside the evidentiary record and public legal authority available to parties. The leaders of the IP subpanel therefore pose a series of questions on the matter for GAO to investigate, including the mechanisms available to the Director to influence APJ decisions in APA cases, such as prescribing or changing APJs on a panel, *ex parte* communications with APJs on a panel, etc.
- On Tuesday, June 8th at 2:00 p.m. ET the House Energy and Commerce Consumer Protection and Commerce Subcommittee will hold a hearing on the FY2022 budget request for the Commerce Department. Secretary of Commerce Gina Raimondo will be the sole witness.

Headlines and Highlights:

- House Judiciary IP Subcommittee leaders ask GAO to review recent developments involving the *Arthrex* case.
- House Subcommittee to hold a Commerce Department budget hearing next week.
- U.S. report accuses Commerce Department of failing to keep sensitive U.S. tech out of China’s hands.
- EU prepares rival plan to the U.S.-backed TRIPS waiver for COVID-19 vaccines to present to the WTO.
- USPTO extends the submission deadline for expanding its Law School Clinic Certification Program to December 31st, 2022
- USPTO to transition to DOCX for all filers on January 1st, 2022.

II. Administration Updates:

- On Tuesday, the U.S.-China Economic and Security Review Commission released its 2020 Annual Report to Congress and stated, among other things, that the U.S. Commerce Department is failing to do its part to protect national security and keep sensitive technology out of the hands of China's military. The report accuses the Commerce Department of being slow to identify U.S. technologies that should be scrutinized before export to China. The Commerce Department, entrusted to strengthen U.S. export control laws, "has, to date, failed to carry out its responsibilities," said the report, titled, "Unfinished Business: Export Control and Foreign Investment Reforms." Read more [here](#).
- The Office of the United States Trade Representative (USTR) is soliciting applications for the Assistant USTR for IP and Innovation Policy position. The individual will be responsible for developing and implementing U.S. bilateral and multilateral trade policies and negotiating strategies regarding innovation and IP rights. Applications are due by June 7th. More info. [here](#).

III. USPTO Updates:

- USPTO announced this week that it is in the process of transitioning to a system that supports submitting new patent applications in structured text, specifically DOCX format. To improve application quality and efficiency, USPTO is slated to transition to DOCX for all filers on January 1st, 2022. More info. [here](#).
- On Tuesday, USPTO announced that it is extending the submission deadline for expanding its Law School Clinic Certification Program to December 31st, 2022. Founded in 2008, the program currently includes 60 law school clinics and offers patent and trademark applicants access to pro bono services. It also gives law students, under the supervision of a faculty clinic supervisor, experience in practicing IP law before the USPTO. Submissions from interested law school clinical programs will be accepted on a rolling basis. More info. [here](#).
- USPTO has issued a NPRM to amend the rules of practice to permit the submission of physical media larger than compact discs for electronic versions of amino acid and nucleotide sequence information, information compiled in a large table, and information relating to a computer program listing. Comments to the NPRM are due by July 26th. More info. [here](#).
- USPTO is seeking nominations for the 2021 National Medal of Technology and Innovation (NMTI). The NMTI is the nation's highest honor for technological achievement and is presented to recipients by the President of the United States at a White House ceremony. Nominations are due by July 30th. More info. [here](#).

IV. Judicial Updates:

- In the latest in a long-standing battle between tech and car companies over royalties for key technologies, news surfaced on Tuesday that Daimler has agreed to pay Nokia for using its patents. Although they did not disclose the terms of the deal, the companies announced that they would halt litigation. "We welcome the settlement, from an economic point of view and because we avoid lengthy ... disputes," a Daimler spokeswoman said. Read more [here](#).

V. International Updates:

- In order to push back against the U.S.-backed TRIPS waiver for COVID-19 vaccines, *The Wall Street Journal* reports that the European Union is preparing a rival plan that would lift export restrictions on vaccines and their raw materials and make it easier for countries to use existing rules to override patents in some case. It would also allow for subsidies to be paid to expand production. EU officials are poised to present the counter-proposal at the World Trade Organization (WTO) next week when members debate the waiver. “Instead of negotiations which will not lead anywhere, it makes more sense to look at the options we have available on which everybody can agree,” an EU official said. Read more [here](#).
- On Tuesday, China’s revised Law and Patent Law came into effect. In a recent blog post, Mark Allen Cohen, a Distinguished Senior Fellow, Director and Lecturer of the Asia IP Project at the Berkeley Center for Law and Technology at the University of California, Berkeley, outlined the interim measures that China has put forward. Cohen explains that CNIPA published its “Interim Measures on Disposition of Examination-Related Activities Post Patent Law Implementation” on May 24th, 2021. The interim measures offer guidance on several issues, including providing for partial design protection; drug patent terms and extension; the availability of recordation of patents for “open licensing;” the beginning of availability of patent evaluation reports to the accused infringer in a patent dispute over utility models or designs; and the commencement of good faith and potential harm to the public substantive examination or reexamination of patent applications beginning June 1st. Of note, there are many non-examination measures that are not addressed by the Interim Measures, including patent linkage. Finally, Cohen points out that there are no comparable interim measures in place to handle the transition period in copyright law implementation. Read more [here](#).

VI. Industry Updates:

- In a Brookings blog post published on Thursday, Brink Lindsey, Vice President at the Niskanen Center, argued that criticisms of the TRIPS waiver that focus only on the next few months are short-sighted. While recognizing that patent law constitutes one important element of a well-designed national innovation system, Lindsey cautions that “the way it goes about encouraging technological progress is singularly ill-suited to the emergency conditions of a pandemic or other public health crises.” Furthermore, he argues that firms in the pharmaceutical industry have “abused the law by piling up patents for trivial, therapeutically irrelevant ‘innovations’...” Read the full blog post [here](#).