

## PATENT & TRADEMARK POLICY REPORT

### SEPTEMBER 17, 2021



#### I. Congressional Developments:

- On Thursday, Senate Judiciary IP Subcommittee Chair Leahy (D-VT), House Judiciary IP Subcommittee Ranking Member Issa (R-CA), and House E&C Health Subcommittee Chair Eshoo (D-CA) joined Senators Wyden (D-OR), Stabenow (D-MI), Warren (D-MA), Blumenthal (D-CT), and Representatives Tiffany (R-WI), Jayapal (D-WA), Spartz (R-IN), and Rush (D-IL) to send a letter to USPTO raising concern that since the *Fintiv* decision “there has been a disturbing rise in discretionary denials of IPR petitions.” The letter urges USPTO to reassert its own “role in reviewing drug manufacturers’ anticompetitive practices, including by ending the policies that have caused the spike in discretionary denials of patent challenges.” Read the full letter [here](#) and more [here](#).
- This week, the 13 House Committees that received reconciliation instructions concluded their individual markups. Of note, Subtitle O of the House Energy & Commerce Committee bill [appropriates](#) \$1 billion to the Federal Trade Commission (FTC) to carry out work related to unfair or deceptive acts or practices related to privacy, data security, identify theft, and data abuses. Meanwhile, Reps. Scott Peters (D-CA), Kathleen Rice (D-NY), and Kurt Schrader (D-OR), [voted against](#) a provision that would allow the Secretary of Health and Human Services (HHS) to negotiate lower drug prices. Although the provision was adopted by the House Ways & Means Committee, the E&C vote signals to leadership that they might not have enough votes from centrist Democrats if they include the language in the final bill. Nevertheless, a spokesperson for Speaker

#### Headlines and Highlights:

- Chair Leahy and Ranking Member Issa raise concern about *Fintiv* decision in letter to USPTO.
- Senate Judiciary Antitrust Subcommittee to hold hearing on big data next week.
- PTAB extends Motion to Amend pilot program through September 16<sup>th</sup>, 2022.
- Biden to nominate privacy advocate Alvaro Bedoya to serve on the FTC.
- FTC votes to withdraw 2020 Vertical Merger Guidelines.
- FTC presents findings from its inquiry into past acquisitions by the largest tech platforms.
- USPTO to host webinar outlining developments in IP law in China over the past three months on September 30<sup>th</sup>.

Pelosi (D-CA) maintained that a provision lowering drug costs “will remain a cornerstone of the Build Back Better Act as work continues between the House, Senate and White House on the final bill.” The respective bills from the 13 committees will now be transmitted to the House Budget Committee, which is tasked with packaging them together and sending the bill off to the House Rules Committee, where significant changes are likely to be made before the legislation goes to the House floor.

- Next Tuesday, September 21<sup>st</sup>, at 2:30 p.m. ET, the Senate Judiciary Antitrust Subcommittee will hold a hearing titled “Big Data, Big Questions: Implications for Competition and Consumers.” No witnesses have been listed yet. More info. [here](#).

## **II. Administration Updates:**

- On Monday, the White House announced that President Biden will nominate Alvaro Bedoya for a seat on the FTC. Bedoya is a Georgetown Law professor and the founding director of the school's Center on Privacy & Technology. He will fill Rohit Chopra’s seat, who is leaving the Commission to lead the Consumer Financial Protection Bureau. Bedoya also previously served as the first chief counsel to the Senate Judiciary Privacy and Tech Subcommittee. Read more [here](#).
- On Wednesday, the FTC released its findings from its inquiry into past acquisitions by the largest tech platforms – including Alphabet, Amazon, Apple, Facebook, and Microsoft – that did not require reporting to antitrust authorities at the FTC and the Department of Justice (DOJ). The FTC’s inquiry focused on 616 transactions (that exclude hiring events and patent acquisitions) valued at or above \$1 million. Out of the 616 transactions studied, the FTC found that 94 exceeded the Hart-Scott-Rodino (HSR) Act Size of Transaction threshold. Under the HSR Act, companies are only required to report transactions exceeding \$92 million in value. Although most transactions that exceed the size threshold must be reported, in some instances parties do not need to file if certain other criteria are met or statutory or regulatory exemptions apply. Pointing to the study results, FTC Chair Lina Khan said that the Commission should identify potential loopholes in HSR reporting requirements that allow some transactions to “fly under the radar.” Read more [here](#) and [here](#).
- On Wednesday, the FTC also voted to withdraw its approval of the Vertical Merger Guidelines that were issued jointly with the DOJ in 2020. According to a press release from the Commission, the guidance documents “include unsound economic theories that are unsupported by the law or market realities.” Specifically, the FTC majority claims that the 2020 Vertical Merger Guidelines improperly contravened the Clayton Act’s language with its approach to efficiencies, which they assert are not recognized by the statute as a defense to an unlawful merger. Going forward, the Commission plans to work with the DOJ to update merger guidance to “better-reflect market realities.” Read more [here](#).

## **III. USPTO Updates:**

- On Wednesday, USPTO announced that the PTAB is extending the Motion to Amend (MTA) pilot program, which provides additional options for a patent owner who files an MTA in a trial proceeding under the AIA, through September 16<sup>th</sup>, 2022. Read the federal

register notice [here](#).

- USPTO has extended the deadline for submitting comments on the state of patent eligibility jurisprudence and its effect on investment and innovation in the United States to October 15<sup>th</sup>. Read more [here](#).
- The deadline for the submission of applications for the USPTO Patents for Humanity COVID-19 award is September 30<sup>th</sup> at 5:00 p.m. ET. More info. [here](#).

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

- On Monday, the U.S. Court of Appeals affirmed Apple's PTAB win invalidating parts of a fingerprint-authentication patent owned by Korean patent owners Firstface Co Ltd. However, the unanimous three-judge panel also upheld two other Firstface patents that Apple had challenged, rejecting Apple's claims that the two other valid patents were obvious based on earlier disclosures. Read more [here](#).

#### **V. International Updates:**

- On Thursday, September 30<sup>th</sup>, from 1:00 – 2:00 p.m. ET, USPTO is hosting a presentation on the latest developments in IP law over the past three months in the People's Republic of China. Register to attend [here](#).

#### **VI. Industry Updates:**

- Thursday, September 16<sup>th</sup> marks the ten-year anniversary of the America Invents Act (AIA) being signed into law by President Barack Obama. *IPWatchdog* published an article outlining stakeholders' thoughts on the AIA and areas where it might need to be improved. The comments reflect a mix of perspectives, but, overall, most stakeholders featured held the view that it's time to reevaluate and make improvements to correct a variety of unintended consequences of the law. Read more [here](#).