

PATENT & TRADEMARK POLICY REPORT AUGUST 4, 2017



I. Congressional Developments:

- Senator Rob Portman (R-OH) and nineteen other senators have [introduced](#) a bill, called the *Stop Enabling Sex Traffickers Act*, that would “eliminate federal liability protections for websites that assist, support, or facilitate a violation of federal sex trafficking laws.” *Recode* reports that “the likes of Amazon, Facebook, and Google are about to go to war with” Congress over the bill, with the Internet Association [claiming](#) that the legislation “jeopardizes bedrock principles of a free and open internet.” Read more [here](#).
- On Thursday, Vishal J. Amin was unanimously confirmed by the Senate to serve as the next Intellectual Property Enforcement Coordinator (IPEC). House Judiciary Chairman Goodlatte (R-VA) released a [statement](#) following the vote calling Amin—who formerly worked on the Committee—a “valued member” of the staff who will be “a tireless advocate on behalf of American innovators and creators...”
- On Thursday, Senator Hatch (R-UT) spoke on the Senate floor about the growing controversies regarding the application of antitrust law in the technology sector, specifically referencing the Democrats’ “[Better Deal](#)” platform which pledges to better police mergers. “Antitrust has been increasingly drawn into the broader public debate on economic policy, and not for the better,” Hatch said. “With each passing day, it seems [free market economics] finds itself besieged from the left.” Hatch went on to touch on a number of topics, including the European Union’s recent \$2.7 billion fine of Google which he called unjustified. Read more [here](#).

Headlines and Highlights:

- Senator Hatch speaks on growing controversy over antitrust law in the tech sector.
- Senate confirms Vishal Amin as next IPEC.
- CBO releases estimate on Sens. Booker and Sanders’ bill allowing Americans to import medicines from other countries.
- Internet Association criticizes online sex trafficking bill, claims it “jeopardizes” free and open internet.
- OAI holds conference call with large tech companies, considers holding “tours of duty” for tech engineers in government.
- White House postpones memorandum signing on Chinese theft of IP.

- On Thursday, the Senate Finance Committee held a hearing on the nomination of Gilbert Kaplan to serve as Under Secretary of Commerce for International Trade. During the hearing, Kaplan said that among his areas of focus would be opening the world to U.S. digital trade and ensuring the protection of U.S. intellectual property abroad. Kaplan suggested multiple times that Section 301 of the Trade Act of 1974 could be used to take action on intellectual property violations. He also suggested that Section 301 could be used for China's restrictions on cloud computing.
- The Congressional Budget Office has released an estimate finding that a bill introduced by Senators Bernie Sanders (I-VT) and Cory Booker (D-NJ), which would allow Americans to import medicines from other countries, would save the federal government almost \$6.8 billion over ten years. The bill, called the Affordable and Safe Prescription Drug Importation Act, was introduced on February 28. Read more [here](#).
- On Thursday, the Senate passed legislation to reauthorize the Food & Drug Administration (FDA) user fee programs for five years. The bill now heads to the President's desk, where it is expected to be signed into law. The bill passed by a vote of 94-1, with Senator Bernie Sanders (I-VT) voting in the negative. In addition to allowing the FDA to charge industry fees for its review of products, the bill expedites the review of certain generic drug applications, and prevents large price increases on old medicines that have no competition, among other provisions. The Senate also passed the Right to Try Act, which creates a new pathway for terminally ill patients to access experimental drugs. That bill passed the Senate by unanimous consent, and now awaits action in the House. Read more [here](#) and [here](#).

II. Administration Updates:

- On Friday, President Trump was scheduled to give a speech and sign a memorandum targeting Chinese theft of American intellectual property and other unfair Chinese trade practices. However, CNBC [reported](#) on Thursday that the speech has been postponed indefinitely. The memorandum would reportedly direct U.S. Trade Representative Robert Lighthizer to conduct an investigation of China's trade practices under Section 301 of the Trade Act of 1974. Read more [here](#) and [here](#). Additionally, to assist with the preparation of its annual report on China's compliance with World Trade Organization (WTO) commitments, the Office of the U.S. Trade Representative (USTR) has requested public input through comment submissions and a public hearing. Read the Federal Register notice [here](#). USTR is also seeking comments on significant barriers to U.S. exports, to assist with the preparation of its annual National Trade Estimate Report on Foreign Trade Barriers (NTE). Read the Federal Register notice [here](#).
- On Thursday, White House Office of American Innovation (OAI) staff, including Jared Kushner and Reed Cordish, held a conference call with large technology companies, according to *Recode*. The call reportedly included representatives from Apple, Amazon, Google, Oracle, Qualcomm, IBM, Intel, Mastercard, Microsoft, and SAP. OAI staff allegedly told the companies that the White House plans to create "centers of excellence," which *Recode* describes as "teams focused on reducing regulation while trying to get federal agencies to embrace cloud computing and make more of their data available for private-sector use." OAI staff are also said to have discussed a potential system that would have tech engineers do short "tours of duty" in the federal government. Read more [here](#).

III. USPTO Updates:

- USPTO Commissioner for Trademarks Mary Boney Denison has written a guest post on the USPTO Director's Forum Blog about measures federal agencies are taking to combat trademark scams. She summarizes a recent USPTO public roundtable on fraudulent solicitations which featured speakers from the Department of Justice, U.S. Postal Inspection Service, Federal Trade Commission, Small Business Administration, and U.S. Customs & Border Protection. Read more [here](#).
- The Patent Trial and Appeal Board (PTAB) has designated the decision of Athena Automation Ltd v. Husky Injection Molding System Ltd., as precedential. The decision “determines that the doctrine of assignor estoppel is not an exception to 35 U.S.C. § 311(a), which allows “a person who is not the owner of a patent” to file a petition for inter partes review.” Read more [here](#).
- The USPTO has published Trademark Exam Guide 2-17, “Merely Informational Matter,” along with the agency's response to public comments on an earlier draft of the guide. The guide “clarifies the policies and procedures for examining certain types of proposed marks that consumers would view as merely communicating information other than the source of goods/services and thus fail to function as marks.” Read more [here](#).

IV. Judicial Updates:

- On Thursday, a federal jury in Boston ordered medical equipment maker Zoll Medical Corp to pay Philips \$7.1 million for infringing three patents covering technology related to external defibrillators. Read more [here](#).

V. International Updates:

- On Monday, the State Intellectual Property Office of China (SIPO) announced that China will prioritize the examination of patents in certain fields to improve patent licensing efficiency. Read more [here](#).

VI. Industry Updates:

- On October 17-19 at the Mandarin Oriental in Washington, D.C., ChIPs, an organization founded in 2005 to “support and promote the advancement, development, and retention of women where technology, law, and policy converge” will be hosting the 2017 ChIPs Women in Tech, Law, and Policy Global Summit. The event will feature remarks from a number of speakers, including former Director of the United States Patent and Trademark Office (USPTO) Michelle Lee, who will also be inducted into the ChIPs Hall of Fame. More information can be found [here](#).
- The *New York Times* reports that in June, the Food & Drug Administration (FDA) sent a [letter](#) to Rep Frank Pallone (D-NJ) stating that the FDA “has limited resources to examine imported cosmetics.” The FDA also provided data on its examination of imported cosmetics, showing for example, that the FDA inspected just 0.3% of cosmetic shipments last year, and laboratory tests conducted on a subset of inspected shipments resulted in “adverse findings” 20 percent of the time. The letter was sent in response to a letter Pallone had sent the FDA

asking about the safety of imported cosmetics. Pallone, the Ranking Member of the House Energy & Commerce Committee, told the *New York Times* that the FDA's data "could help convince Congress to take up legislation to strengthen the regulation of imported cosmetics." Pallone also said that "he intends to reintroduce his proposal to expand the regulation of cosmetics, including imports, as part of a larger bill that would fund greater oversight of over-the-counter drugs." The *Times* notes that the idea of legislation "has been embraced by...many major companies in the industry, who could benefit if cheap imports (including sometime counterfeits of their brand-name products) are subject to more scrutiny." Read more [here](#).

- *Bloomberg* reports that patent advisory firm Aqua Licensing has launched a new program "to match startups looking to purchase intellectual property to defend against potential litigation with patent holders interested in selling patents that aren't essential to their core business." AT&T, Lenovo, Entegris, and Rambus are reportedly among the companies that have joined the program, agreeing to pool more than 60,000 patents for sale. Read more [here](#).