

PATENT & TRADEMARK POLICY REPORT JUNE 30, 2017



I. Congressional Developments:

- On Tuesday, House Judiciary Chairman Goodlatte (R-VA) [announced](#) the addition of Rep. Karen Handel (R-GA) to the Committee. Rep. Handel is the second Republican addition to the Committee this month, with Rep. John Rutherford (R-FL) [joining](#) on June 13. However, Judiciary Republicans are losing Rep. Jason Chaffetz (R-UT), who is [leaving Congress](#) on June 30.
- On Thursday, the House Appropriations Subcommittee on Commerce, Justice, Science passed the FY 2018 Commerce, Justice, Science Appropriations Bill by voice vote. The bill provides \$3.5 billion for the USPTO, which the subcommittee [notes](#) is “equal to the Congressional Budget Office’s estimate of fees to be collected by the PTO during FY 2018.”
- On Thursday, the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing titled ‘Recent Trends in International Antitrust Enforcement.’ The hearing focused on a recent [report](#) issued by the International Competition Policy Expert Group (ICPEG) and commissioned by the U.S. Chamber of Commerce, which found that some of the United States’ major trading partners appear to have used their competition laws to harm U.S. companies, protect their own markets from foreign competition, promote national champions, force technology transfers, and in some cases deny U.S. companies fundamental due process. Among the potential solutions proposed by ICPEG, witnesses discussed the establishment of a White House working group focused on the coordination of competition and international trade policy within the U.S. government, public exposure of foreign efforts to use competition laws to harm U.S. companies, dialog with trading

Headlines and Highlights:

- Rep. Karen Handel (R-GA) joins the House Judiciary Committee.
- House Judiciary Committee holds hearing on antitrust enforcement abroad.
- USTR holds public hearings on NAFTA renegotiation, issues request for comment on performance of current trade deals.
- European Union fines Google \$2.7 billion.
- USPTO requests PPAC and TPAC nominations.
- Judge denies Qualcomm’s motion to dismiss FTC lawsuit.

partners, and working within multilateral institutions in which the U.S. is already heavily involved. Intellectual property received some mention during the hearing, but little in-depth discussion. It was pointed out at several points that some countries use competition policy to force tech transfers and licensing of U.S. companies' intellectual property rights at lower rates. There was some limited discussion of American tech companies, especially investigations in China, Taiwan, the EU and the U.S. into alleged anticompetitive behavior by Qualcomm.

- On Monday, the Congressional Tech Transfer Caucus held a briefing on Capitol Hill about the importance of the commercialization of university research. The event featured remarks from Association of University Technology Managers (AUTM) CEO Steve Susalka, who praised the Bayh-Dole Act for spurring university research, resulting in economic growth, job creation, and the creation of valuable new products. Susalka also cited a recently-released AUTM/Biotechnology Innovation Organization [study](#) finding that the licensing of academic patents has contributed as much as \$1.33 trillion to the U.S. economy over a 20-year period. Additionally, representatives from biotechnology companies Ceres Nanosciences and KeraNetics spoke about how their businesses grew out of university research.

II. Administration Updates:

- The Office of the United States Trade Representative (USTR) has issued a request for comments to be considered as part of its performance reviews of U.S. trade agreements and other trade relationships. Those performance reviews are required by President Trump's April 29 Executive Order titled '[Addressing Trade Agreement Violations and Abuses.](#)' USTR is requesting comments on (a) the performance of individual free trade agreements (FTAs) and bilateral investment treaties (BITs); (b) the performance of WTO agreements with regard to trading partners with which the U.S. does not have an FTA, but with which the U.S. runs significant trade deficits; and (c) the performance of U.S. trade preference programs. The request for comments asks commenters to address a number of specific harms or benefits resulting from any trade agreement or treaty, including "violations or abuses" of an agreement that have, for example, "harmed intellectual property rights held by U.S. companies and U.S. persons; reduced the rate of innovation in the United States; or impaired research and development from occurring in the United States." Comments are due on July 31, 2017. Read the request for comments [here](#).
- Chris Campbell, Staff Director for the Senate Finance Committee, was [nominated](#) this week to serve as Assistant Secretary for Financial Institutions at the U.S. Treasury Department. Senate Finance Chairman Orrin Hatch (R-UT) announced that the Committee's Policy Director, Jay Khosla, will succeed Campbell as Majority Staff Director. Read more [here](#).
- The Federal Trade Commission (FTC) has issued a notice of proposed rulemaking to amend the Textile Rules "to delete the requirement that an owner of a registered word trademark furnish the FTC with a copy of the mark's registration with the [USPTO] before using the mark on labels, and to no longer restrict the use of such trademarks to only those also employed as house marks." Comments are due on July 31, 2017. Read the Federal Register notice [here](#).

- On Tuesday, the Trump Administration announced two actions it is taking to foster pharmaceutical competition and lower the cost of prescription drugs by promoting generic competition. The FDA has published a [list](#) of off-patent branded drugs for which no generic competitor is approved in the United States and for which no other competition exclusivity period applies. The FDA is also [taking steps](#) to implement an expedited approval process for generic drug applications. The actions are part of the roll out of the Administration’s “Drug Competition Action Plan” announced by Food & Drug Administrator (FDA) Commissioner Scott Gottlieb in May, and complement the announcement of a July 18th public meeting to solicit public input on how FDA rules—including the standards and procedures related to generic drug approvals—are being used in ways that may create obstacles to generic access. Read more [here](#).
- President Trump has [nominated](#) Jason Kearns to serve as a commissioner on the International Trade Commission for a term expiring in 2024. Kearns is currently the Chief International Trade Counsel for the Democratic staff of the House Ways and Means Committee. He had previously been nominated for the position by President Obama, but his nomination did not move in Congress before President Trump took office.

III. USPTO Updates:

- The USPTO is requesting nominations for up to three members of the Patent Public Advisory Committee (PPAC) and for up to three members of the Trademark Public Advisory Committee (TPAC), for terms of three years that begin on December 1, 2017. Nominations are due on July 25, 2017. Read the Federal Register notice [here](#).
- The USPTO has issued a final trademark rule titled ‘Revival of Abandoned Applications, Reinstatement of Abandoned Applications and Cancelled or Expired Registrations, and Petitions to the Director.’ The USPTO states that the rule has two goals: (1) identify the existing deadlines and requirements for filing a petition to revive, petition to the director, and request for reinstatement; and (2) promote the integrity of the trademark database by generally not reinstating or reviving applications or registrations more than six months after they have abandoned, cancelled, or expired. Read more [here](#)
- The USPTO has requested comments on a proposed extension of the existing International Design Applications (Hague Agreement) collection. Comments are due on August 29, 2017. Read the Federal Register notice [here](#).
- On July 26, the USPTO will hold a public roundtable regarding fraudulent solicitations directed to trademark owners. The USPTO states that the roundtable is intended “to further public awareness of the problem, to provide U.S. government officials with more information about its scope, and to facilitate a discussion among members of the public about how to address the problem.” Read the Federal Register notice [here](#).
- The USPTO has issued new trademark examination guidance titled ‘Examination Guidance for Section 2(a)’s Disparagement Provision after Matal v. Tam and Examination Compliance with Section 2(a)’s Scandalousness Provision While Constitutionality Remains in Question.’ The USPTO states that “because the constitutionality of the scandalousness provision remains pending before the Federal Circuit in *In re Brunetti*, No. 15-1109 (Federal Circuit),

we continue to examine applications for compliance with that provision according to the existing guidance in the Trademark Examining Manual of Examining Procedure (TMEP) and Examination Guide 01-16.” Read more [here](#).

- USPTO Chief Policy Officer and Director for International Affairs Shira Perlmutter has written a guest post on the USPTO Director’s Forum Blog titled ‘One Year On: Developments in the Protection of Trade Secrets.’ The post details the USPTO’s public symposium on trade secret protection last month, and notes that the USPTO “will continue its work to promote the adoption of effective systems of trade secret protection and enforcement around the world.” Read more [here](#).
- The USPTO will hold its ‘Invention-Con 2017’ on August 11 & 12 at the USPTO headquarters in Alexandria, Virginia. Read more [here](#).

IV. Judicial Updates:

- On Monday, U.S. District Judge Lucy Koh of the Northern District of California in San Jose denied Qualcomm’s motion to dismiss the Federal Trade Commission’s lawsuit against the company for allegedly engaging in anticompetitive tactics to maintain a monopoly on the cellphone chip market. Koh argued that the FTC had “adequately alleged” anticompetitive behavior. Read more [here](#).
- The Native American group that had been battling the Washington Redskins football team over the team’s trademark registration has decided to end its legal challenge, given that the Supreme Court recently ruled in a separate case involving the Asian-American rock band ‘The Slants’ that a trademark law banning disparaging trademarks violated the First Amendment. Read more [here](#).

V. International Updates:

- On Tuesday, European Union antitrust regulators announced a fine of \$2.7 billion on Google for using its search engine to unfairly steer traffic to its shopping platform. “What Google has done is illegal under EU antitrust rules,” Margrethe Vestager, European Commissioner for Competition, said. “It denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation.” Regulators also stipulated that Google has 90 days to alter its behavior or face additional fines and penalties. Following the ruling, a Google spokesperson said that the company “respectfully disagree[s] with the conclusion” reached by the EU. “We will review the Commission’s decision in detail as we consider an appeal, and we look forward to continuing to make our case.” Sen. Blumenthal (D-CT), a member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, said the fine could be used as an impetus for the Federal Trade Commission to reinvestigate Google. “Here in the United States, the FTC must confront the mounting evidence that Google is manipulating search results in anticompetitive ways and possibly running afoul of our antitrust laws.” Rep. Lofgren (D-CA), who represents part of Silicon Valley, criticized the fine, calling it “unfair” and “overzealous.” Read more [here](#) and [here](#).

- On Sunday, Indian Prime Minister Narendra Modi met with U.S. executives ahead of his state visit to the United States, according to the *Economic Times*. Corporations participating in the meeting with Modi included technology companies such as Amazon, Apple, Google, and Adobe, as well as companies from other sectors, such as Caterpillar, Walmart, and JP Morgan. The group reportedly discussed topics such as Indian tax policy, measures to entice foreign companies to do business in India, and India's demonetization. Read more [here](#).

VI. Industry Updates:

- Shai Jalfin, the Senior Vice President of Morningside's patent division, has written an *IP Watchdog* article about patent protection in the burgeoning blockchain sector. He notes that "because core blockchain technology is already part of the public domain, only important additions and significant variations can be patented," with "one popular area for such patents" being blockchain security and encryption. Jalfin also highlights the Chamber of Digital Commerce's Blockchain Intellectual Property Council (BIPC), which will explore establishing a "repository of blockchain-specific patent information;" developing non-aggression agreements in which member companies agree not to assert patents against one another; and developing patent pools for cross-licensing, among other initiatives. Addressing the question of whether blockchain technology will be largely open or proprietary, Jalfin predicts that "blockchain innovation will be driven both by open source initiatives that will build collaboration and interoperability as well as by proprietary code – which may or may not be made available through licensing agreements." Read more [here](#).
- David Balto, who previously served as a Federal Trade Commission (FTC) policy director and as an attorney in the Department of Justice's (DOJ) Antitrust Division, has written an op-ed in *The Hill* urging the Senate to swiftly approve the nomination of Makan Delrahim to lead the DOJ Antitrust Division. He points out that "Delrahim is not controversial and is regarded by both Republicans and Democrats to be perfect for the job." Balto argues that the delay on Delrahim's nomination is akin to a scenario in which a top NBA draft pick is forced "to sit on the sidelines for several months after the new season started." Read more [here](#).