

PATENT & TRADEMARK POLICY REPORT JULY 14, 2017



I. Congressional Developments:

- On Tuesday, July 18th at 10 a.m. the House Ways and Means Subcommittee on Tax Policy will hold a hearing on “NAFTA Modernization.”
- On Thursday at 10 a.m., the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary held a hearing titled “The Impact of Bad Patents on American Businesses.” The hearing focused on a range of issues, including venue post-*TC Heartland*, patent quality, covered business methods (CBM) review and inter partes review (IPR), eligibility, pleading standards, and fee shifting. Both Member statements and witness testimony suggested some continued uncertainty about the overall direction the Committee should take going forward. Discussing the Innovation Act, Judiciary Committee Chairman Bob Goodlatte stated, “Although the legislation became stuck in the Senate, the Supreme Court was able to step in to unanimously resolve some, but not all, litigation abuse problems that were to be addressed by the Innovation Act.” Ranking Member John Conyers argued that “we must take a cautious approach to any future legislation proposals,” and that “we must strenuously reject any legislative proposals that would unbalance the patent system, deprive inventors of full legal protection for their inventions, fuel more rather than less litigation, and weaken patent enforcement protections.”
- On Wednesday, the House Appropriations Committee [approved](#) the FY2018 Financial Services and General Government Appropriations bill by a vote of 31-21. In the [bill report language](#), the Committee expressed its support for the Office of the Intellectual Property Enforcement Coordinator (IPEC) and encouraged the Office “to continue to promote private sector

Headlines and Highlights:

- President Trump nominates Dennis Shea to serve as next Deputy USTR.
- Neomi Rao confirmed as next Administrator of OIRA.
- House Ways and Means subcommittee to hold “NAFTA Modernization” hearing.
- *Wall Street Journal* publishes piece on Google’s academic influence campaign.
- Acting FTC Director writes article in Stanford Technology Law Review.
- House Judiciary subcommittee holds hearing on “The Impact of Bad Patents on American Businesses.”
- Sens. Grassley and Coons send letter to Sec. Ross on “Enterprise Services.”

efforts to reduce online copyright infringement and to implement a meaningful plan, as called for in the Joint Strategic Plan, to enhance the capacity building, outreach, and training programs to promote meaningful protection of American intellectual property abroad.”

- On July 7th, Senate Judiciary Chairman Chuck Grassley (R-IA) and Senator Chris Coons (D-DE) sent a [letter](#) to Secretary of Commerce Wilbur Ross questioning the United States Patent and Trademark Office’s (USPTO) participation in the Department of Commerce’s initiative to develop shared services for all of the Department’s bureaus, called “Enterprise Services.” “If the USPTO will not be utilizing what Enterprise Services offers, but is being asked to pay for its setup costs, it would strongly suggest that this will undermine the statutory protections specifically put in place to prevent USPTO fees from supporting other parts of the federal government to provide for USPTO’s operational independence,” the Senators wrote. Read more [here](#).

II. Administration Updates:

- On Monday, the Senate voted 54-41 to confirm Neomi Rao to be administrator of the White House Office of Information and Regulatory Affairs (OIRA). In the position Rao will oversee the federal government’s entire regulatory process and all proposed and final rules, as well as government data collections. Rao is the founder of the Center for the Study of the Administrative State at George Mason University which is [tasked](#) with examining “the administrative state as a whole, its constitutional foundations and its political and economic impacts.” Rao is also a former staffer of Sen. Orrin Hatch (R-UT). Following her confirmation, Hatch issued a [press release](#) praising Rao, calling her a “sharp and principled public servant.” Read more [here](#).
- *Science* magazine is reporting this week on that the White House Office of Science and Technology Policy (OSTP) is “still small and waiting for leadership.” In interviews with administration officials and past OSTP staffers, *Science* reported that the office now has 35 staffers and, while there has been no formal reorganization of OSTP, a “smaller, more collaborative staff” is now grouped around three areas—science, technology, and national security. Read more [here](#).
- On Tuesday, President Trump [announced](#) the nomination of Dennis Shea to serve as Deputy United States Trade Representative (Geneva Office). Shea previously served as the vice chairman of the U.S.-China Economic and Security Review Commission, which is charged with annually assessing the security, economic and trade relationship between the two nations. Read more [here](#).
- In a new [article](#) published in the Stanford Technology Law Review, Acting Federal Trade Commission (FTC) Chair Maureen Ohlhausen argues that the use of antitrust law in patent cases is often misguided. In particular, Ohlhausen criticizes as violating “core antitrust principles” regulatory theories holding that patentees “violate antitrust law if they try to enjoin a “willing licensee” rule.” She also states that the FTC is overreliant on Section 5 of the FTC Act when attempting to “capture conduct that goes beyond the reach of the Sherman Act.” More broadly, the article argues that certain standard essential patent (SEP)-related conduct “assailed by antitrust-enforcement bodies is not a problem born of the competitive process,” and instead “reflects incomplete contracting at the time of standardization, ensuing

choices by firms to lock into technologies for which they lack licenses, and harm that can occur only when a court would likely grant the sought-after relief.” Read more [here](#).

III. USPTO Updates:

- On Tuesday, the USPTO conducted its monthly “Patent Quality Chat” webinar. The topic for this month was “Latest Updates in USPTO’s Work Sharing Efforts” and featured remarks by Deputy Commissioner for International Patent Cooperation Mark Powell and Daniel Hunter, Director for International Work Sharing, Office of International Patent Cooperation. More info [here](#).
- On Thursday, Joe Matal, Acting USPTO Director, and Christal Sheppard, Director of the Midwest Regional Office penned a blogpost in the Director’s Forum titled “Elijah J. McCoy Midwest Regional U.S. Patent and Trademark Office—5 Years Supporting Innovation.” Read the blogpost [here](#).

IV. Judicial Updates:

- On June 29, 2017, Judge Rodney Gilstrap of the Eastern District of Texas published an important opinion that follows on the Supreme Court’s recent [TC Heartland](#) decision. Recall that in *TC Heartland*, the Supreme Court addressed only the first prong of the patent venue statute, which establishes that “civil action for patent infringement may be brought in the judicial district where the defendant resides.” The Court did not address the second prong, under which venue may alternatively be established “where the defendant has committed acts of infringement and has a regular and established place of business.” In [Raytheon Company v. Cray, Inc.](#), Judge Gilstrap applied the second prong to find that venue was proper where defendant Cray had employed a sales representative in the Eastern District of Texas for over seven years who sold an allegedly infringing supercomputer to the University of Texas System that was accessed via remote terminals at UT campuses within the Eastern District, and had made multiple “offers to sell” within the Eastern District. More importantly, Judge Gilstrap set forth a four-factor, “totality of the circumstances approach” to determining where a defendant has a “regular and established place of business.” The factors include the extent to which a defendant (1) “has a physical presence in the district, including but not limited to property, inventory, infrastructure, or people”; (2) “represents, internally or externally, that it has a presence in the district”; (3) “derives benefits from its presence in the district, including but not limited to sales revenue”; and (4) “interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district, including but not limited to through localized customer support, ongoing contractual relationships, or targeted marketing efforts.” House Judiciary Chairman Bob Goodlatte [criticized](#) the decision, stating that “one judge in [the Eastern District of Texas] has already reinterpreted both the law and the unanimous Supreme Court decision to keep as many patent cases as possible in his district in defiance of the Supreme Court and Congressional intent.”

V. International Updates:

- On Wednesday, EU Brexit negotiator Michel Barnier said that, in light of the UK’s impending exit from the bloc, the EU is “looking into” moving the pharmaceuticals and life sciences division of Europe’s new Unified Patent Court from London to another EU city. Read more [here](#).

VI. Industry Updates:

- The *Wall Street Journal* has published an exposé on Google's funding of academic research favorable to its interests. The company allegedly spends between \$5,000 to \$400,000 for pieces favorable academic research, and has at times "compiled wish lists of academic papers that included working titles, abstracts and budgets for each proposed paper," – subsequently using those wish lists to search for authors. Overall, the article states that since 2009, Google funded around 100 academic papers on public policy matters, and "another 100 or so research papers were written by authors with financing by think tanks or university research centers funded by Google and other tech firms." Google also funded research in areas such as antitrust policy, consumer data privacy, and copyright law. Read more [here](#).
- Eight large technology companies – Adobe, Amazon, Cisco, Dell, Google, Intel, Oracle, and Salesforce - have [formed](#) a new advocacy group called the High Tech Inventors Alliance. The group claims that its purpose is to support "balanced patent policy," by addressing "current dysfunction" in the patent system such as "the crisis in patent quality, baseless patent assertions, and the chronic persistence of patent troll litigation."
- Vodafone, Panasonic, and Sharp have joined the Avanci patent licensing consortium. In a [press release](#), Avanci stated that "by adding the entire portfolio of standard essential 2G, 3G and 4G wireless patents from these leading innovators to its joint license offering, Avanci...has now more than doubled the number of patent owners in its marketplace." Avanci, which was launched in September 2016, is an internet of things patent licensing consortium that aims to allow companies to access patented wireless technology for internet of things products "in one place, with one agreement and for one fair, flat rate."