

PATENT & TRADEMARK POLICY REPORT MARCH 10, 2023



I. Congressional Developments:

- On Wednesday, the House Judiciary IP Subcommittee held a hearing titled “Intellectual Property and Strategic Competition with China: Part I.” The following witnesses testified before the Subcommittee: [William Evanina](#), Founder and CEO of Evanina Group; [Jamieson Greer](#), an International Trade Partner at King & Spalding; [Mark Cohen](#), Distinguished Senior Fellow and Director of the Asia IP Project at the Berkeley Center for Law and Technology; and [Charles Duan](#), Policy Fellow and Adjunct Professor at American University Washington College of Law’s Program on Information Justice and IP, as well as member of the PPAC. Witnesses and members on both sides of the aisle seemed to share the concern that the Chinese government is deploying an IP strategy to gain a competitive advantage to American companies in key industries such as aerospace, pharmaceuticals, IT, electric battery technologies, and DNA geonomics. They noted that while China was making its patent system better – in part to attract U.S. investment – the U.S. needs to up its game on quality and enforceable patents. Some witnesses, such as Mark Cohen, asserted that China is taking advantage of current weak or unclear provisions in US patent law, such as patent eligible subject matter and availability of injunctive relief. Of note, several Republicans, including Reps. Cline (R-VA), Gooden (R-TX), Kiley (R-CA), and Lee (R-FL) raised concern about the Biden Administration’s Justice Department [ending the China Initiative program](#). Mr. Evanina clarified that while the Biden Administration made the political decision to change the program’s name, the effort is still underway. Another major theme of the hearing was the potential

Headlines and Highlights:

- House Judiciary IP Subcommittee holds hearing on IP and China.
- Senate Judiciary Committee considers proposals to rein in digital platforms during hearing.
- President Biden sends Congress his budget request Fiscal Year 2024.
- Gigi Sohn withdraws nomination to serve on the FCC after months of stalemate.
- USPTO announces CI2 First-Time Filer Expedited Examination Pilot Program.
- USPTO announces new special category of its Patents for Humanity Program for green energy inventions.
- DOJ pushing to keep digital advertising lawsuit against Google in Virginia federal district court.

international implications of proposals to ban noncompete agreements, specifically the [recent FTC rulemaking](#) and the [California law](#). During his opening statement, Chairman Issa (R-CA) raised concern that the new California law gives anybody who accepts a job in California a “free ticket” to go wherever they want (including another country) and take the trade secrets they’ve gained from their current job with them. During his line of questioning, Full Committee Ranking Member Nadler (D-NY) asked the witnesses what they thought about modifying the full bans on noncompetes to clarify that it does not apply to those seeking to take a job out of the country, which witness Mark Cohen seemed to think was a good idea. Watch the full hearing [here](#).

- On Tuesday, the Senate Judiciary Committee held a hearing on “Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Market.” The hearing focused on Big Tech antitrust in general, and there were three primary laws discussed: the American Innovation and Choice Online Act (AICOA), the Open App Markets Act (OAMA), and the Journalism Competition and Preservation Act (JCPA). Assistant Professor of Law at NYU Daniel Francis and Michigan Professor of Law Adam Candeub stood against these bills claiming AICOA would prevent covered companies from using data to develop competing products and would also bar certain companies from providing consumers lower-cost alternatives. OAMA would mandate that large app stores allow users to install third-party apps outside their stores. This could increase the risk of downloading malware and undermine user privacy, cybersecurity, and national security. Finally, the JCPA aims to compensate news outlets for the value of their work but may instead build up the power of dominant media organizations while limiting public access to information online. During the hearing, Chairwoman Klobuchar (D-MN) acknowledged disagreements between Democrats and Republicans on content moderation, preventing action on her legislation. She attributed this disagreement to lobbying measures employed by tech companies. Senator Mike Lee (R-UT) suggested that the problem is Big Tech working with the government, and the solution is separating tech and state instead of giving more power to the government over tech. Watch the full hearing [here](#).
- On Wednesday, the Senate Judiciary Subcommittee on Privacy, Technology, and the Law held a hearing titled “Platform Accountability: Gonzalez and Reform.” The focus of the hearing was to discuss the need for reform to Section 230 of the Communications Decency Act of 1996. Under the current reading of the law, Section 230 grants online platforms broad immunity for third-party content on their platforms created by their users. Overall, there was broad consensus from members of the committee that reform is needed. An important point that was discussed is the distinction between housing harmful content versus actively promoting and recommending harmful content to users. A full memo from ACG is available upon request and you may watch the full hearing online [here](#).

II. Administration Updates:

- On Thursday, President Biden sent his budget request to Congress for Fiscal Year (FY) 2024, kicking off the appropriations season. Of note, President Biden requested \$12.3 billion in discretionary budget authority for the Department of Commerce, a \$1.3 billion or 11-percent increase above the 2023 enacted level. Resources provided through the 2024 Budget complement investments in high-speed Internet access and climate resilience provided by the Bipartisan Infrastructure Law, as well as significant investments to revitalize the domestic semiconductor industry provided by the CHIPS and Science Act, and additional support for

climate resilience and science provided by the Inflation Reduction Act. Read an overview of the budget [here](#) and find supplemental materials [here](#). As a reminder, the budget request is an aspirational document from the Administration, as the appropriations for the federal government is crafted by and must pass through Congress each year. The current fiscal year ends on September 30th.

- On Tuesday, *The Washington Post* reported that Biden’s Federal Communications Commission (FCC) nominee Gigi Sohn has withdrawn her name from consideration after a 16-month stalemate. “The opposition to Sohn catapulted the relatively low-profile position to the center of an unprecedented fight, which involved three Senate confirmation hearings, a series of ads and a billboard criticizing Sohn as ‘extreme’ and ‘partisan’ amid dissection of her social media posts.” Read more [here](#).

III. USPTO Updates:

- On Friday, comments were due to the USPTO in response to its Federal Register Notice “Joint USPTO-FDA Collaboration Initiatives; Notice of Public Listening Session and Request for Comments.” More info. more [here](#).
- On Thursday USPTO announced the [Council for Inclusive Innovation \(CI2\) First-Time Filer Expedited Examination Pilot Program](#). The new initiative is intended to benefit individuals or small businesses qualifying as a “[micro entity](#)” who are first-time filers for patent rights, including those from groups that are underrepresented in the innovation space, by providing expedited initial feedback from the agency on their application, also known as “first office action.” The USPTO will accept petitions to make special under the First-Time Filer Expedited Examination Pilot Program beginning March 9, 2023, until either March 11, 2024, or the date the USPTO grants 1,000 petitions to participate in the program, whichever occurs earlier. More info. [here](#) and [here](#).
- On Monday, USPTO announced that it has launched a special category of its Patents for Humanity Program for green energy inventions. The new award category will provide business incentives for patent applicants, holders, and licensees whose inventions are addressing the challenges of climate change through green energy innovations, including wind, solar, hydrogen, hydropower, geothermal, and biofuels technologies. More info. [here](#).

IV. Judicial Updates:

- Mayo Gabriel McNeil, an 82-year-old Colorado man who is being sued for allegedly defrauding people out of \$800,000 fake sports memorabilia, made his first court appearance this week. In an interview on the matter with *CBS Colorado*, James Farnsworth, the owner of All C’s Collectibles, raised concern that the selling of counterfeit sports cards has ramped up since the pandemic. Farnsworth said that “there’s a high counterfeit market coming out of China.” McNeil will be arraigned in the Eastern District of New York at a later date. Read more [here](#).
- On Monday, *Reuters* reported that the U.S. Justice Department is fighting to keep its digital advertising lawsuit against Google in Virginia federal district court rather than having it moved to New York at the request of Alphabet. In its filing, the DOJ stated that if the case were transferred to Manhattan, the earliest a trial could take place would be 2025. “The need

for swift action is particularly pronounced in this case given the pace of change in technology and the dynamic nature of Google’s anticompetitive conduct across the ad tech industry,” lawyers for the DOJ, Virginia, and other states – including New York and California – said in their filing. Read more [here](#).

V. Industry Updates:

- This week, the *StarTribune* published an article about how the legal questions surrounding NFTs and IP are heating up. For instance, earlier this year, a federal jury in New York decided a digital artist infringed Hermès' trademark with his creation of NFTs resembling the popular Birkin bag. The verdict resulted in the artist having to pay the French company \$133,000 in damages. The article claims that it is the first case that has challenged trademark or IP law for NFTs and crypto properties, and as such the *StarTribune* reports that IP attorneys are following it closely. Read the full article [here](#).