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PATENT & TRADEMARK POLICY REPORT

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I. Congressional Developments:

- On Wednesday, September 13, multiple tech CEOs gathered for an AI Insight Forum sponsored by Majority Leader Chuck Schumer. In an article published by the *Wall Street Journal* shortly after the meeting, it was revealed that nearly everyone present agreed that the government needs to play a role in regulating artificial intelligence. While we are still a long way away from legislative text this seems like a step in the right direction. The article also stated that copyright violations are of particular concern. “One open question is what areas the legislation will cover. Issues previously raised by participants in Wednesday’s meeting covered a wide range of potential concerns involving esoteric areas of law. Among them: copyright violations, privacy invasions, racial discrimination, economic ties with China, and the use of AI by the government for military or other purposes.” Read more [here](#).
- On Tuesday, September 12, 2023, the Senate Judiciary Committee Subcommittee on Privacy, Technology, and the Law held a hearing titled, “*Oversight of A.I.: Legislating on Artificial Intelligence*.” Overall, the hearing was incredibly bipartisan and led to great discussion on how AI regulation should be looked at going forward. The Blumenthal-Hawley legislative framework was widely accepted by the witnesses as a good starting point. Two particularly interesting comments were made. (1) Senator Klobuchar asked about AI usage of local news content without compensation. Mr. Smith replied saying that local news/journalists should be allowed to decide if their work is used for training/developing AI. They should be able to negotiate collectively. (2) During her second round of questions Senator Klobuchar asked about NVIDIA’s partnership with Getty Images. Mr. Dally replied by saying “We believe in respecting people’s intellectual property rights. We did not want to infringe on the rights of the photographers that took

Headlines and Highlights:

- Schumer Holds AI Forum With Tech CEOs
- Senate Judiciary Committee Holds Hearing on AI Oversight
- Senate Commerce Committee Holds Hearing on AI Transparency
- FTC Warns Against Improperly Listing Drug Patents
- USPTO Postpones Implementation of Trademark Modernization Act’s Provisions for Post-Registration Response Deadlines
- USPTO to Hold Anticounterfeiting and Antipiracy Roundtable
- Google Faces Antitrust Trail
- CAFC Reverses PTAB Finding For Patent Owner

the images that our models had been trained on. We did not just scrap a bunch of images off the web to train our model, we partnered with Getty. When people use our model Picasso to generate images the people who provided the original content get remunerated. We see this as a way of going forward in general where people who are providing the IP for the training of these models should benefit from the use of them and that IP.” A link to the livestream can be found [here](#). A summary from ACG can be provided upon request.

- On Tuesday, September 12, 2023, the Senate Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety & Data Security held a hearing entitled “The Need for Transparency in Artificial Intelligence.” Witnesses included Ms. Victoria Espinel (CEO, BSA, The Software Alliance), Dr. Ramayya Krishnan (Dean of the Heinz College of Information Systems and Public Policy, Carnegie Mellon University), Mr. Sam Gregory (Executive Director of WITNESS), and Mr. Rob Strayer (Executive Vice President for Policy, Information Technology Industry Council). A few highlights from the hearing included: (1) Senator Hickenlooper asked about existing rights for consumers to maintain ownership of their creations and any additional rights they might have. In response, Dr. Krishnan highlighted concerns regarding the use of data and content by AI models, particularly when it comes to compensating creators. He emphasized the importance of copyright protection and suggested that creators should have the right to seek advertising opportunities related to their content used by AI models. (2) Senator Cantwell said she would be introducing separate legislation to combat deepfakes to protect consumers and national security, stop potential disruptions of interstate commerce and protect civil liberties and First Amendment rights. (3) Senator Young was curious about the distinction between AI developers and deployers. Ms. Espinel responded by explaining that developers create AI systems, while deployers are the users of these systems. She emphasized the importance of distinguishing them for legislative purposes, especially in high-risk situations where impact assessments should be conducted. A full summary from ACG can be provided upon request.

II. Administration Updates:

- On Thursday, September 14, the Federal Trade Commission (FTC) issued a policy statement in collaboration with the U.S. Food and Drug Administration (FDA) warning brand pharmaceutical manufacturers about the potential legal consequences of improperly listing patents in the FDA's "Orange Book," a catalog of approved drug products. The policy statement highlights that such improper listings can harm competition by inhibiting affordable generic alternatives and artificially inflating drug prices, prompting the FTC to investigate them as potential violations of the FTC Act. FTC Chair Lina M. Khan and FDA Commissioner Robert M. Califf expressed concerns about the impact on consumers and pledged to collaborate to protect American consumers from anticompetitive practices. The Orange Book listings can trigger statutory stays on generic approvals, but improper listings can delay competition for years, a concern supported by a 2002 FTC study. The FTC intends to use all available tools, including FDA's regulatory process and antitrust laws, to address these issues and combat high drug prices effectively.

III. USPTO Updates:

- On Monday, September 11, it was announced that the United States Patent and Trademark Office (USPTO) is delaying the implementation of the Trademark Modernization Act's provisions concerning post-registration response deadlines. This postponement is due to ongoing upgrades in their databases, public search system, and internal examination systems aimed at enhancing efficiency for both customers and staff. It is anticipated that these updates will be completed in the spring or early summer of 2024, at which point the USPTO will announce a new effective date for

the provisions through a final rule in the Federal Register. Once in effect, registrants will have a three-month window to respond to post-registration office actions affected by these provisions. Additionally, they will have the option to request a single three-month extension, subject to a fee. Read the federal register notice [here](#).

- On October 3, the United States Patent and Trademark Office (USPTO) will host a public roundtable to engage stakeholders in discussions about future strategies for anticounterfeiting and antipiracy. This event comes as part of the USPTO's efforts to gather insights and observations from a wide range of interested parties, including consumers, intellectual property rights holders, online marketplaces, physical marketplaces, and others in the private sector, regarding the evolving landscape of counterfeiting and piracy. The USPTO had initially requested comments on this topic by May 25, but the deadline for submitting these comments has been extended to September 25, 2023. Further details about the extension and the roundtable will be available in an upcoming Federal Register Notice. Additionally, the deadline for submitting requests to be a panelist at the October 3 roundtable remains September 1, and more information can be found on the USPTO website.

IV. Judicial Update

- On Tuesday, September 12, 2023, the antitrust trial against Google commenced, marking a significant legal battle in the realm of tech giants' dominance in the internet era. The trial, known as *U.S. et al. v. Google*, unfolded at the E. Barrett Prettyman U.S. Courthouse in Washington, D.C., with the U.S. Department of Justice and 38 states and territories alleging that Google had systematically leveraged its power in online search to suppress competition and maintain a monopoly. The government presented evidence of Google's agreements, including a substantial annual payment to Apple, designed to secure its position as the default search engine on smartphones. In response, Google argued that it hadn't acted illegally and maintained that users had plenty of choices in selecting search engines. This trial has profound implications for the tech industry, as its outcome could reshape the landscape of large tech companies' influence and impact how people interact with the internet, with the final judgment potentially altering the balance of power in the tech sector. Over the next ten weeks, both the government and Google will present arguments and call witnesses, while Judge Amit P. Mehta will ultimately decide the case, which has the potential to impact not only Google but other tech giants as well. Read more [here](#).
- On Monday, September 11, the U.S. Court of Appeals for the Federal Circuit (CAFC) issued two significant precedential opinions related to patent disputes. In the first case, involving *Netflix, Inc. v. DivX, LLC*, the CAFC criticized the Patent Trial and Appeal Board (PTAB) for abusing its discretion in its judgment against Netflix. The PTAB had rejected Netflix's argument of patent obviousness, contending that Netflix had not adequately established a common field of endeavor between the patent in question and the prior art. The CAFC disagreed with the PTAB, stating that it had unreasonably required Netflix to use specific terminology when defining the field of endeavor. In the second case, *Apple, Inc. v. Corephotonics, Ltd.*, the CAFC vacated two final decisions by the PTAB in favor of the patent owner, Corephotonics, emphasizing the need for a clear and reasonable interpretation of patent claims and the necessity for the PTAB to provide proper justification for its decisions under the Administrative Procedure Act (APA).