



AMERICAN CONTINENTAL GROUP

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PATENT & TRADEMARK POLICY REPORT JUNE 2, 2017



I. Congressional Developments:

- A bipartisan group of approximately 60 House members sent a [letter](#) to U.S. Trade Representative (USTR) Robert Lighthizer this week, urging him to “recognize the importance of promoting North American energy independence” when renegotiating the North American Free Trade Agreement (NAFTA). While the letter largely focuses on energy policy, the group also asks Lighthizer to “consider the importance of maintaining, and where feasible upgrading, policies regarding...protections for U.S. intellectual property.” Read more [here](#).
- The Senate Judiciary Committee has [scheduled](#) a vote for Makan Delrahim, President Trump’s nominee for Department of Justice antitrust chief, on June 8th. The Committee will also vote on the nomination of Noel J. Francisco to serve as U.S. Solicitor General.
- *POLITICO* is reporting this week that Everett Eissenstat, the current chief Republican trade counsel for the Senate Finance Committee, has been selected as the next Deputy Director for the White House’s National Economic Council. The role, which also includes serving as the deputy assistant to the president for international economic affairs, would see Eissenstat act as a “sherpa,” negotiating U.S. interests at the annual G-7, G-20 and Asia-Pacific Economic Cooperation Summits. Responding to the reports, Senate Finance Chairman Orrin Hatch said that if the Trump Administration is interested in Eissenstat, “they’re approaching things pretty intelligently, because he’s very, very good.” Eissenstat is expected to replace Kenneth Juster, who is in line to become U.S. Ambassador to India.
- On Thursday, June 8th the Senate Appropriations Subcommittee on Commerce, Justice and Science, and Related Agencies will

Headlines and Highlights:

- Bipartisan group of House members send USTR Lighthizer letter on “importance” of NAFTA.
- DOJ Antitrust nominee vows to “vigorously enforce” antitrust laws with respect to online platforms.
- Secretary of Commerce Ross to testify before Senate on FY18 Commerce Dept. budget.
- Senate Finance Committee staffer to join National Economic Council, *POLITICO* reports.
- EU antitrust regulators to hit Google with large fine for distorting internet search results, *Reuters* reports.
- National Legal and Policy Center alleges EFF submitted over 100,000 pro-net neutrality comments using fake emails.

hold a hearing on the FY2018 budget request for the Commerce Department. Secretary of Commerce Ross will testify.

- On June 14th from 8:00 a.m. - 9:30 a.m. EST, *Bloomberg* will be hosting a breakfast with House Energy and Commerce Committee Chairman Greg Walden (R-OR) in which he will provide an overview of his legislative priorities for the 115th Congress. The event will be held at Bloomberg's DC office. Sign up for the event [here](#).
- The House and Senate were in recess this week.

II. Administration Updates:

- In written responses to questions submitted by members of the Senate Judiciary Committee, Makan Delrahim—the nominee to head the Justice Department's Antitrust Division—said that he will “vigorously enforce antitrust laws with respect to online platforms.” In the responses, obtained by *Axios*, Delrahim writes that “[a]ntitrust has a vital role to play in the high-tech, e-commerce economy to protect consumers,” and adds that any action by firms that may threaten competition in this sector “should be investigated and pursued...” Read more [here](#).

III. USPTO Updates:

- The USPTO will host a Patent Quality Chat webinar on June 13, from noon to 1 p.m. The webinar will cover ‘Patent Quality Metrics,’ with speakers discussing the “latest evolution” of the USPTO's patent quality metrics that divides them into product, process, and perception indicators. Read more [here](#).
- The Internet Association has submitted comments to the USPTO regarding the agency's Patent Trial & Appeal Board (PTAB) ‘Procedural Reform Initiative.’ The group argues that the Procedural Reform Initiative is “premature at this time,” and urges the agency to “proceed with caution before considering any additional reform until sufficient statistical evidence accumulates on the workability of” the revised PTAB rules that were made effective in May 2016. The comments also argue that “no rule is needed” to regulate multiple petitions; claim construction “is properly done under the broadest reasonable interpretation standard; decisions to institute are currently “being properly handled”; it would be “premature for the PTO to change procedures related to motions to amend”; and “procedures for extending the length of proceedings, joinder practice, the interplay with other proceedings, and additional review of decisions to institute are better handled on a case-by-case basis at this time.” Read the comments [here](#).
- The USPTO will hold ‘Invention-Con 2017’ on August-11-12 in Alexandria, VA. The event will feature plenary talks, breakout sessions, and remarks from USPTO officials and other experts. The event will focus on independent inventors, entrepreneurs, and small business owners. Read more [here](#).
- The USPTO's PTAB Judicial conference will be held on June 29, from 1 to 5pm at the USPTO headquarters in Alexandria, VA. The conference will cover recent PTAB developments, and feature remarks from judges and practitioners. Read more [here](#).

- On June 1, 2017, the Patent Trial and Appeal Board issued a [ruling](#) invalidating key claims in a Cisco Systems-owned network device security-related [patent](#), siding with petitioner Arista Networks. A week before, on May 25, 2017, the PTAB had [invalidated](#) claims in another Cisco-owned patent. The International Trade Commission had previously made a [determination](#) that Arista’s switches infringed Cisco patents, and had stated that it would issue an order banning Arista from importing the infringing switches into the United States. Arista “will now seek complete suspension” of the ITC import ban, [according to](#) General Counsel Marc Taxay.

IV. Judicial Updates:

- On May 30, 2017, the Supreme Court handed down its decision in [Impression Products, Inc. v. Lexmark International, Inc.](#), Case No. 15-1189. The case dealt with the scope of the exhaustion doctrine in patent law. The Court addressed two issues in particular: (1) “whether a patentee that sells an item under an express restriction on the purchaser’s right to reuse or resell the product may enforce that restriction through an infringement lawsuit”; and (2) “whether a patentee exhausts its patent rights by selling its product outside the United States, where American patent laws do not apply.” Concerning the first issue, the Court held that “[o]nce a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license.” On the second issue, the Court held that “[a]n authorized sale outside the United States, just as one within the United States, exhausts all rights under the Patent Act.”
- On Wednesday the *Miami Herald* reported that Miami art fair [Art Basel sued Adidas for trademark infringement](#), claiming that limited edition “Art Basel” Adidas sneakers given away during a promotion at last year’s event sullied the “Art Basel” trademark and that the footwear company did not have permission to use the mark. (*IPO Daily News*)

V. International Updates:

- *Reuters* reported on Thursday that EU antitrust regulators aim to hit Alphabet, Google’s parent company, with a large fine after the EU competition authority accused the company in April 2015 of distorting internet search results to favor its shopping service. The fine is expected to be announced before August, the report says, and could be as high as 10 percent of Google’s global turnover, or \$9 billion of its 2016 turnover. Read more [here](#).

VI. Industry Updates:

- On Wednesday, *FedScoop* and *CyberScoop* published an article in which they gathered leading public and private CIOs, CISOs and IT officials to discuss federal cybersecurity shortcomings. The officials identified five issues plaguing federal cybersecurity: lack of talent, duplicative systems, agility in cybersecurity, IT modernization, and poor communication. The article points out that the group was in near unanimous agreement that Congress—and it’s lack of IT knowledge—is the “root” of the problem. “Senators don’t understand the problem at all,” an IT official said. “They don’t understand computers.” Officials also agreed that central to creating secure federal IT systems is modernizing “ancient legacy systems.” “It’s about IT and security. We keep separating those two worlds—we’ve created stovepipes,” a CIO said. Read more [here](#).

- *Morning Consult* has profiled the copyright and patent court case in which Oracle is seeking \$9 billion in damages from Google over alleged infringement of Java API code. The case is now in the U.S. Court of Appeals in Washington, after a San Francisco District Court previously ruled against Oracle. The article highlights a passage from the Copyright Alliance’s [amicus brief](#) filed in the case. In the passage, the Copyright Alliance argues that “if applied broadly, the district court’s analysis would have a negative impact on potential or emerging markets for copyrighted works more generally, and would unduly harm individual creators and small businesses that do not have the resources to enter all potential markets simultaneously.” Read more [here](#).
- The National Legal and Policy Center (NLPC) has [alleged](#) that over 100,000 pro-net neutrality comments, submitted to the Federal Communications Commission (FCC) in connection with the Electronic Frontier Foundation’s (EFF) comment campaign, “appear to have been generated using both fake email and fake physical addresses and perhaps even fake names.” The NLPC further alleges that many of the comments were submitted “using what appear to be other people’s private email addresses,” and may have been “culled from spam and hacker databases available on the open web, or from other publicly available files found on the open web.” In [response](#), the EFF said that the report is “false” because the data cited in the report does not match “to any of the comments that came through the EFF’s comment tool,” although the NLPC had not alleged that the potentially fake submissions were submitted directly through that tool. Overall, the NLPC found that “more than 465,322 pro-net neutrality comment submissions (close to 20% of all pro-net neutrality comments filed)” were potentially fake. That number includes the approximately 100,000 comments allegedly connected to the EFF.