



AMERICAN CONTINENTAL GROUP

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PATENT & TRADEMARK POLICY REPORT MAY 5, 2017



I. Congressional Developments:

- On Tuesday, the Senate Foreign Relations Committee held hearing to consider the nomination of Iowa Governor Terry Branstad to serve as U.S. Ambassador to China. In his [opening statement](#), Branstad said that the “protection of intellectual property and technology security is of the utmost importance to our country” and pledged to make that “clear” to the Chinese government. Branstad also said that he wanted to convince the Chinese government that protecting IP is not only in the best interest of the U.S. but for China, as well. “As the Chinese have advanced, hopefully they are going to see that there is a danger to them as well, in having their intellectual property stolen by other countries,” Branstad said. Watch the video [here](#).
- The Senate Judiciary Committee will hold its rescheduled confirmation hearing for Makan Delrahim to serve as Assistant Attorney General of the Department of Justice’s Antitrust Division on Wednesday, May 10th at 10:00 am. The Committee will also consider the nominations of Steven A. Engel as Assistant Attorney General, Office of Legal Counsel; and Noel J. Francisco to serve as Solicitor General of the U.S. More info [here](#).

II. Administration Updates:

- On Monday, President Trump signed an Executive Order establishing the “American Technology Council.” The Council will be tasked with promoting “the secure, efficient, and economical use of information technology” to achieve the missions of the U.S. government and its membership will consist of the U.S. Chief Technology Officer, the Director of OMB, the Secretary of Commerce, amongst others. Read more [here](#).

Headlines and Highlights:

- President Trump signs executive order establishing “American Technology Council.”
- ITC rules that Arista infringed two of Cisco’s network switching patents.
- POLITICO EU publishes profile on tech company lobbying landscape in EU.
- State Health Secretary for Louisiana explores using “march-in” rights to lower hepatitis c medicine costs.
- European internet companies, including Spotify, write to European Commission accusing Google, Apple of hindering competition.
- Qualcomm, alleging unfair patent licensing terms, to ask ITC to ban imports of Apple’s iPhone, *Bloomberg* reports.

III. USPTO Updates:

- On Monday, Commissioner for Patents Drew Hirshfeld and Deputy General Counsel William R. Covey penned a blogpost on the Director’s Forum titled “[Patent Pro Bono Volunteer Attorneys Assisting Inventors Across the Country](#).”
- On Thursday, according to Gene Quinn of *IPWatchdog*, USPTO Director Michelle K. Lee gave introductory remarks at the quarterly Patent Public Advisory Committee meeting in which she admitted that the USPTO is using a disproportionate amount of user fees to internally subsidize Patent Trial and Appeal Board trials. Referring to PTAB, Lee said “We have done a good job over the past several years ensuring that our fees generally covered costs, but we do need to raise the PTAB trial fees to ensure that these trials are self-funding on a going forward basis.” Read more [here](#).

IV. Judicial Updates:

- The International Trade Commission (ITC) has ruled that Arista infringed on two of Cisco’s network switching patents. In a [blog post](#), Cisco General Counsel Mark Chandler called the ruling “the latest of several findings that Arista has intentionally and unlawfully copied Cisco’s proprietary technology.” Chandler also notes that the ruling includes a recommended import ban and a cease and desist order. The decision now enters the 60-day presidential review period during which the United States Trade Representative can disapprove of the exclusion order. Arista has Inter Partes Review proceedings pending on the two patents in questions, with decisions in those proceedings expected in early June. Read more [here](#).
- On Wednesday the *Washington Post* [reported on a hearing in Waymo’s suit against Uber for allegedly stealing trade secrets](#) associated with self-driving cars. During the hearing for an injunction to block Uber’s self-driving program, the parties debated whether Uber’s withholding of 3,500 documents was sufficient to warrant suspending much of its business. (*IPO Daily News*)

V. International Updates:

- The European Commission will close an investigation into Amazon’s e-book licensing deals with publishers, having reached an [agreement](#) with the company. Amazon has agreed not to enforce contract clauses requiring publishers to offer Amazon similar terms to those they offer to Amazon’s competitors, as well as clauses requiring publishers to reveal details of their contracts with other distributors. Publishers will also be allowed to terminate e-book contracts containing provisions “linking discount possibilities for e-books to the retail price of a given e-book on a competing platform.” In the future, Amazon will refrain from including any of the aforementioned types of provisions in contracts with publishers. Read more [here](#).
- This week, a group of European internet businesses, including streaming service Spotify, sent a letter to the European Commission accusing big internet platforms of abusing their “privileged position” to hinder competition. Although the letter does not cite Internet giants Google and Apple by name, it argues that some app stores, search engines, and mobile operating systems “have evolved from gateways into gatekeepers—effectively hindering rivals from competing with their own service.” The chief executives who signed the letter

argue that this problem requires “specific rules guiding the interactions between platforms and their business users.” Read more [here](#).

- *Politico EU* has published a profile of technology company lobbying in the European Union. The article cites research by Transparency International showing that large internet companies – including Google, Facebook, eBay, and Twitter - have “boosted their lobbying spend in Brussels by up to 278 percent since 2014.” The piece argues that the main cause of this increase in lobbying is the European Commission’s ‘digital single market’ strategy, which was launched in 2015. EU antitrust policy is also highlighted as a top concern for technology companies, with the article quoting one Brussels lobbyist as saying, “historically all the big American companies have had their fair share of competition issues, but the real bite has been in Europe.” Read more [here](#).

VI. Industry Updates:

- The Center for the Protection of Intellectual Property (CPIP) at the George Mason University School of Law has published a policy brief titled ‘Open-Access Mandates and the Seductively False Promise of “Free”’. The brief advances four arguments against open-access mandates requiring academic research to be made freely available. Such mandates, the paper argues, harm publishers’ ability to invest in the production and distribution of works; “contradict basic principles of copyright law” such as the principle that “copyright owners retain authority in and control over their works;” constitute “a solution in search of a problem” given that “there is no evidence of a systemic market failure in scholarly publishing;” and are “based on untenable economic models” which hold that publishers will be able to make returns on their investments when competing against “repositories that free-ride” on those investments. Read the brief [here](#).
- *The Washington Post* is reporting this week that Rebekah Gee, the Secretary of Health for Louisiana, recently wrote one of the leading public health experts, Joshua M. Sharfstein, associate dean at the Johns Hopkins Bloomberg School of Public Health, asking him to explore the feasibility of Louisiana tapping U.S. Code Section 1498—known as march-in rights—to lower the price of Hepatitis-C medication. Section 1498 allows federal regulators the power to appropriate inventions for the public good. Louisiana estimated that it would cost the state \$764 million this year to cover hepatitis c treatment for the 35,000 uninsured and Medicaid-dependent residents in the state. “We don’t have the resources,” said Gee, adding that “Pharma needs to think about different approaches to profitability.” “Sometimes quantity can be an important driver of profit, not just the price of each unit of drug.” Read more [here](#).
- *Bloomberg*, citing “a person familiar with the company’s strategy,” reported this week that Qualcomm is planning to ask the International Trade Commission (ITC) to ban imports of Apple’s iPhone. Such a move would come in response to Apple’s January lawsuit against Qualcomm alleging unfair patent licensing terms, as well as Apple’s April decision to withhold certain royalty payments from Qualcomm. Read more [here](#).
- Legal data firm Lex Machina has released its [report](#) on patent litigation in the first quarter of 2017. The firm finds that Q1 2017, with 938 patent cases, had “the lowest per-quarter filings of any quarter since 2011 Q3,” but notes that the first quarter of 2016 had a similarly low number, with just 963 filings. Turning to data on patent litigation venue, Lex Machina finds

that the Eastern District of Texas remains the most popular jurisdiction, with 33% of filings in Q1 2017 – down from 41% in Q4 2016. Additionally, the report finds that Q1 2017 saw a “record number” of Inter Partes Review (IPR) petition filing, noting that IPR filings have increased over each of the last four quarters.