



AMERICAN CONTINENTAL GROUP

1800 M Street NW | 5th Floor | Washington D.C. 20036
Tel: (202) 327-8100 | Fax: (202) 327-8101

PATENT & TRADEMARK POLICY REPORT APRIL 5, 2019



I. Congressional Developments:

- On Wednesday, the Senate Judiciary Committee's Subcommittee on IP held a hearing on "Trailblazers and Lost Einsteins: Women Inventors and the Future of American Innovation." Members and witnesses discussed both the gender divide in our innovation economy and potential legislative solutions to increase women participation in inventing and patenting in the United States. Much of the discussion focused on findings from a recent USPTO report titled "[Progress and Potential: A profile of women inventors on U.S. patents](#)," which highlights the untapped potential of women to spur innovation in the United States. Witnesses identified several factors that contribute to the gender divide in inventing and patenting in the United States, including the failure to recruit women to STEM careers, the lower retention rate for women who chose STEM career paths despite barriers to entry, the unique challenges women inventors face when attempting to secure the capital needed to file for a patent, and the systemic avoidance of attribution of credit to women inventors. Some witnesses and members on the Subcommittee pointed to government programs, such as the USPTO's [Inventors Assistance Center](#) and the programs offered by the Small Business Administration's (SBA) [Office of Women's Business Ownership](#), as critical tools that help promote the goal of gender parity. More info. [here](#).
- On Wednesday, the House Energy & Commerce Committee approved five bills that seek to curb prescription drug prices for U.S. patients by reforming the process of bringing generic competitors to the market. The following bills passed the Committee by a voice vote: BLOCKING Act of 2019 ([H.R. 938](#)); The Purple Book Continuity Act of 2019 ([H.R. 1520](#)) with an [amendment](#) offered by Rep. Eshoo (D-CA); the Orange Book

Headlines and Highlights:

- White House issues a memorandum on "Combating Trafficking in Pirated and Counterfeit goods."
- House Energy & Commerce Committee approves five drug pricing bills in full committee markup.
- Fed. Circuit rules that two Cleveland Clinic cardiovascular disease tests patents are invalid for claiming only natural law.
- Fed. Circuit Chief Judge Michel expresses concerns that the current patent system is "plagued by massive uncertainty and unpredictability."
- Speaker Pelosi: no vote on USMCA until Mexico passes and implements labor law reforms.

Transparency Act of 2019 ([H.R. 1503](#)) with [amendment](#) offered by Reps. Kelly (D-IL) and Guthrie (R-KY); and the Protecting Consumer Access to Generic Drugs Act of 2010 ([H.R. 1499](#)) with an [amendment](#) offered by Reps. Rush (D-IL) and Upton (R-MI). Members on the Committee also approved the CREATES Act of 2019 ([H.R. 965](#)) with a substitute [amendment](#) offered by Chairman Pallone (D-NJ) and Ranking Member Walden (R-OR). The substitute amendment establishes affirmative defense to ensure that good actors can protect themselves from liability, which was a top priority for Republicans. These bills previously passed through the Committee's health subpanel last week. More info. [here](#) and [here](#).

- POLITICO reports that Reps. Bill Pascrell (D-NJ) and Rosa DeLauro (D-CT) are collecting signatures on a letter to United States Trade Representative (USTR) Robert Lighthizer expressing concerns about Mexico's labor practices. The letter, which is endorsed by the AFL-CIO, raises concerns that the legislation the Mexican Congress is preparing "does not meet the requirements of Annex 23-A" of the United States–Mexico–Canada Agreement (USMCA). Specifically, the document claims that the draft legislation "fails to ensure that workers will be able to exercise a free, secret, and personal vote on the collective bargaining agreement that will cover their terms and conditions of work." Read more [here](#).
- Speaker of the House Nancy Pelosi (D-CA) told POLITICO this week that she does not plan to advance legislation to implement the USMCA until Mexico's policymakers pass and implement legislation to improve the country's labor laws. Speaker Pelosi asserted, "Unless you do this, we can't even consider it. ... We have to see that [Mexico passes] the legislation, that they have the factors in place that will make sure it's implemented and they demonstrate some commitments in sincerity, because it's a big issue how workers are treated in Mexico." Read more [here](#).
- Next Tuesday, April 9th, at 10:15 AM, the Senate Committee on Finance will hold a hearing titled, "Drug Pricing in America: A Prescription for Change, Part III." More info. [here](#).

II. Administration Updates:

- On Wednesday, the White House issued a memorandum on "Combating Trafficking in Pirated and Counterfeit goods." The memorandum directs the Secretary of Homeland Security, in coordination with the Secretary of Commerce, and in consultation with the Attorney General, the Director of the Office of Management and Budget, the USTR, the Assistant to the President for Economic Policy, and the Assistant to the President for Trade and Manufacturing Policy, to prepare and submit a report to the President within 210 days on the extent to which online third-party marketplaces and other third party intermediaries are used to facilitate the importation and sale of counterfeit and pirated goods. The report will also identify appropriate administrative, statutory, regulatory, or other changes, including enhanced enforcement actions, that could substantially reduce trafficking in counterfeit and pirated goods or promote more effective law enforcement regarding trafficking in such goods. Read more [here](#).
- On Tuesday, USTR Lighthizer met with freshmen Democrats to discuss the USMCA. POLITICO reports that the discussion focused on how the proposal might affect the cost of pharmaceuticals in the U.S. Democrats have raised concerns about the provision in the USMCA that requires Mexico and Canada to provide ten years of protection for test data used to develop biologic medicines. According to Rep. Susan Wild (D-PA), USTR Lighthizer told lawmakers that these provisions are "non-negotiable." Read more [here](#).

III. USPTO Updates:

- USPTO's Trademark Trial and Appeal Board (TTAB) is seeking feedback on a provision of its standard protective order (SPO) that stipulates that in-house counsel is not allowed to access materials designated "Confidential – For Attorneys' Eyes Only (trade secret/ commercially sensitive)" unless an appropriate showing has been made and approved by the TTAB. The comment deadline has been extended to June 30th. More info. [here](#).
- On April 9, from 12:00PM – 1:00PM ET, the USPTO will hold a Patent Quality Chat webinar, "New pilot program for motions to amend in AIA trial proceedings." Deputy Chief Judge Jackie Bonilla and Lead Judge Jessica Kaiser will talk about the new pilot program and the webinar will give participants the opportunity to receive feedback from the PTAB about a first motion to amend as well as to file a second motion to amend based on that feedback. More info. [here](#).
- On Tuesday, April 30th from 8:45AM – 5:00PM ET, the USPTO Technology Centers (TC) 3600 and 3700 and American Intellectual Property Law Association (AIPLA) will host a Customer Partnership Meeting at USPTO Headquarters. The meeting will focus on medical technology, gaming, transportation, and other mechanical based topics during informal discussions. USPTO Director Iancu and Japan Patent Director General Masanori Katsura, Patent Examination Department, Mechanical Technology, will both provide remarks. More info. [here](#).

IV. Judicial Updates:

- On Monday, the United States Court of Appeals for the Federal Circuit ruled that two Cleveland Clinic cardiovascular disease tests patents are invalid for claiming only natural law, upholding a decision from Judge Leonie M. Brinkema of the Eastern District of Virginia. The court rejected the Cleveland Clinic's argument that its patents could claim the relationship between a certain protein and the risk of heart disease because detecting it requires new techniques. "These laws of nature exist regardless of the methods used by humans to observe them. Inadequate measures of detection do not render a natural law any less natural," the court writes. Although the USPTO's recent Section 101 guidance to patent examiners may suggest a contrary result, the panel asserts that "we are not bound by its guidance." Read more [here](#).
- A Florida district court this week issued a default judgement against 27 defendants who operate websites that host links to copyright-infringing streams of ABS-CBN content. U.S. District Judge William Dimitrouleas granted a default judgement and ordered the 27 defendants to each pay \$1 million in damages for willfully violating ABS-CBN's trademark after none of the defendants showed up in court. Four defendants received an additional \$30,000 in copyright infringement damages. Read more [here](#).

V. International Updates:

- On Monday, a coalition of civil society organizations including labor unions, consumer advocates, and environmental organizations sent a letter to World Trade Organization (WTO) members opposing the proposed e-commerce negotiations, asserting that these negotiations could result in binding rules on the still-emerging digital economy, which the group believes

would “severely constrain the ability of countries to develop their economies in the future.” On IP, the document claims that e-commerce proposals at the WTO would “further entrench systems of IP maximalism and should be rejected.” The coalition claims that the current international system of rules governing patents and copyrights has resulted in “an incalculable transfer of wealth from the global South and consumers everywhere to a tiny set of hyper-protected patent and copyright-holding TNCs in a few countries.” Read more [here](#).

VI. Industry Updates:

- During a break at IP Watchdog’s recent Patent Masters™ Symposium, Federal Circuit Chief Judge Paul Michel told reporters that he is gravely concerned with the state of the U.S. patent system and urged Congress to act to address these concerns. Specifically, Judge Michel cautioned that the current system is plagued by “massive uncertainty and unpredictability,” which stymies investments in breakthrough technologies. Judge Michel asserted that, in his view, the “fundamental problem is that the Supreme Court has treated patent law much the way it treats constitutional case law,” when patent law is part of commercial law, and the decisions that happen outside the court room depend on high levels of certainty. Because the Federal Circuit is “trapped” by the Supreme Court’s “holdings and implications,” Judge Michel urged Congress to revise certain provisions in the America Invents Act (AIA) that he believes “were poorly thought out and poorly drafted.” Overall, Judge Michel seemed enthusiastic about the leadership in the committees of jurisdiction in Congress and about the prospect of legislative action—pointing to Senate Judiciary IP Subcommittee Chairman Tillis (R-NC), Ranking Member Coons (D-DE), and House Judiciary IP Subcommittee Chairman Johnson (D-GA) as knowledgeable champions of prudent patent policy. Read more [here](#).
- As reported by Sports Illustrated, Major League Soccer (MLS) recently filed a notice of opposition asking the TTAB to block Italian soccer club FC Internazionale Milano, better known as Inter Milan, from gaining trademark protection for the word “Inter,” which it applied for in 2014. MLS claims that because the use of “Inter” in soccer teams’ names is “widespread,” coupled with the fact that Inter is simply short for the conventional word “international,” Inter Milan nor any other club should be allowed to claim exclusive rights to the word. Inter Milan is expected to respond to this notice of opposition by early May. Read more [here](#).
- After a two-year legal battle, the national Women’s March organization announced that it has withdrawn its application to trademark the words “women’s march” because “the process has become a distraction from important work in our movement.” Women’s March Inc. filed for a trademark in March 2017 shortly after the Women’s March in Washington, which drew hundreds of thousands of women to Washington, DC to stand against President Trump and his agenda. The march inspired hundreds of other protests around the world that identified as the “Women’s March,” despite the fact that they were organized independently by local organizations that are not officially recognized by Women’s March Inc. Four organizations, including Women’s March Chicago, Women’s March Los Angeles, March On, and Women’s March Alliance, filed suit last year in an attempt to stop the Women’s March Inc. from obtaining a trademark. Read more [here](#).