

## PATENT & TRADEMARK POLICY REPORT

### MARCH 29, 2019



#### I. Congressional Developments:

- On Wednesday, March 27<sup>th</sup>, the House Energy & Commerce Committee’s Subcommittee on Health met in open markup session at 10:00am ET. The Subcommittee reported several bills favorably to the full Committee that seek to reduce drug prices through reforms to the process of bringing generic competitors to the market. The following bills were reported favorably to the full 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 Subcommittee Chair Anna Eshoo (D-CA); Orange Book Transparency Act of 2019 ([H.R. 1503](#)) with an [amendment](#) offered by Rep. Robin Kelly (D-IL); Protecting Consumer Access to Generic Drugs Act of 2010 ([H.R. 1499](#)) with an [amendment](#) offered by Rep. Bobby Rush (D-IL); and the CREATES Act of 2019 ([H.R. 965](#)) with an [amendment](#) offered by Rep. Peter Welch (D-VT). More info. [here](#).
- On Wednesday, the House Judiciary IP Subcommittee held a hearing titled “Lost Einsteins: Lack of Diversity in Patent Inventorship and the Impact on America’s Innovation Economy” featuring [Michelle K. Lee](#), Former Director of the USPTO; [Professor Lisa D. Cook](#), Associate Professor of Economics and International Relations and Director of the American Economic Association Summer Training Program at Michigan State University; [Professor Ayanna Howard](#), Professor and Chair of the School of Interactive Computing at Georgia Institute of Technology; and [Ms. Susie Armstrong](#), Senior Vice President of Engineering at Qualcomm Inc. Chairman Johnson (D-GA) opened the hearing by lamenting the lack of diversity in patent inventorship in the U.S., crucially with regards to women and minorities. Ranking Member Roby (R-AL) reiterated her colleague’s concerns and cited a recent [USPTO study](#) that found that in 2016 a woman was named on only 21 percent of patents

#### Headlines and Highlights:

- House Energy & Commerce Committee’s Health Subcommittee report group of drug pricing bills favorably to the full Committee for consideration.
- House Judiciary Committee IP Subcommittee holds hearing on the lack of diversity in patent inventorship and its impact on the U.S. innovation economy.
- SJC IP Subcommittee Chairman Tillis (R-NC) lays out priorities for Section 101 reform at LeadershIP conference.
- Labor groups express concerns about USMCA’s labor enforcement mechanisms to House Ways & Means Trade Subcommittee members.
- SJC IP Subcommittee to hold hearing on women inventors and the future of American innovation next Wed., April 3<sup>rd</sup>.

granted and women inventors only made up 12 percent of all inventors. Witnesses shed insight into why there is a lack of diversity in patent ownership in the U.S. and offered potential solutions for government and industry. For instance, speaking from her personal experience, Dr. Howard explained that it can be expensive for inventors to obtain a patent, and pointed out that female-founded startups in the U.S. raised just 2.2% of venture capital investment in 2018. She suggested that a more robust pro bono patent attorney/agent program for small businesses and individual inventors would help level the playing field for all inventors, including those from underrepresented groups.

- On Tuesday, at 10:00AM ET, the House Ways & Means Committee’s Subcommittee on Trade held a hearing on “Trade and Labor: Creating and Enforcing Rules to Benefit American Workers.” Witnesses raised concerns about the lack of mechanisms to enforce the labor standards in the United States–Mexico–Canada Agreement (USMCA). Several witnesses, including representatives from the AFL-CIO, the United Automobile Workers, the Communications Workers of America, and the Economic Policy Institute, encouraged members to leverage their role in implementing the USMCA to force the Trump Administration back to the negotiating table. Only one witness—Susan Monteverde from the American Association of Port Authorities—endorsed the proposal as drafted. More info. [here](#).
- Next Wednesday, April 3<sup>rd</sup> at 2:15PM ET, the Senate Judiciary Committee’s IP Subcommittee on IP will hold a hearing titled, “Trailblazers and Lost Einsteins: Women Inventors and the Future of American Innovation.” The following witnesses are scheduled to testify before the Subcommittee: Ms. Robin L. Rasor, M.S., CLP (Executive Director, Office of Licensing and Venture, Duke University); Dr. Barbara Gault, Ph.D. (Executive Vice President, Institute for Women’s Policy Research); Dr. Patricia E. Bath, M.D. (President, American Institute for the Prevention of Blindness) and Ms. Sandra K. Novak (Assistant Chief Intellectual Property Counsel, 3M Innovative Properties Company). More info. [here](#).

## **II. Administration Updates:**

- On Tuesday, International Trade Commission (ITC) Administrative Law Judge MaryJoan McNarma said that Apple infringed on a Qualcomm hardware patent and that she plans to recommend an import ban on certain models of the iPhone. Judge McNarma will officially rule on the case in the next several weeks before it is sent to the full ITC panel for review in July. Read more [here](#).
- In a separate decision on Tuesday in a long-standing legal battle between Qualcomm and Apple, the ITC invalidated the chipmaker’s patent for a battery-saving feature, stating that “Apple has shown by clear and convincing evidence” that one of the patent’s claims was invalid. Qualcomm brought this case before the ITC in 2017 and asked the Commission to ban the import of iPhones that allegedly violated its patents. Administrative Law Judge Thomas Pender had ruled last September that Apple violated one of Qualcomm’s software patents but recommended against an iPhone ban. Read more [here](#).
- Reports surfaced late last week that Clete Willems will soon depart from his current role of deputy director of the National Economic Council (NEC) at the White House. Kelly Ann Shaw, who joined the White House staff in November as an assistant to the president and senior director for international trade, investment and development is slated to over Willems’s

role at the NEC. “It has been a great honor to serve the president in this White House for the last two years. President Trump’s leadership on trade has entirely changed the global conversation and will lead to an international system that is more free, fair, and reciprocal,” Willems said in a statement. Read more [here](#).

### **III. USPTO Updates:**

- The USPTO’s Trademark Trial and Appeal Board (TTAB) is seeking feedback on a specific provision of its [standard protective order](#) (SPO). Specifically, the TTAB would like comments on whether it should retain or modify the provision of the 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. Comments are due by March 31<sup>st</sup>. More info. [here](#).

### **IV. Judicial Updates:**

- On Friday, a federal jury in Wilmington, Delaware, rejected a claim by Orexo that two generic opioid-addiction treatments created by Teva Pharmaceutical Industries Ltd. infringed on a patent for Orexo’s drug Zubsolv. Orexo argued in court that Teva infringed on their patent because they used the same essential formula for their products covered under the patent for Zubsolv. Read more [here](#).

### **V. International Updates:**

- World Intellectual Property Review reports that Gan Shaoning, deputy head of China’s National Intellectual Property Administration (SIPO), announced at the 20<sup>th</sup> China Development Forum last weekend that the country plans to “cut the time needed for patent review” by at least 15% and reduce the timeframe for reviewing trademark applications so it falls “within five months.” Chinese law firm CCPIT has said that it takes 22 months, on average, to obtain a patent in China. Read more [here](#).

### **VI. Industry Updates:**

- At the sixth annual LeadshIP conference in Washington, DC on Tuesday, Senate Judiciary IP Subcommittee Chairman Thom Tillis (R-NC) shed insight into his legislative priorities for the 116<sup>th</sup> Congress. Chairman Tillis asserted that reforming Section 101 is his top priority and reiterated the “four guiding principles” that would shape the legislative effort he is undertaking with Subcommittee Ranking Member Chris Coons (D-DE). Specifically, (1) any reform should ensure that the availability of patent protection isn’t determined based on the existence of related technology; (2) when assessing the eligibility of patent claims, those claims must be construed as a whole, with each limitation in a claim given equal weight, and none dismissed or discounted as “routine,” “known,” “conventional,” mere “data gathering,” mere “post-solution activity,” or the like; (3) diagnostic and life science technologies should be eligible for patent protection per se, subject to meeting other statutory requirements; (4) any reform should statutorily codify a definition and/or a list of limitations or exceptions to patent eligibility.