



AMERICAN CONTINENTAL GROUP

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## PATENT & TRADEMARK POLICY REPORT SEPTEMBER 8, 2017



### I. Congressional Developments:

- On Tuesday, Sens. Hatch (R-UT) and Wyden (D-OR) and Reps. Brady (R-TX) and Neal (D-MA), the Chairmen and Ranking Members of the Senate Finance and House Ways and Means Committees, respectively, released a joint statement expressing support for the U.S.-South Korea (KORUS) free trade agreement. Additionally, they urged President Trump to not withdraw from the agreement, calling South Korea a “significant economic partner...and a vital customer for U.S. manufacturers, services providers, farmers and ranchers.” Read more [here](#).
- On Tuesday, September 12<sup>th</sup>, at 10:15 a.m. the House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection will hold a hearing entitled “21<sup>st</sup> Century Trade Barriers: Protectionist Cross Border Data Flow Policies Impact on U.S. Jobs.” Read more [here](#).
- Rep. Dave Reichert (R-WA), Chairman of the House Ways and Means Subcommittee on Trade, [announced](#) on Wednesday that he will retire from Congress at the end of his current term. Read more [here](#).
- According to a report by *Reuters*, Sen. Elizabeth Warren (D-MA) met with Makan Delrahim, President Trump’s nominee to run the Justice Department’s Antitrust Division, on Wednesday. Warren, who has reportedly put a “hold” on Delrahim’s confirmation, pressed him on political interference in antitrust and lobbying. Read more [here](#).
- The Senate Finance Committee had been scheduled to vote on the nomination of Gilbert Kaplan to be Under Secretary of Commerce for International Trade on Wednesday, but the markup was delayed because there were not enough senators

### Headlines and Highlights:

- Congressional trade leaders issue joint statement of support for KORUS agreement.
- Sec. of Commerce Ross said withdrawing from NAFTA would be “right thing to do” if renegotiation fails.
- Trump nominates Andrei Iancu to serve as next USPTO Director.
- Rep. Reichert, chair of trade subcommittee, announces retirement.
- A better U.S. patent system will spur innovation, *Financial Times* writes.
- NY Times reports that Google executive Eric Schmidt pressured New American foundation to oust Google critic.
- FDA announces comprehensive review of its regulations.

present to reach a quorum. The mark up resumed the next day, and Kaplan's nomination was reported out favorably by the committee. Kaplan's nomination hearing was held on August 3. Read more [here](#).

## II. Administration Updates:

- On Tuesday, President Trump formally nominated Andrei Iancu to serve as the next Director of the United States Patent and Trademark Office (USPTO). Iancu is currently the Managing Partner of [Irell & Manella LLP](#), where his practice focuses on intellectual property law. Read more [here](#).
- On Tuesday, President Trump nominated Rep. Tom Marino (R-PA), Chairman of the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, as the next Director of the Office of National Drug Control Policy. Marino had previously withdrawn from the director position in May, citing a "critical illness" in his family. Read more [here](#).
- The Food & Drug Administration (FDA) has announced that it is "undertaking a comprehensive review of [its] regulations." In particular, the agency will consider whether to "revise, update, and in some cases eliminate existing regulations to help [the agency] better keep pace with scientific advancements." The review was announced in a [blog post](#) written by Anna Abram, the FDA's Deputy Commissioner for Policy, Planning, Legislation, and Analysis. In her post, Abram noted that the agency is "opening a number of public dockets to solicit feedback from" a wide range of stakeholders, and will be "exploring other opportunities to solicit input from stakeholders." Abrams also mentions the agency's work to identify "places where FDA's rules concerning new drugs are being used in ways that may create obstacles to the timely entry of generic competition."
- On Friday, Secretary of Commerce Wilbur Ross said that withdrawing from the North American Free Trade Agreement (NAFTA) would "the right thing" to do if the renegotiation is unsuccessful. Ross also said that the Trump Administration views the end of 2017 as the deadline to wrap up talks, citing the potential delays negotiators would run into with elections in all three countries and the expiration of Trade Promotion Authority (TPA). "As you get closer to all of those political dates, the ability to get anything done will go down," Ross said, adding that "there's no fine line, magic tape, but more or less by the end of the year is probably where we're going to know where we are." Read more [here](#).

## III. USPTO Updates:

- The USPTO has [a new webpage for customers affected by Hurricane Harvey](#). It includes contact information for those who may have questions or problems regarding applications or other proceedings related to patents, trademarks, or other business before the agency. The webpage will be updated to include links to forthcoming guidance and instructions for customers impacted by Harvey, and for those impacted by Hurricane Irma should it become necessary.
- The [Business Methods Partnership meeting](#) will be held Wednesday, Sept. 20 from 1-4 p.m. ET at the USPTO campus in Alexandria, Virginia. [Register](#) in advance. The event will also be webcast to include group viewing sessions at the USPTO regional offices in Dallas, Denver, Detroit, and Silicon Valley.

#### IV. Judicial Updates:

- On Thursday, in *Intercontinental Great Brands v. Kellogg North Am. Co.*, a split Federal Circuit upheld a district court's summary judgment that Kraft's patent was invalid for obviousness. The patent claimed a food packaging that combined a frame surrounded by a wrapper with a label that could be pulled back to access the contents and resealed to maintain freshness. Kraft alleged infringement by Kellogg in relation to its sale of cookies in resealable packages. Kraft argued that the district court failed to evaluate its evidence regarding objective indicia before concluding that the claims were obvious. The Federal Circuit said the district court properly considered the evidence after Kellogg made an "extremely strong prima facie showing" of obviousness, based on the *Graham* factors concerning the prior art's teachings and considerations bearing on a skilled artisan's motivation to combine, that the objective indicia were insufficient to overcome. Kraft cited no authority requiring that the analysis be conducted in a particular order. (Source: *IPO Daily News*)
- Hewlett Packard Enterprise, Hewlett Packard, and Vizio have signed on to an [amicus brief](#) submitted to the Federal Circuit in support of Arista's fight against an International Trade Commission import ban on certain Arista products. The Commission had found that those products infringed patents owned by Cisco. However, in June, the Patent Trial and Appeal Board (PTAB) found that Cisco's patents were invalid. Read more [here](#) and [here](#).

#### V. International Updates:

- On Monday, *POLITICO Europe* published an article on "6 things to watch on this autumn's tech agenda." The story lists the Google antitrust case, in which the EU fined the internet giant \$2.6 billion dollars for favoring its own shopping service in search results. The two sides will "spend autumn haggling over remedies and likely responding to court submissions," the author writes. Read more [here](#).
- After having an appeal rejected by the Seoul High Court on Tuesday, Qualcomm [will file an appeal](#) with the Korea Supreme Court regarding the Korea Fair Trade Commission's (KFTC) \$850 million fine against the company. The fine, issued last December, came after a three-year investigation which found that Qualcomm's business model was "unfair." Read more [here](#).

#### VI. Industry Updates:

- On August 30<sup>th</sup> *The New York Times* [reported](#) that Google's executive chairman Eric Schmidt pressured the CEO of the Washington D.C.-based think tank the New America Foundation to fire a researcher after he posted a statement on the foundation website supporting the European Union's \$2.7 billion fine of Google. The researcher, Barry Lynn, ran a New America initiative called Open Markets that has often complained of market dominance by companies such as Google. Schmidt, his family's foundation, and Google have donated more than \$21 million to the think tank since its founding in 1999. New America's CEO, Anne-Marie Slaughter, [released a statement](#) rejecting the NY Times' story, calling it "absolutely false." Slaughter said she fired Lynn due to his "refusal to adhere to New America's standards of openness and institutional collegiality..."

- Following reports that the Trump Administration was considering withdrawing from the U.S.-South Korea (KORUS) free trade agreement, the U.S. Chamber of Commerce issued a press release on Tuesday opposing withdrawal from KORUS “in the strongest possible terms,” adding that it would not “create a single American job—but it would cost many.” “It’s difficult to imagine a move that would bring more self-harm to our economy and national security, with no benefit in return, than withdrawing from KORUS,” the statement continues. “We urge the administration not to make this rash and irresponsible move.” Read the entire statement [here](#).
- On Sunday, Rana Foroohar, global business columnist and associate editor at the *Financial Times* published an article entitled “A better US patent system will spur innovation.” Foroohar writes that recent changes in the US patent system have made it more difficult for people to protect their inventions. This uncertainty, Foroohar says, leads investors to lose interest and funnel their money “to other innovations in places like Germany, or China, where such research is better protected.” “Suppliers and talent begin moving their too,” she adds. Foroohar lays the blame for this trend at the feet of Big Tech and the USPTO’s Patent Trial and Appeal Board. “[T]he PTAB has become a ‘powerful shield’ for those accused of patent infringement, leading former chief judge Randall Rader...to label it the ‘death squad for IP.’” Read more [here](#).
- *Bloomberg BNA* reports that the number of patent suit filings in the Eastern District of Texas rose in August, after having decreased following the *TC Heartland* decision in May. Sixty-three patent infringement complaints were filed in the Eastern District of Texas in August, up from 32 in July. However, *Bloomberg* notes that “the volume of filings was still down about 60 percent from the same period a year ago.” Read more [here](#).
- Legal analytics firm Docket Alarm has written a guest blog post on *PatentlyO* detailing a lack of gender diversity in litigation before the Patent Trial & Appeal Board (PTAB). In particular, 55 of the top 100 law firms practicing before the PTAB have less than 10% of their attorneys on cases being female. Attorney appearances before the PTAB are on average only 12% female. Docket Alarm also identifies a number of firms that “buck the trend,” with significantly higher ratios of female attorneys working on PTAB cases. Read more [here](#).