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*Session 510: CX Topic Analysis: A  
Focus on the Affirmative*

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# **INTELLECTUAL PROPERTY: AFFIRMATIVE**

Resolved: The United States federal government should significantly strengthen its protection of domestic intellectual property rights in copyrights, patents, and/or trademarks.

A look at possible affirmative cases, provided by Rich Edwards, Baylor University

# About Patents

**Legal Authority:** U.S. Constitution, Article I, Section 8, Paragraph 8: “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

**Purpose:** Promote innovation and investment

**Administered by:** U.S. Patent and Trademark Office (Dept. of Commerce)

**Types:** Utility (20 years), Design (15 years), Plant (20 years)

**Number:** Ten Millionth Patent issued in 2018

**Stupid Patents:** Electronic Frontier Foundation awards a “stupid patent of the month:” In 2002, Ross Long was given a patent for a stick: item that “has at least one protrusion extending therefrom and that resembles a branch in appearance” . . . the description also said that it “would float in water.”

In 1999, patent #6,004,596 for a peanut butter and jelly sandwich.

**Trolls:** Non-Practicing Entities (NPEs); often backed by companies such as US Innovation Fund, IP Edge, and Acacia Research

**America Invents Act (AIA):** 2012; First-to-File not First-to-Invent; Mechanisms for challenging patents already filed: Inter-Partes Review; Patent and Trademark Appeal Board

# KEY SUPREME COURT CASES DEALING WITH PATENTS

**Mayo:** *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* (2012): Processes that target the application of natural law are not eligible for patents.


**Myriad:** *Association for Molecular Pathology v. Myriad Genetics, Inc.* (2013): Discoveries of gene sequences & genetic tests not available for patent protection.

**Alice:** *Alice Corp. v. CLS Bank International* (2014): An abstract idea cannot be patented. Established a two-step standard: (1) is it an abstract idea?; (2) Does it add to the idea “something extra” that embodies an “inventive concept?”

HOME > NEWS > COURTS

## *Alice-Insanity (Part One), or Why the Alice-Mayo Test Violates Due Process of Law*

 **BURMAN YORK (BUD) MATHIS III**  
OCTOBER 26, 2021, 04:15 PM 88

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“*Alice-Mayo*, as is practiced by the USPTO and the Federal Circuit, is an exercise in capriciousness as well as a rote, near cliché babbling of meaningless words that falsely portend to be a cognizable standard of patent eligibility.”

<https://ipwatchdog.com/2021/10/26/alice-insanity-part-one-alice-mayo-test-violates-due-process-law/id=139229/>

# PATENT ELIGIBILITY RESTORATION ACT (PERA)

**Harm:** Patent uncertainty undermines U.S. innovation in genetic research, biologics, AI, and other high tech areas; this uncertainty undermines investment; key research centers are moving overseas.

**Inherency:** Recent Supreme Court decisions (Mayo, Myriad, Alice) have made undermined patent certainty.

**Solvency:** The Patent Eligibility Restoration Act (PERA) would re-establish certainty, promote investment in high tech areas, and restore U.S. leadership.

118TH CONGRESS  
1ST SESSION

**S. 2140**

To amend title 35, United States Code, to address matters relating to patent subject matter eligibility, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 22, 2023

Mr. TILLIS (for himself and Mr. COONS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

## **A BILL**

To amend title 35, United States Code, to address matters relating to patent subject matter eligibility, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Patent Eligibility Res-  
5 toration Act of 2023”.

### 6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) As of the day before the date of enactment  
9 of this Act, patent eligibility jurisprudence inter-

# CHINA TECHNOLOGY CONTROL ACT

**Harm:** The U.S. and China are currently engaged in competition for leadership in AI, quantum computing, and numerous other areas of advanced technology. Chinese economic advances are funding a military buildup that will culminate in an attack on Taiwan and resulting war with the U.S.

**Inherency:** The Biden administration fails to take action to stop Chinese theft of U.S. intellectual property.

**Solvency:** The China Technology Control Act would stop China from acquiring sensitive U.S. technology and intellectual property.

118TH CONGRESS  
1ST SESSION

**H. R. 2594**

To control the export to the People's Republic of China of certain technology and intellectual property important to the national interest of the United States, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

APRIL 13, 2023

Mr. GREEN of Tennessee introduced the following bill; which was referred to the Committee on Foreign Affairs, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## **A BILL**

To control the export to the People's Republic of China of certain technology and intellectual property important to the national interest of the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

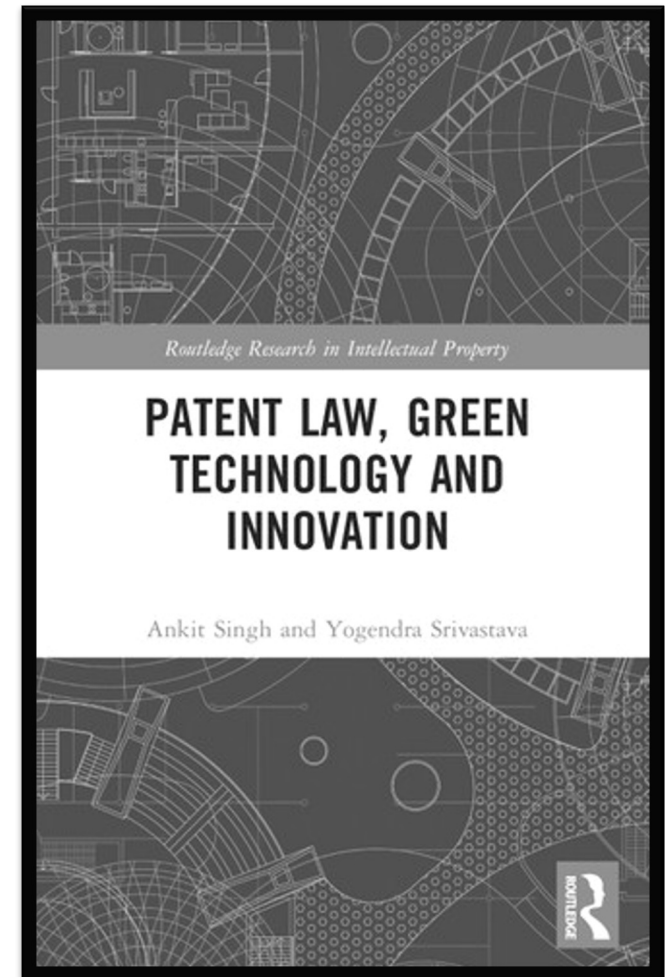
4 This Act may be cited as the "China Technology  
5 Transfer Control Act of 2023".

# GREEN TECHNOLOGY PATENTS

**Harm:** Patent protection is the key to the promotion of technological innovation. The promotion of technological innovation is essential to slow climate change. Climate change is an existential threat.

**Inherency:** Though the U.S. Patent and Trademark Office operates green patent promotion programs, the incentives are inadequate as compared to the reality of the threat.

**Solvency:** The U.S. should provide additional incentives for the filing of green technology patents.



\$54.95 on Amazon



# “MARCH-IN RIGHTS” IN THE BAYH-DOLE ACT

**Harm:** Patent certainty is key to preserve innovation in the pharmaceutical industry. Such innovation is essential not only for discovering disease cures but also critical to preparation for future pandemics.

**Inherency:** The Biden administration has announced its intention to claim “March-in Rights” under the Bayh-Dole Act as a means to control pharmaceutical pricing.

**Solvency:** The U.S. federal government should restore the certainty of drug patent protection by eliminating the “March-In Rights” provision of the Bayh-Dole Act.



The image is a screenshot of a webpage from the Center for Strategic & International Studies (CSIS). The page features a dark header with the CSIS logo and navigation menus for 'Regions' and 'Topics'. The main content area has a white background. At the top of the article is the title 'March-In Rights and U.S. Global Competitiveness' in a bold, black font. Below the title is a photograph of various pills and capsules on a surface. Underneath the photo is a small caption: 'Photo: okskaz/Adobe Stock'. Below the photo are social media sharing icons for Facebook, Twitter, LinkedIn, and Email. Further down, the text reads 'Critical Questions by Alexander Kersten and Gabrielle Athanasia' and 'Published March 24, 2022'. The article begins with an 'Introduction' section. The text in the introduction discusses the political debate around 'march-in rights' and mentions the National Institutes of Health (NIH) and the U.S. Department of Health and Human Services (HHS). It specifically refers to a case involving the Japanese pharmaceutical firm Astellas' prostate cancer drug, Xtandi. On the right side of the article, there are two author portraits. The first is Alexander Kersten, identified as Deputy Director and Fellow, Renewing American Innovation Project. The second is Gabrielle Athanasia, identified as Former Program Coordinator and...

CSIS | CENTER FOR STRATEGIC & INTERNATIONAL STUDIES

Regions ▾ Topics ▾

## March-In Rights and U.S. Global Competitiveness

Photo: okskaz/Adobe Stock

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Critical Questions by Alexander Kersten and Gabrielle Athanasia  
Published March 24, 2022

### Introduction

"March-in rights" are once again a subject of political debate, as the National Institutes of Health (NIH) and U.S. Department of Health and Human Services (HHS) decide whether to march in to offer cheaper versions of Japanese pharmaceutical firm Astellas' prostate cancer drug, Xtandi. This [case](#) revives the question of the role of intellectual property (IP) protection in stimulating the innovation ecosystem to deliver new drugs, therapies, and vaccines versus government actions to boost the wider availability of specific products in the short run.

**Alexander Kersten**  
Deputy Director and Fellow,  
Renewing American Innovation  
Project

**Gabrielle Athanasia**  
Former Program Coordinator and

<https://www.csis.org/analysis/march-rights-and-us-global-competitiveness>

# STOPPING PATENT TROLLS

**Harm:** The U.S. patent system should be improved by taking action against the patent trolls that currently undermine U.S. innovation and leadership in technology.

**Inherency:** Current law allows “patent assertion agencies” to use “cease and desist” letters to threaten patent action, knowing that small businesses do not have the financial means to defend themselves in the expensive court or Inter Partes Review processes.

**Solvency:** Passing the “Targeting Rogue and Opaque Letters Act” would take necessary action to stop patent trolls.

117<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

**H. R. 192**

To provide that certain bad faith communications in connection with the assertion of a United States patent are unfair or deceptive acts or practices, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 2021

Mr. BURGESS introduced the following bill; which was referred to the Committee on Energy and Commerce

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## **A BILL**

To provide that certain bad faith communications in connection with the assertion of a United States patent are unfair or deceptive acts or practices, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Targeting Rogue and  
5 Opaque Letters Act of 2021”.

# About Copyrights

**Legal Authority:** U.S. Constitution, Article I, Section 8, Paragraph 8: “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

**Purpose:** Promote and protect creativity

**Administered by:** U.S. Copyright Office (part of the Library of Congress)

**Length:** Life of the author, plus 70 years

**Number:** Copyrights do not have to be filed, but authors are not allowed to use the circle-c mark unless they have been filed; Currently, about 440,000 are filed per year.

**International Application:** Berne Copyright Convention and the GATT treaty allow U.S. authors to enforce their copyrights in most industrialized nations

**Fair Use:** In copyright law, the fair use provision facilitates the use of copyrighted works for educational purposes, especially on a not-for-profit basis. The preamble of section 107 (of the Copyright Act of 1976) specifically mentions "teaching (including multiple copies for classroom use), scholarship, or research." Section 110(1) allows teachers and students to publicly perform or display a copyrighted work "in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction."

# GENERATIVE AI COPYRIGHT DISCLOSURE ACT

**Harm:** Human creativity is currently being marginalized as artists, musicians, and writers are having their livelihoods threatened by generative AI software programs.

**Inherency:** At present, the learning processes of generative AI software programs are allowed to use vast troves of copyrighted materials without permission, acknowledgment, or payment of royalties.

**Solvency:** The Passage of the Generative AI Copyright Disclosure Act will protect the rights of creatives.

118TH CONGRESS  
2D SESSION

**H. R. 7913**

To require a notice be submitted to the Register of Copyrights with respect to copyrighted works used in building generative AI systems, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

APRIL 9, 2024

Mr. SCHIFF introduced the following bill; which was referred to the Committee on the Judiciary

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## **A BILL**

To require a notice be submitted to the Register of Copyrights with respect to copyrighted works used in building generative AI systems, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Generative AI Copy-  
5 right Disclosure Act of 2024”.

# AMERICAN MUSIC FAIRNESS ACT

**Harm:** Recording artists are denied the royalties they are due when their music is played on AM/FM radio stations. The U.S. is the only developed country not honoring copyrights in the playing of music. This results in the denial of reciprocal payments from abroad.

**Inherency:** The 2018 Music Modernization Act exempts terrestrial radio stations from the requirement to pay royalties when playing copyrighted music.

**Solvency:** The American Music Fairness Act would eliminate the exemption and restore royalty rights.

118TH CONGRESS  
1ST SESSION

**S. 253**

To amend title 17, United States Code, to provide fair treatment of radio stations and artists for the use of sound recordings, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 2023

Mr. PADILLA (for himself, Mrs. BLACKBURN, Mr. TILLIS, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

## **A BILL**

To amend title 17, United States Code, to provide fair treatment of radio stations and artists for the use of sound recordings, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “American Music Fairness Act”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for  
7 this Act is as follows:

Sec. 1. Short title; table of contents.  
Sec. 2. Equitable treatment for terrestrial broadcasts and internet services.  
Sec. 3. Timing of proceedings under sections 112(e) and 114(f).  
Sec. 4. Special protection for small broadcasters.

# About Trademarks

**Legal Authority:** Lanham Act of 1946

**Use Requirement:** In U.S. Law, the mark must be “used in commerce,” meaning “the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark”

**Legal Use Requirement:** The Lanham Act allows federal trademark protection only for products for which trade is legal under federal law.

**Administered by:** U.S. Patent and Trademark Office (Department of Commerce)

**How long does it last:** No limit, but must be renewed every ten years

**Number:** Current number is about 2.5 million still-active registrations, with about 770,000 filings per year (including renewals).

**Types:** A word phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others

**Doctrine of “laches:”** If a trademark owner ignores/allows infringement of its trademark for an undefined period of time, the infringer can use as a defense that the trademark owner has exhausted the opportunity to object. This doctrine creates an affirmative obligation on a trademark owner to vigorously defend its mark. However, whenever a trademark owner becomes overly aggressive, they are commonly labeled a “trademark bully” – Apple & Adidas have earned this designation

# SHOP SAFE ACT

**Harm:** Counterfeit product sales damage the economy and threaten the health of consumers both in the U.S. and throughout the world.

**Inherency:** Current law makes regulation a useless game of “whack-a-mole.”

**Solvency:** Passing the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act or the SHOP SAFE Act would solve by making eCommerce platforms responsible for sale of counterfeit drugs and other products.

118TH CONGRESS  
1ST SESSION

## S. 2934

To amend the Trademark Act of 1946 to provide for contributory liability for certain electronic commerce platforms for use of a counterfeit mark by a third party on such platforms, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 26 (legislative day, SEPTEMBER 22), 2023

Mr. COONS (for himself and Mr. TILLIS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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### A BILL

To amend the Trademark Act of 1946 to provide for contributory liability for certain electronic commerce platforms for use of a counterfeit mark by a third party on such platforms, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Stopping Harmful Of-  
5 fers on Platforms by Screening Against Fakes in E-com-  
6 merce Act of 2023” or the “SHOP SAFE Act of 2023”.

# TRADEMARK BULLIES

**Harm:** Trademark bullying undermines U.S. innovation; large companies, especially those in the tech field, abusively harass small businesses.

**Inherency:** Current law provides only an insistence upon aggressively defending a trademark without any countervailing penalty for bullying behavior.

**Solvency:** The solution requires establishing a “misuse doctrine” in the Lanham Act, enforced with the threat that a trademark bully will lose their own trademark.

## Apple's Trademark 'Bullying' Targets Small Businesses, Nonprofits



A custom stationary business, a school district, and a nonprofit group that works with autistic children have all felt the wrath of the company's trademark lawyers.

<https://www.techtransparencyproject.org/articles/apples-trademark-bullying-targets-small-businesses-nonprofits>



# CANNABIS TRADEMARKS

**Harm:** More than half of U.S. states have legalized cannabis sales. The current state-by-state trademark filings for cannabis sellers creates confusion and risks consumer safety.

**Inherency:** At present, the U.S. Patent and Trademark Office does not allow trademark filings for any product illegal under federal law.

**Solvency:** The illegal product exemption in the Lanham Act should be removed. The U.S. already allows patents and copyrights for cannabis products.

## Cannabis IP: How Federal Inconsistencies Have Stifled a Budding Industry

Celena Dyal

### INTRODUCTION

The cannabis<sup>1</sup> industry is quickly taking off in the United States. However, federal laws and regulations have not kept pace and as a result there are significant legal uncertainties as to the development of business plans. As a matter of federal law, marijuana is illegal, but state law is becoming more accepting of it. Currently, 33 states and the District of Columbia have passed laws legalizing marijuana in some capacity.<sup>2</sup> Marijuana for medicinal use has been approved by 33 states and the District of Columbia.<sup>3</sup> Additionally, 11 states and the District of Columbia have also adopted laws allowing for medicinal and recreational use of marijuana.<sup>4</sup> Only 17 states have legalized neither medicinal nor recreational use of marijuana.<sup>5</sup> However, the growing legalization trend suggests that these states are likely to follow suit and be more tolerant of marijuana, whether by decriminalizing the drug or allowing for consumption.<sup>6</sup> As more states have legalized or decriminalized marijuana, there has

[https://digitalcommons.law.umaryland.edu/cgi/view\\_content.cgi?article=1330&context=jbtl](https://digitalcommons.law.umaryland.edu/cgi/view_content.cgi?article=1330&context=jbtl)

# **INTELLECTUAL PROPERTY: AFFIRMATIVE**

Resolved: The United States federal government should significantly strengthen its protection of domestic intellectual property rights in copyrights, patents, and/or trademarks.

A look at possible affirmative cases, provided by Rich Edwards, Baylor University