



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT DECEMBER 15, 2017



### I. Congressional Updates:

- Minnesota Governor Mark Dayton has appointed current Minnesota Lieutenant Governor Tina Smith to replace Senator Al Franken, who is resigning following allegations of sexual misconduct. Smith, who is expected to be sworn in to the Senate in January, also plans to run in the 2018 special election to complete Senator Franken's term, which ends in 2020. Read more [here](#).
- Democrat Doug Jones was elected to the Senate on Tuesday, beating Republican Roy Moore in the special election for the Alabama Senate seat vacated by current Attorney General Jeff Sessions, and currently held by Luther Strange. Jones' Senate term will end in January 2021. Read more [here](#).
- The House Judiciary Committee passed an amended version of the *Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)* on Tuesday. The new version of the bill received criticism from victims' rights advocacy groups, who said in a letter to the committee that the bill's new intent standard for liability "makes it nearly impossible for any civil litigant to file successfully against bad actors." The groups also said that the bill "fails" by "ignoring the possibility of a private right of action," among other criticisms. Read more [here](#) and [here](#).
- On Wednesday the Senate Judiciary Subcommittee on Antitrust, Competition, and Consumer Rights held a hearing titled 'The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?' The hearing featured testimony from Barry Lynn of Open Markets, who argued in favor of broadening the antitrust framework from the consumer welfare standard to include

### Headlines and Highlights:

- Iancu, nominee for Director of USPTO, reported favorably out of Senate Judiciary Committee.
- White House releases final IT Modernization Report, emphasizes "cost effective infrastructure" including "shared services."
- Minnesota Governor appoints Lieutenant Governor Tina Smith to fill Al Franken's seat.
- White House Deputy CTO speaks at HHS "Innovation Day" on Administration's tech and science priorities.

### In the Blogs:

[When "Ticking the Box" is Not Such a Good Idea](#)

Hugh Stephens Blog

December 11 by Hugh Stephens

[Some Good Copyright News From Down Under](#)

Illusion of More

December 13 by David Newhoff

[Internet Governance Forum Next Week: Cyber Security, Artificial Intelligence, Big Data on Agenda](#)  
IP Watch

December 13 by Catherine Saez

other public interest factors. The other witnesses, and many Senators, espoused the opposing view that moving beyond the consumer welfare standard is too radical of a proposal, and that antitrust law should not be used to pursue public policy goals beyond those concerning the preservation of the “competitive process.” At the hearing, Senator Richard Blumenthal (D-CT) said he has sent a letter urging the Department of Justice to investigate potential anticompetitive threats that might result if the Comcast-NBCUniversal merger is allowed to continue after the conditions of the merger’s consent decree expire in September 2018, and to extend those conditions in the meantime.

- On Thursday morning, Andrei Iancu, the nominee to be the next Director of the U.S. Patent and Trademark Office, was reported favorably by the Senate Judiciary Committee to the full Senate.
- *POLITICO* [reported](#) on Thursday that House Speaker Paul Ryan (R-WI) has told close confidants that he will leave Congress at the end of 2018. Ryan, however, told reporters later that day that the rumor is untrue.

## II. Judicial Updates:

- The *Financial Times* reports that Spotify and Deezer have sent a letter to the European Commission urging the Commission to take action against large U.S. technology companies such as Apple and Amazon for “regularly abusing their advantaged position” to the detriment of smaller companies that rely on their services, such as the Apple app store. Read more [here](#).

## III. Administration Updates:

- On Wednesday, the White House released its final IT Modernization Report. The goal of the report, according to a White House [blog](#), is to articulate actions that will “compliment Agency efforts to modernize citizen facing services—by moving to a more secure, agile, and cost effective infrastructure, much of which will be provided by shared services.” Read the entire report [here](#).
- On Wednesday, Michael Kratsios, the Deputy Chief Technology Officer at the White House, spoke at the Department of Health and Human Services’ “Innovation Day” about the Administration’s tech and science priorities. Kratsios said that the Administration’s priorities include expanding rural broadband, investing in nuclear energy and promoting STEM education. Additionally, Kratsios said the White House is devoted to eliminating regulations it believes act as a barrier to innovation. Read more [here](#).

## IV. International Updates:

- The *Australian Financial Review* reports that Google, Facebook, and other internet companies have been urging the Australian government to include them in safe harbor protections in copyright legislation introduced last week. That proposed legislation provides safe harbor protection to entities such as educational institutions and libraries, but not to internet companies like Google and Facebook. Responding to the internet companies’ request for inclusion, Australian Recording Industry Association (ARIA) chief executive Dan Rosen said, “commercial online services were never meant to get this

protection, and international experience has shown it is used to undermine commercial negotiations to the detriment of artists and the creative industries.” Read more [here](#).

- This week, Canada’s House of Commons triggered a parliamentary review of Canada’s Copyright Act. The review is mandated by law every five years after Canada passed the Copyright Modernization Act in the summer of 2012. Music Canada, an organization that includes Sony Music, Universal Music and Warner Music, applauded the announcement to review the law, saying “music creators, and all creators who depend on copyright, deserve a Copyright Act that protects their rights when their works are commercialized by others.” “This is our chance to address the Value Gap threatening the livelihood of Canadian creators and the future of Canadian culture.” Read more [here](#).

## V. Industry Updates:

- On Thursday, the Walt Disney Company announced that it had reached a deal to buy most of the assets of 21<sup>st</sup> Century Fox. The all-stock transaction is valued at roughly \$52.4 billion. Read more [here](#).
- On Thursday, the U.S. Copyright Office Copyright Royalty Judges referred novel material questions of substantive law to the Register of Copyrights for resolution in connection with the SDARS III proceeding. The Register responded with a written opinion that can be found [here](#).
- On Monday, Dave Kappos, former Director of the USPTO in President Obama’s first term and current partner at Cravath Swaine & Moore in New York, penned an op-ed in *IAM Media* arguing that Antitrust Chief Makan Delrahim’s November [speech](#) at the University of Southern California is a signal that the Dept. of Justice will “no longer favour IP users over owners.” In his op-ed, Kappos criticizes the second Obama Administration for cutting “away at the value of IP rights, favouring users of IP at the expense of rights holders.” Kappos makes specific reference to the Dept. of Justice finding that the consent decrees under which ASCAP and BMI had long operated do not allow for fractional licensing as harmful to copyright owners. “Mr Delrahim’s speech at USC’s Gould School of Law on 10th November marks the start of a new era of DOJ policy,” Kappos writes, “one that stands in welcomed contrast to the actions of the antitrust division during the previous administration. Read more [here](#).
- On Wednesday, Farhad Manjoo of *The New York Times* wrote an article titled “How 2017 Became a Turning Point for Tech Giants”, outlining how Google, Amazon, Facebook and others “began to grudgingly accept that they have some responsibility to the offline world.” Manjoo argues that while the tech giants have begun to accept responsibility for their products, it isn’t entirely clear what “responsibility” means and solving the many problems presented by these platforms would be “hard.” “Just as the packaged food industry did in the 1950s, Facebook and Google have lured users with convenience, while feeding them a certain diet to cause lasting harm,” musician and venture capitalist Roger McNamee told Manjoo. “The problem cannot be addressed by hiring; it can only be fixed by changing the algorithms in ways that will materially reduce profitability.” Read more [here](#).
- SoundExchange subsidiary SXWorks has [launched](#) a free database called NOI LOOKUP that will help music publishers identify “address unknown” filings for uses of their works. SXWorks Chairman Michael Huppe said in a statement that the new database “will give

music publishers unprecedented visibility into NOI filings...and provide publishers with an opportunity to claim unpaid mechanical royalties from services.” Read more [here](#).

- New data from Parse.ly shows that Google has regained its spot as the number one source of referral traffic for web publishers, beating Facebook, which now provides just 26 percent of publishers’ external traffic, down from almost 40 percent at the beginning of the year. Google now provides 44 percent of publishers’ external traffic, up from 34 percent at the beginning of the year. Read more [here](#).