



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT MAY 12, 2017



### I. Congressional Updates:

- On Thursday, May 18<sup>th</sup> at 2:00 p.m. the House Appropriations Subcommittee on the Legislative Branch will hold a hearing on “Library of Congress: FY2018 Budget,” featuring Librarian of Congress Carla Hayden, Library of Congress CIO Bud Barton, and Deputy Librarian for institutional advancement Robert Newlen as witnesses. More info [here](#).
- On Thursday, Robert Lighthizer, nominee for United States Trade Representative (USTR), was confirmed 82-14 by the Senate. In related news, on Wednesday, Senator John McCain (R-AZ), Chairman of the Senate Armed Services Committee, and Senator Ben Sasse (R-NE), released a [joint statement](#) announcing they would vote against Robert Lighthizer’s nomination to be United States Trade Representative (USTR). The two lawmakers said Lighthizer’s “confirmation process has failed to reassure us that you understand the North American Free Trade Agreement’s positive economic benefits to our respective States and the nation as a whole.”

### II. Judicial Updates:

- This week, Internet service provider Windstream filed an appeal with the 2<sup>nd</sup> Circuit Court of Appeals in New York, disputing an April ruling by U.S. District Court Judge Kimba Wood that dismissed the company’s lawsuit against music publisher BMG, which allegedly “threatened to sue Windstream for copyright infringement based on piracy by Web users.” In June 2016—shortly before BMG won a \$25 million verdict against Cox Communications, which was found to have enabled piracy by its users—Windstream sought a

### Headlines and Highlights:

- Treasury Dept. launches website that tracks federal agency spending.
- *Bloomberg* profiles EU Competition Commissioner Margrethe Vestager.
- Senate approves USTR nominee Robert Lighthizer by 82-14 vote.
- RBB Economics publishes YouTube-commissioned study on “value of YouTube to the music industry.”

### In the Blogs:

[Calculating the Economic Impact of Counterfeiting and Piracy: It’s in the Hundreds of Billions](#)

Hugh Stephens Blog  
May 8 by Hugh Stephens

[Solicitor General Says No Cert for “Dancing Baby” Case](#)

Illusion of More  
May 10 by David Newhoff

[Access Treaty for Visually Impaired Readers \(Finally\) Steps Forward On EU Ratification](#)

IP Watch  
May 11 by Catherine Saez

declaratory judgment stating it could not be held liable for its users' infringement. Judge Kimba Wood dismissed the complaint, saying it was premature and too broad. "Rather than seeking defined declarations of non-infringement regarding existing or foreseeable disputes about specific copyrights and instances of infringement, Windstream seeks broad declarations about every possible conflict that has occurred or could occur in the future," the Judge wrote. Read more [here](#).

- On May 4, 2017, the United States filed its [Brief for the United States as Amicus Curiae](#) in *Lenz v. Universal Music Corp.*, a case currently before the U.S. Supreme Court. The case concerns whether a copyright owner may be held liable under section 512(f) of the Copyright Act for sending a notification of claimed infringement based on a sincere but unreasonable belief that the challenged material is infringing. Under section 512(f), "Any person who knowingly materially misrepresents under [the notice and takedown provisions of the DMCA] . . . that material or activity is infringing . . . shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer . . . as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it." The case arose when Universal Music Corp. filed a DMCA takedown notice, alleging that petitioner Stephanie Lenz's 29-second home video of her children dancing to the song "Let's Go Crazy" by Prince was infringing. Universal's video evaluation guidelines did not explicitly include consideration of the fair use doctrine. Lenz filed action, ultimately alleging misrepresentation under section 512(f). The district court denied the parties' cross-motions for summary judgment, and on interlocutory appeal, the Ninth Circuit [held](#) that "the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law." Lenz [petitioned](#) the Supreme Court for a writ of certiorari, asking the court to decide "[w]hether the Ninth circuit erred in concluding that the affirmation of good faith belief . . . may be purely subjective and, therefore, that an unreasonable belief—such as a belief formed without consideration of the statutory fair use factors—will not subject the sender of a takedown notice to liability under Section 512(f) of the DMCA[.]" The United States, in its amicus brief, asked the Court to deny certiorari. The Government wrote that the "court of appeals correctly held that liability under the DMCA requires actual knowledge or willful blindness, and its interlocutory decision does not conflict with any decision of this Court or another court of appeals."

### III. Administration Updates:

- On Thursday, President Trump signed an Executive Order titled "Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure." The order states that "Agency heads shall show preference in their procurement for shared IT services" and orders the Director of the American Technology Council to coordinate a report within 90 days of the feasibility of transitioning all agencies to "shared IT services." Read the order [here](#).
- The Treasury Department has [launched](#) a new website that tracks federal agency spending data. The website, called [USAspending.gov](#), is the product of the Data Accountability and Transparency Act (DATA) of 2014. It provides spending data on nearly \$4 trillion in government spending, and covers a wide range of federal government entities, including the Library of Congress. Read more [here](#). Also this week, members of the House Oversight

& Government Reform Committee sent a [letter](#) to the Treasury Department warning of “ongoing implementation challenges” to the success of the DATA Act, such as “longstanding financial management issues.” The letter makes a number of recommendations for the act’s further implementation, such as establishing “clear policies and processes for developing and maintaining data standards that are consistent with leading practices for data governance,” and establishing “mechanisms to assess the results of independent audits and reviews of agencies’ compliance with DATA Act requirements.”

#### IV. International Updates:

- The European Commission [announced](#) on Wednesday that by the end of 2017 it “will prepare legislative instruments to address the issues of possible unfair contractual clauses and trading practices” employed by online platforms such as search engines and app stores. The announcement came as part of the Commission’s [mid-term review](#) of its Digital Single Market Strategy. The Commission launched an investigation last year which found that some platforms have engaged in unfair trading practices such as restricting access to data or improperly delisting certain products. Last week, Spotify led a group of companies in a [letter](#) to the Commission arguing that online platforms “have a strong incentive to turn into gatekeepers” and “*can* and *do* abuse their privileged position and adopt B2B practices with adverse consequences for innovation and competition.” The letter specifically mentions the practices of “restricting access to data or interaction with consumers, biased ranking and search results[...], imbalanced terms and conditions and preference of their own vertically integrated services.” The Commission also plans to “move forward with the procedural aspects and principals on removal of illegal content – notice and action – based on transparency and protecting the fundamental rights.” Specifically, this “would concern issues such as minimum procedural requirements for the ‘notice and action’ procedures of online intermediaries related for example to quality criteria for notices, counter-notice procedures, reporting obligations, third-party consultation mechanisms, dispute resolution systems and coordination with public authorities as well as measures against repeat infringers and abusive, bad-faith notices.” Read more [here](#).
- On Wednesday, Samantha Subramanian of *Bloomberg* published a profile on European Union (EU) Competition Commissioner Margrethe Vestager and her attempts to regulate numerous corporations, including Amazon, Apple, and Google. “Vestager’s entire tenure has been laced with an instinctive mistrust of big corporations,” Subramanian writes. In the profile Vestager defends her work and rejects the idea that she is specifically targeting U.S. companies. “We’re not going hard at U.S. companies specifically. It’s not your flag that matters to us. What really matters is: If you want to do business in Europe, you play by the European rule book.” Read more [here](#).
- Advocacy organization UK Music has published its [2017 Manifesto](#), which aims to establish a plan to “maintain growth and withstand” challenges over the next five years. A section on “international action” states that under U.S. copyright law, “a variety of issues prevent the UK music industry from benefiting from the use of music,” arguing that “the imposition of compulsory licences, the bars and grills exception, no sound recording royalties on FM radio and Consent Decrees should all be tackled in future trade deals.” A section on intellectual property argues that withdrawal from the EU “does not require substantial changes to the UK copyright framework,” given that “there is no evidence of the need for new exceptions to copyright.” UK Music also calls for initiatives to combat online piracy, government assistance to improve copyright data about the digital

environment, and the establishment of “a coherent definition of hyperlinking under copyright law.”

- A *Politico EU* survey of representatives from 44 media and technology companies found that those representatives believe the policy area in which the European Union (EU) has “done the poorest job creating a digital single market” is that of ‘copyright and media.’ The next-worst category is ‘cross-border data flows and cloud storage,’ followed by ‘privacy and data protection.’ The survey quotes one respondent as criticizing EU copyright law for its basis in a single “harmonized exclusive right complemented by 21 voluntary exceptions.” Another respondent said that the European Commission is reluctant to address issues such as “phasing out copyright levies” because “they are a source of cultural funds for collecting societies in some major countries, such as France and Germany.” On the topic of online news aggregators, a majority of respondents said those services “should stick to existing copyright rules for written material rather than implementing rules for the music industry.” Read more [here](#).

## V. Industry Updates:

- Jonathan Taplin, the author of a recent book titled ‘Move Fast and Break Things: How Facebook, Google and Amazon Cornered Culture and Undermined Democracy,’ has written an op-ed in the *Los Angeles Times* calling for changes to copyright law that would make companies like Google and Facebook responsible for ensuring that their services remain free of infringing content. Taplin argues that “tech companies have a strong financial incentive to erode copyright law because their businesses grow in part through the recycling and repurposing of content.” He suggests that the Register of Copyrights should “codify a 30-second time limit” for fair use of audio and video clips, and “require that content be used in a transformative or interpretive way.” Read more [here](#).
- The Copyright Office has issued a final rule making non-substantive technical amendments to the Office’s regulations governing the submission of designated agent and service provider information. The final rule was issued in connection with a new release of the Office’s electronic system to designate and search for agents to receive notifications of claimed infringement under the Digital Millennium Copyright Act (DMCA). Read more [here](#). The Copyright Office has announced a pilot program allowing for the bulk submission of copyright registration applications for claims to single literary works that have a single author, where all content that appears in the work was created and is owned solely by that single author. Applicants participating in the pilot program will be able to transmit their claims directly into the electronic registration system instead of filing them on an individual basis. Read more [here](#).
- This week, research company RBB Economics released a study—commissioned by YouTube—on the “Value of YouTube to the music industry”. The study attempts to push back against claims from the music industry that YouTube greatly contributes to piracy. The study finds that without YouTube, “users would switch to spend more time on piracy or file sharing” and that songs which are blocked on YouTube “do not perform better on streaming platforms than tracks that remain available on YouTube.” To reach its findings, RBB surveyed 1,500 people, and used data on YouTube and streams on audio platforms of 5,000 tracks in Italy, Germany, the United Kingdom and France. Read the study [here](#).