



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT NOVEMBER 3, 2017



### I. Congressional Updates:

- Facebook, Twitter, and Google testified about Russian election interference at three separate congressional hearings in the Senate Judiciary and House and Senate Intelligence committees this week. Lawmakers criticized the companies for their slow response to investigators, and expressed concern that the companies wield too much power. Additionally, members explored potential regulatory fixes, including changes to election advertising law such as those proposed in the recently-introduced *Honest Ads Act*. Speaking about extremist content on platforms like Facebook, Twitter, and Google, Senator Dianne Feinstein (D-CA) said she is “working on legislation to require tech companies to report known terrorist activity on their platforms to law enforcement, and to provide law enforcement with civil injunction authority.” Read more [here](#) and [here](#).
- Last Friday, House Energy & Commerce Committee Chairman Greg Walden (R-OR) announced in a [Medium op-ed](#) that his committee will examine implications for “consumer choice and safety” arising from the practices of technology companies like Facebook, Google, and Amazon. The committee will hold a hearing to consider issues such as the handling and use of consumer data, and tech firms’ abilities, for example when displaying search results, to alter “content choices unbeknownst to the consumer.” Recode [reports](#) that the hearing will include discussion of tech companies’ algorithms for news feeds and search results. The committee will convene a separate hearing to assess identity verification practices and “whether they can be improved to protect personal data on the web even after a consumer’s information has been

### Headlines and Highlights:

- Facebook, Google, Twitter grilled by three congressional committees over election interference.
- Sen. Feinstein working on legislation to require online platforms to report terrorist activity to law enforcement.
- House E&C to examine tech company practices affecting consumer choice and safety.
- Rep. Lamar Smith to retire from Congress.
- House Republicans release tax bill.

### In the Blogs:

[Senate Hearings: A Sea Change for Social Media Companies & Users](#)  
Illusion of More  
November 1 by David Newhoff

[Another Seasons, Another Common-Law Copyright Opinion](#)  
Mostly IP History  
October 26 by Zvi S. Rosen

breached.”

- On Wednesday, the House Judiciary Committee held a hearing on net neutrality and antitrust. At the hearing, Chairman Bob Goodlatte (R-VA) said he is “open to the idea of amending the antitrust laws, if necessary, to account for the characteristics of the internet.” He further stated that vertical agreements “between internet service providers and related businesses” could lead to anti-competitive practices, which “should be aggressively deterred and punished.” Read more [here](#). Separately, Rep. Marsha Blackburn (R-TN), the chairman of the House Energy & Commerce Subcommittee on Communications and Technology [made similar comments](#) on Thursday.
- Representative Lamar Smith (R-TX) has announced that he will retire from Congress at the end of his current term. Smith’s career is notable for his sponsorship of intellectual property legislation such as the *Stop Online Piracy Act (SOPA)* and the *America Invents Act (AIA)*. Smith is currently the chairman of the House Science Committee, and a member of the House Judiciary Committee, which he formerly chaired. Read more [here](#).
- Country music songwriter Lee Thomas Miller is reportedly planning to run for the House seat of Rep. Marsha Blackburn (R-TN), who is leaving to run for the Senate. Miller has been a prominent advocate for songwriters’ interests in Washington, primarily through his work with the Nashville Songwriters Association International (NSAI). Read more [here](#).
- On Tuesday, House Speaker Paul Ryan (R-WI), Senator Patty Murray (D-WA), Senator Brian Schatz (D-HI), House Oversight and Government Reform Committee Chairman Trey Gowdy (R-SC), Representative Derek Kilmer (D-WA), and Representative Blake Farenthold (R-TX) [introduced](#) the *Foundations for Evidence-Based Policymaking Act (H.R. 4174/S. 2046)*. The bill was quickly ushered through the House Oversight and Government Reform Committee, where it passed by voice vote at a full committee [markup](#) on Thursday. The legislation, which is intended to “establish a more secure, transparent, and efficient data system that will help federal agencies better assess the effectiveness of their programs,” includes a version of the *OPEN Government Data Act*. *The OPEN Government Data Act*, in its aim of providing public access to government data, contains provisions with implications for intellectual property. A separate version of *The OPEN Government Data Act* recently passed the Senate as an amendment to the *National Defense Authorization Act (NDAA)*, which is currently being conferenced between the House and Senate. On Thursday, Representative Farenthold (R-TX) suggested that, “if we move fast enough,” the new *Foundations for Evidence-Based Policymaking Act* could be attached to the NDAA. Read more [here](#).
- The *Financial Times* [reports](#) that the new House Republican tax bill, released on Thursday, levies a 20 percent excise tax on “payments between affiliates of the same company, [which] are commonly made as international divisions trade materials, services and royalties for intellectual property.” The *Times* notes that this excise tax “would have a limited effect on US tech companies [...] Although they use IP royalties to shift profits out of the US, their ability to do so is constrained by a provision of existing law that does not apply to foreign-owned companies.” The bill also includes a global minimum tax on overseas earnings, which *The Washington Post* [notes](#) will affect “technology and pharmaceutical companies...[that currently] transfer their intellectual property to a low-tax place...and then the U.S. unit pays royalties on the sales to customers in the United States.” The concept of a global minimum tax, and its implications for intellectual property, was discussed at a Senate Finance

Committee [hearing](#) in early October (read more [here](#), [here](#), and [here](#)). Additionally, the new House bill includes a provision removing the ability of creators of musical compositions or copyrights in musical works to elect to treat that property as a capital asset.

- The *Wall Street Journal's* John D. McKinnon and Brody Mullins report that Google, facing a “reckoning” in Washington, is “moving mountains to regain” its “lost political clout.” The article details how Google has become embattled in the nation’s capital on issues such as antitrust, net neutrality, consumer privacy, election interference, liability for illegal content on its platform, and its control over consumers’ access to news stories. The article also chronicles Google’s efforts to win back favor in Washington by means such as campaign contributions to Republicans, increased lobbying expenditures, and “public-service events with members of Congress back home in their districts.” Read more [here](#).
- A *New York Times* feature details how Senator Mark Warner (R-VA), a longtime technology industry ally, has undergone a “sharp reversal,” and is now “among the harshest” critics of Silicon Valley in Congress. Warner, the ranking member of the Senate Intelligence Committee, has recently criticized companies like Facebook, Google, and Twitter for Russian election interference on their platforms, and introduced, with other lawmakers, legislation requiring disclosure of information about political advertisements online. Read more [here](#).
- On Tuesday, November 7, the House Judiciary Committee’s Intellectual Property Subcommittee will hold a [hearing](#) on the topic of sovereign immunity in the intellectual property system. The hearing is expected to focus on the use of sovereign immunity to avoid challenges to patents at the Patent Trial and Appeal Board (PTAB), in light of recent controversy over pharmaceutical company Allergan’s use of that tactic in concert with the Saint Regis Mohawk Tribe. It is possible that the hearing will touch on sovereign immunity as it relates to copyright.
- The Senate Commerce Committee will consider the *Stop Enabling Sex Traffickers Act* (S. 1693) at a [markup](#) on Wednesday, November 8.
- On Wednesday, November 8, the Senate Judiciary Committee will hold a [hearing](#) titled ‘The Impact of Lawsuit Abuse on American Small Businesses and Job Creators.’
- On Tuesday, November 7, the Senate Commerce Subcommittee on Communications, Technology, Innovation, and the Internet will hold a [hearing](#) to “examine the use and benefits of the Internet of Things (IoT) in rural communities, and the infrastructure needs necessary to advance the IoT market to ensure rural America has access to products and devices that are driving the digital economy.”

## II. Judicial Updates:

- *Digital Music News*, citing legal paperwork it has reviewed, reports that the California Supreme Court will likely not issue a decision on pre-1972 music recording copyrights for “at least another year.” Read more [here](#).
- On Thursday, a California federal judge ruled that Google is not required to de-list from its search results an allegedly infringing website. The ruling came in a fight between Google and

Canadian company Equustek, which has been pursuing legal avenues to force Google to de-list a website that it claims has infringed Equustek's intellectual property. The Canadian Supreme Court in June ordered Google to remove the site from its search results worldwide. *The Hollywood Reporter* notes that the "Canadian court could ignore" the California judge's decision, and "impose sanctions for Google for any failure to comply with its own injunctive order." Read more [here](#).

### III. Administration Updates:

- Last Friday, Assistant Attorney General for the Antitrust Division Makan Delrahim delivered a [speech](#) at the New York University School of Law. Focusing on antitrust policy abroad, Delrahim bemoaned that some countries are using antitrust "to favor domestic companies or discriminate against foreign firms," and called for countries to "work together on a mutual consensus toward non-discriminatory enforcement of antitrust laws worldwide." With respect to the NAFTA and KORUS renegotiations, Delrahim said he intends to work with "USTR and our trade partners to craft competition chapters that fulfill objectives of affirming basic rules of procedural fairness in competition law enforcement." He also pledged to bolster the staff and resources of the International Section of the Antitrust Division; engage and support new competition agencies abroad; and pursue "new types of agreements" with foreign partners that would focus on non-discrimination, procedural fairness, and transparency.
- President Trump has [nominated](#) Jeffrey Kessler to be Assistant Secretary of Commerce for Enforcement and Compliance. Kessler is currently an attorney at Wilmer Hale, where he has represented United States manufacturers at the World Trade Organization and in domestic trade remedy proceedings.
- The President has declared November 2017 'National Entrepreneurship Month,' and November 21, 2017 'National Entrepreneurs' Day.' The President's [declaration](#) emphasizes the importance of protecting intellectual property, and states that the administration "is committed to ensuring that American and global intellectual property regimes firmly protect American innovations at home and abroad."
- The Federal Trade Commission (FTC) has [released](#) its draft Strategic Plan for Fiscal Years 2018 to 2022. Public comments on the draft are due December 3, 2017.

### IV. International Updates:

- Film producer Teddy Schwarzman has published an op-ed in *Forbes* arguing for strong intellectual property protections in a renegotiated North American Free Trade Agreement (NAFTA). Schwarzman states that when "Silicon Valley's skills argue for 'exceptions and limitations' [in NAFTA,] they are really arguing for a massive weakening of copyright protection." He urges a return "to [the United States'] days as a leader in global copyright protections." Read more [here](#).
- President Trump embarked Friday on a 12-day trip to Japan, South Korea, China, Vietnam, and the Philippines. Commerce Secretary Wilbur Ross will also lead a business delegation to China during the president's visit. Read more [here](#) and [here](#).

## V. Industry Updates:

- The Copyright Office has issued a notice of proposed rulemaking containing a number of amendments to its regulation governing the group registration option for newspapers. The Office states that the amendments are intended to reduce burdens on applicants. Read the Federal Register notice [here](#).
- A new report from Digital TV Research estimates that the impact of piracy on streaming services such as Netflix and Amazon will total \$52 billion in lost revenue between 2016 and 2022. Read more [here](#).
- A new report from Sandvine, a bandwidth-management systems company, finds that 6.5% of North American households stream television services illegally every month, causing potential revenue losses of \$4.2 billion for television providers. Read more [here](#).
- “Yelp’s vice president of public policy Luther Lowe has written an op-ed in the *Wall Street Journal* arguing that “in the absence of rigorous antitrust enforcement, the consumer internet has become too concentrated in a few dominant companies.” Lowe states that Google’s philosophy has shifted over time, making the internet “less open and pluralistic” by operating as a powerful intermediary that favors its own services over those of its competitors. Likewise, “Facebook’s walled garden is even more stringent, requiring all third-party content accessed from its app to run through its frame.” Lowe goes on to argue that because the internet has “turned into a pair of walled gardens,” it offers financial incentives and “economies of scale for attackers” like fake news peddlers, who can, in a “feedback loop optimized for mischief...monetize on Google, and spend the proceeds to propagandize on Facebook.” Read more [here](#).
- Google has announced that it will shut down its airfare search service called QPX Express API. That service is used by third-party travel sites to access air travel data. *The Verge* [reports](#) that the move “won’t signal the end of these [third-party] services, but will certainly require more work on their parts to curate and automate data on flight times and fares.” Meanwhile Google “is also building out its own consumer-facing Flights service.” *Tech Crunch*’s Ingrid Lunden [writes](#) that Google is “cut[ting] off its role as a data provider to would-be competitors.”
- Last week, the Content Creators Coalition (C3) launched an advertisement on YouTube criticizing the platform for paying music creators low royalties. C3 also ran an ad on YouTube about creators’ frustrations with the current safe harbor regime. YouTube reportedly blocked those ads two days into the campaign, but subsequently unblocked them, saying that they had been “briefly prevented from running...due to a payment issue.” Read more [here](#).