



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT OCTOBER 6, 2017



### I. Congressional Updates:

- On Wednesday, Representatives Hakeem Jeffries (D-NY), Tom Marino (R-PA), Judy Chu (D-CA), Doug Collins (R-GA), Ted Lieu (D-CA), and Lamar Smith (R-TX) [introduced](#) the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2017. The legislation creates a voluntary small claims board within the Copyright Office that will give copyright owners an alternative to the expensive process of bringing infringement claims in federal court. This new board, called the Copyright Claims Board (CCB), would have a cap on damages of \$15,000 per work infringed and \$30,000 total. Read more [here](#).
- On Monday, the Senate [voted](#) 52-41 to reconfirm Federal Communications Commission (FCC) Chairman Ajit Pai. The vote grants Pai another four years, retroactively confirming him for a five-year term that began in July 2016. Four Democrats – Senators Manchin (D-WV), McCaskill (D-MO), Peters (D-MI), and Tester (D-MT) – voted in favor of Pai’s nomination, with no Republicans voting in the negative. Read more [here](#).
- The House Judiciary Committee’s Subcommittee on Crime, Terrorism, Homeland Security, and Investigations held a [hearing](#) on Tuesday titled ‘Online Sex Trafficking and the Communications Decency Act.’ The hearing addressed the controversy over the extent to which online services like Backpage.com should be held liable for illegal third-party content on their platforms. The hearing, which included witnesses representing organizations such as Engine Advocacy and NetChoice, came after the Senate Commerce Committee held a high-profile hearing about the Stop Enabling Sex Traffickers Act (S. 1693) on

### Headlines and Highlights:

- Copyright small claims legislation introduced.
- Ajit Pai confirmed for another term.
- Rep. Blackburn announces Senate run.
- Google ends ‘first click free’ policy.
- MPAA submits comments to USTR on notorious online markets.

### In the Blogs:

#### [What Does ‘Tangible’ Mean in Copyright?](#)

Plagiarism Today  
October 3 by Jonathan Bailey

#### [Copyright and Politics: Interesting Bedfellows](#)

Hugh Stephens Blog  
October 3 by Hugh Stephens

#### [Fake News Tops Results After Las Vegas Shooting](#)

Illusion of More  
October 4 by David Newhoff

September 19. Read more [here](#). In related news, IBM [announced](#) its support for S. 1693 this week, stating its approval of “appropriate, balanced measures to prevent new technologies and online services from being abused by criminals.” Other companies that have endorsed the bill include Oracle, Hewlett-Packard Enterprise, 21<sup>st</sup> Century Fox, and the Walt Disney Company.

- The Copyright Office has submitted a letter to the chairmen and ranking members of the House and Senate Judiciary Committees arguing that “any proposed legislation” to create a Copyright Office pilot program for mass digitization projects through extended collective licensing (ECL) “would be premature at this time.” The letter describes public comment submissions the Office received on the matter, which indicate “that stakeholders currently have limited interest in an ECL program for mass digitization.” Further, “even among ECL supporters there is a lack of consensus on key elements of such a program.” However, the Office “still believe[s] that the establishment of an ECL framework in the United States” could be beneficial. Read more [here](#).
- The Senate [confirmed](#) Walter Copan to lead the National Institute of Standards and Technology (NIST) by unanimous consent on Thursday, with the Senate Commerce Committee having [approved](#) Copan’s nomination on Wednesday. The Committee also approved the nomination of David Redl to lead the National Telecommunications & Information Administration (NTIA), but he has not yet been confirmed by the full Senate.
- At a Tuesday Senate Finance Committee [hearing](#) on international tax issues, Chairman Orrin Hatch (R-UT) said he is unsure whether the Committee will support a new minimum tax on corporations’ foreign earnings, although he pledged to allow members of the Committee “to move in that direction” if they want. Senator Rob Portman (R-OH) said that the minimum tax is aimed at keeping “people from taking intangible income, like, say, royalty income or patent income and taking it to [the] Cayman Islands.” However, Portman, who used [much of his time](#) during the hearing to discuss international intellectual property taxation, did not indicate whether he supports the minimum tax proposal itself. Read more [here](#) and [here](#).
- Rep. Marsha Blackburn (R-TN), the vice-chair of the House Energy & Commerce Committee, announced on Thursday that she will run for the Senate seat of retiring Senator Bob Corker (R-TN). Read more [here](#).
- Facebook and Twitter have [agreed](#) to testify about election interference before the Senate Intelligence Committee in a hearing on November 1. Google has also been invited, but has not indicated whether it will accept. Facebook also plans to testify at a House Intelligence Committee hearing that [may also take place on November 1](#). Read more [here](#) and [here](#). Axios is [reporting](#) that Facebook is “stepping up its offensive to respond questions about the role it played in Russian meddling,” including launching ad campaigns and hiring consulting firms in “an unprecedented response...at an unprecedented moment.” Additionally, Google and Facebook [received criticism](#) this week for their roles in spreading false information about the Las Vegas shooting.
- *Bloomberg* reports that Senator Jerry Moran (R-KS), the chairman of the Senate Commerce Committee’s Subcommittee on Consumer Protection, “is considering ways to streamline the FTC in light of the business community’s concerns that some of the agency’s practices are too burdensome.” In particular, Moran is “studying” the FTC’s merger review process. Senator Moran has submitted questions to four witnesses at a recent subcommittee hearing,

asking them whether Congress should “take action to ensure that” the FTC and Department of Justice “follow the same procedures.” *Bloomberg* suggests that Moran’s line of questioning “is the latest signal that Republicans...could be gearing up to pressure the [FTC] to make changes or ask future nominees about the issues.” Read more [here](#).

- On October 12, the House Energy & Commerce Subcommittee on Digital Commerce and Consumer Protection will hold a [hearing](#) titled “21<sup>st</sup> Century Trade Barriers: Protectionist Cross Border Data Flow Policies’ Impact on U.S. Jobs.” Witnesses from BSA – The Software Alliance, The Information Technology Industry Council (ITI), and The App Association will testify.

## II. Judicial Updates:

- The Supreme Court announced on Monday that it will not hear a case involving Megaupload operator Kim Dotcom. Dotcom is challenging the seizure of his overseas assets by U.S. authorities. According to the *Hollywood Reporter*, his lawyers have also “been insisting that a judge should examine the criminality of secondary copyright infringement and also regard safe harbors for internet service providers in coming to a conclusion about whether he’s been properly indicted.” Read more [here](#).
- Indiana artist Michel Keck has filed a class action lawsuit against Alibaba, detailing in the suit her efforts to prevent Chinese vendors on the platform from selling knock offs of her canvas prints. One of Keck’s lawyers told *The Recorder*, “we’re not seeing any systems in place to deal with the level of infringement by sellers” on Alibaba, further accusing the company of “extreme carelessness” and “just ignoring” infringement complaints. Read more [here](#).

## III. Administration Updates:

- This week, the Motion Picture Association of America (MPAA) submitted [comments](#) to the Office of the United States Trade Representative (USTR) in connection with the Office’s 2017 Special 301 Out of Cycle Review of Notorious Markets. The MPAA’s filing focuses solely on online marketplaces, given that online marketplaces “are frequently extraterritorial in reach and have the most significant impact on the global legitimate market for U.S. movies and television programming.” The document lists online markets that “are particularly illustrative of the nature and scope of online content theft.” Read more [here](#).
- The Office of the United States Trade Representative (USTR) held a [hearing](#) this week on China’s compliance with World Trade Organization commitments, ahead of USTR’s annual report to Congress on that subject. *Reuters* reports that at the hearing U.S. business groups complained about “increasing threats from Chinese investment rules, industrial policies, subsidies to state-owned enterprises, excess manufacturing capacity, cybersecurity regulations and forced technology transfers.” Organizations that testified at the hearing include the Information Technology Industry Council (ITI) and the U.S. Chamber of Commerce. Read more [here](#).
- On Tuesday, October 10, USTR will hold a hearing in connection with its Section 301 investigation into China’s practices related to intellectual property and technology transfer.

Read the Federal Register notice from August [here](#).

- The Department of Justice (DOJ) and Federal Trade Commission (FTC) have released their FY 2016 Hart-Scott Rodino (HSR) Report, which provides data on the HSR Premerger Notification Program and summarizes the agencies' merger enforcement activities. Read more [here](#).

#### IV. International Updates:

- The European Union has ordered Amazon to pay Luxembourg approximately \$295 million in back taxes after Amazon allegedly moved profits to a holding company that was not subject to tax. European Union Competition Commissioner Margrethe said that Luxembourg had given Amazon "illegal tax benefits" such that "almost three quarters of Amazon's profits were not taxed." Amazon maintains that it "did not receive any special treatment from Luxembourg," and is considering appealing the decision. Read more [here](#).

#### V. Industry Updates:

- Google [announced](#) on Monday that it is ending its controversial 'first click free' policy, which allowed Google users to access three free articles per day from paywalled news outlets. Google is replacing the policy with 'flexible sampling,' which allows news outlets to decide how many free articles to offer to Google users. The first click free policy caused controversy earlier this year when the *Wall Street Journal* declined to give Google users free access, and subsequently saw its content demoted in Google's search results. In addition to ending the first click free policy, Google plans to build "a suite of products and services to help news publishers reach new audiences, drive subscriptions and grow revenue." In a [statement](#), News Media Alliance CEO David Chavern said, "these are strong and good steps forward by Google, and we are happy to see them." Chavern also called the end of first click free "a great improvement." Read more [here](#) and [here](#). Also this week, Google rolled out two new ad filters that allow publishers to block various types of undesirable ads from their websites, as well as a tool that allows publishers to interact with users who are using an ad blocker. The latter feature lets publishers give users employing ad blockers the opportunity either to whitelist the publisher or purchase an ads-free pass. Read more [here](#).
- Facebook has [announced](#) that it will integrate its Rights Manager feature with third-party rights management services Zefr, Friend MTS, and MarkMonitor. Facebook says that the move will "expand access to Rights Manager functionality by allowing rights owners to work with service providers to help manage their intellectual property if that's their preferred option." Read more [here](#).
- In an op-ed in *Variety*, National Music Publishers' Association (NMPA) President and CEO David Israelite argues that the livelihood of many songwriters and composers "currently is being threatened by a disturbing trend among major studios and networks," who are "contractually requiring that the network gets a percentage of the downstream public performance revenue" of composers' songs. Israelite asks that the television and film industries "examine just what is being asked of working production music composers and companies," predicting that the practice "will result in a mutually destructive conflict," given that "in this Golden Age of Television...music has never been more central to the appeal of

great drama.” Read more [here](#).

- The Trustworthy Accountability Group (TAG), a cross-industry program largely focused on combatting ad-supported internet piracy, has released a [study](#) finding that digital advertising industry efforts to combat piracy have reduced ad revenue for pirate sites by between 48 and 61 percent, denying pirates an estimated \$102 million to \$177 million. The study also found that digital advertising revenue linked to infringing content was approximately \$111 million in 2016. Read more [here](#).
- The Copyright Royalty Judges are soliciting reply comments on a motion of Allocation Phase claimants for partial distribution of 2015 satellite royalty funds. Read the Federal Register notice [here](#).