

CONTENT & TECHNOLOGY POLICY REPORT

DECEMBER 6, 2019



I. Congressional Updates:

- Next Wednesday, December 11th, at 2:00 p.m. ET, the Senate Judiciary IP Subcommittee will hold a hearing on “Oversight of Modernization of the United States Copyright Office.” The following witnesses are slated to testify before the subpanel: The Honorable Carla Hayden (Librarian of Congress, Library of Congress); Karyn Temple (Register of Copyrights and Director, United States Copyright Office); and Bernard Barton (Chief Information Officer, Library of Congress). More info. [here](#).
- News surfaced this week that Speaker of the House Nancy Pelosi (D-CA) is seeking to remove language mirroring Section 230 from the United States–Mexico–Canada Agreement (USMCA). “There are concerns in the House about enshrining the increasingly controversial...liability shield in our trade agreements, particularly at a time when Congress is considering whether changes need to be made in U.S. law,” a spokesman for the Speaker said. Speaker Pelosi and her nine-member trade working group have been working with United States Trade Representative (USTR) Robert Lighthizer to iron out Democrats’ outstanding concerns with the agreement, although it remains uncertain whether they will reach their goal of ratifying the renegotiated pact before the end of the year as the days on the legislative calendar narrow. In August, House Energy & Commerce Committee Chairman Frank Pallone (D-NJ) and Ranking Member Greg Walden (R-OR), [called](#) on USTR to remove language mirroring Section 230 from the USMCA while “serious policy discussions” about the liability shield are ongoing in the U.S. Read more [here](#).
- On Wednesday, a group of lawmakers sent a letter to Richard Revesz, the Director of the American Law Institute

Headlines and Highlights:

- Senate Judiciary IP Subcommittee to hold Copyright Office modernization hearing next Wednesday, Dec. 11th.
- Speaker Pelosi pushing to remove Section 230 language in USMCA.
- U.S. Supreme Court hears oral arguments in *Georgia v. Public.Resource.Org.*
- Copyright Office seeks public input on the determination of a work’s publication status for registration purposes.
- USPTO extends deadline for public comments on AI to January 10th.

In the Blogs:

[Canada’s First Piracy Site Blocking Decision is Under Appeal: What are the Issues and What’s at Stake?](#)

Hugh Stephens Blog
December 2 by Hugh Stephens

[Promoting Progress in the Digital Age](#)

Illusion of More
November 29 by David Newhoff

(ALI), expressing concerns with the ALI's Copyright Restatement Project. In the letter, Senate Judiciary IP Subcommittee Chair Tillis (R-NC) joined House Judiciary IP Subcommittee Ranking Member Roby (R-AL) and Reps. Cline (R-VA), Deutch (D-FL), and Rouda (D-CA), to raise concern that the project has the potential to be cited as deciding authority for case law disputes instead of existing federal rules and regulations. The letter points out that restatements are "often cited as highly persuasive authority in court cases and scholarly works" but that federal copyright law is "ill-suited for treatment in a restatement because the law is clearly articulated by Congress in both the statute and legislative history." The legislators question the ALI's decision to draft a Restatement on copyright law after nearly 100 years of not doing so on an area of law that is almost exclusively federal statutory law. The lawmakers note that similar concerns were expressed by the U.S. Copyright Office, the American Bar Association, and numerous academics and federal judges. At the end of the letter, the lawmakers present the ALI with nine questions and request responses by January 3, 2020. The lawmakers' letter was praised by many in the creative community, including in a [press release](#) from Keith Kupferschmid, CEO of the Copyright Alliance. Read the letter [here](#) and more info [here](#).

- Late last month, Senator Marsha Blackburn (R-TN) and House Judiciary Committee Chairman Jerry Nadler (D-NY) introduced the Ask Musicians for Music Act (AM-FM), which aims to give music creators control of their own content by requiring broadcasters to obtain permission from artists and copyright owners before transmitting sound recordings. While music creators could negotiate rates with large broadcasters before granting permission to broadcasters to air their recordings, the legislation protects small, public, college, and other non-commercial stations. Senator Blackburn stated that the AM-FM act "will reward singers, songwriters and musicians for their hard work when their music is played on the radio." Chairman Nadler raised concern that the U.S. is an "outlier" for not requiring broadcasters to pay artists for their music, which is "unfair to both artists and music providers." While the National Association of Broadcasters opposes the bill, others in the music industry were quick to offer their support. For instance, SoundExchange CEO Michael J. Huppe stated that the AM-FM Act "sets the table for meaningful marketplace negotiations and ends the current market distortion in our laws that forces artists to subsidize the multi-billion-dollar FM radio broadcast industry." Read more. [here](#).

II. Judicial Updates:

- On Monday, the U.S. Supreme Court heard oral arguments in *Georgia v. Public.Resource.Org*. Georgia sued Public.Resource.Org (PRO) for copyright infringement after PRO scanned and published the Official Code of Georgia Annotated (OCGA) online. PRO contends that the annotated version of the law is not legal edict because it lacks the force of law. The District Court for the Northern District of Georgia originally sided with the State of Georgia. However, in October 2018, the U.S. Court of Appeals for the Eleventh Circuit held that the text in question is ineligible for copyright protection because it is "inherently public domain material." During the oral arguments on Monday, questions from Justice Neil Gorsuch reportedly dominated much of Josh Johnson's presentation on behalf of the State of Georgia. Gorsuch pointed out that even though annotations might be drafted by a commission rather than the legislature, the legislature seems to approve them in much the same way it does legislation. Justice Sonia Sotomayor inquired why the annotations differ from annotations prepared by a judge, which are ineligible for copyright protection. However, other justices on the bench appeared to be more receptive to Georgia's argument. For instance, Justice Brett Kavanaugh asserted that it "would be a mistake" to treat the

annotations as having any significance in the articulation of law. A decision in this case is expected by late June. Read more [here](#).

- On Tuesday, Genius Media Group filed suit against Google in state court in Brooklyn, NY for allegedly participating in anti-competitive behavior. Genius, which posts hard-to-decipher lyrics to hit songs, claims that traffic to its site fell after Google began publishing lyrics on its own platform, some of which were allegedly lifted directly from Genius' site. Although Genius does not have copyright claims on the lyrics, this behavior violates its terms of service. Google denies that it took lyrics from Genius' site, contending that it secures licenses and lyric transcriptions from business partners such as LyricFind, a Canadian company that licenses lyrics from music publishers. Genius is seeking \$50 million in combined minimum damages from Google and LyricFind. Read more [here](#).

III. Administration Updates:

- On Wednesday, the Copyright Office published a notice requesting public input on the determination of a work's publication status for registration purposes. The Office is seeking feedback regarding issues that require clarification generally, as well as specific suggestions about how the Office may consider amending its regulations and, as appropriate, effectively advise Congress regarding possible changes to the Copyright Act. Comments are due to the Copyright Office by February 3rd, 2020. According to the Federal Register notice, commenters to the Office have indicated that the distinction between published and unpublished works is "so complex and divergent from an intuitive and colloquial understanding of the terms that it serves as a barrier to registration, especially with respect to works that are disseminated online." More info. [here](#).
- The U.S. Patent and Trademark Office has extended the deadline for public comments on the impact of artificial intelligence technologies on intellectual property law and policy from December 16th, 2019 to January 10th, 2020. More info. [here](#).

IV. International Updates:

- On Wednesday, Japan's Diet ratified the two trade deals recently brokered with the U.S., clearing the way for the agreements to take effect on January 1st, 2020. Under the first mini-deal, Japan agreed to cut tariffs and provide more market access for a wide array of U.S. agricultural goods, providing the U.S. nearly the same level of access it had granted under the Trans-Pacific Partnership (TPP) before President Trump withdrew from the accord in his early days in office. Second, the two nations reached an agreement on a "high-standard" and "comprehensive" set of provisions addressing areas in digital trade. This includes prohibitions on imposing customs duties on digital products transmitted electronically such as videos, music, e-books, software, and games. The pacts do not require congressional ratification in the U.S., and USTR Lighthizer explained in a statement that President Trump is expected to sign an implementing proclamation next week. Read more [here](#) and [here](#).
- Speaking to reporters in London on Tuesday, President Trump signaled that he might prefer to wait until after the 2020 presidential election to strike a deal with China. The President stated, "I have no deadline. In some ways I like the idea of waiting until after the election for the China deal." The Trump Administration has asked China to offer more concessions to protect intellectual property and open its markets to American companies, while China is demanding more relief from President Trump's tariffs in return for such concessions. U.S.

and Chinese officials have been cautiously optimistic that negotiators can reach a deal before the U.S. hits the imports of more than \$100 billion worth of Chinese goods with tariffs on December 15th, but the final decision remains with President Trump and President Xi Jinping. Read more [here](#).

V. Industry Updates:

- Tuesday, UNITE HERE, a union of 300,000 members and their families, which represents workers in the hotel, warehouse, and other service industries, penned a letter to Speaker Pelosi urging her to ensure that the final USMCA does not obtain Section 230 language. D. Taylor, President of UNITE HERE, warned that the union will oppose the final USMCA if it includes such language. The letter points out that Airbnb has asserted that CDA 230 “immunizes it from claims that some of its hosts discriminate on the basis of race when rejecting prospective guests.” D. Taylor writes, “The effort to export CDA immunity is wrong-headed and must be removed from the USMCA text.” Read the letter [here](#).