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CONTENT & TECHNOLOGY POLICY REPORT FEBRUARY 21, 2020



I. Congressional Updates:

- On Tuesday, U.K. Trade Caucus co-founders Sens. Portman (R-OH) and Coons (D-DE) led a group of bipartisan colleagues in sending a letter to United States Trade Representative (USTR) Robert Lighthizer calling for the Administration to prioritize trade talks with the U.K. now that it has formally left the European Union. The letter reasons that swift negotiations would prove beneficial because “the United Kingdom has the greatest freedom of action now.” The group of lawmakers also urge the Trump Administration to pursue a comprehensive deal, claiming that “everyone from farmers to fishermen to autoworkers to companies that do business over the internet stand to gain.” In particular, the letter mentions lowering tariffs, expanding agricultural market access, and finding a mutually agreeable tax treatment for digital services as some big ticket items. Finally, in addition to adhering to the congressional consultation process under the Trade Promotion Authority, the letter urges USTR to consult with industry, environment, and other stakeholders to inform negotiations. Read more [here](#).
- In an editorial published in *The Washington Post* on Sunday, Senate Finance Committee Ranking Member Ron Wyden (D-OR) defends Section 230 of the Communications Decency Act (CDA), which has recently been scrutinized by members on both sides of the aisle for a myriad of reasons. Wyden co-authored the statute that provides immunity from liability for providers and users of platforms, which was enacted in 1996. The editorial accuses some of our nation’s biggest corporations of working with the Trump Administration and top Republicans “to undermine Americans’ rights and give the government unprecedented control over online speech.” He

Headlines and Highlights:

- Bipartisan group of senators urge USTR Lighthizer to prioritize trade talks with the U.K.
- In *Washington Post* editorial, Senator Wyden defends Section 230.
- DOJ files amicus brief in support of Oracle in its copyright infringement case with Google, which the Supreme Court is scheduled to hear on March 24th.
- DOJ and FBI hold joint workshop on Section 230.
- Copyright Office announces new fee schedule, effective March 20th.

In the Blogs:

[EU “Third Country” IP Report Targets China \(Again\), adds Saudi Arabia to Priority List, and drops USA](#)

Hugh Stephens Blog
February 17 by Hugh Stephens

[Google v. Oracle III – Popularity Does Not Overturn Copyright Illusion of More](#)
February 18 by David Newhoff

further claims that without Section 230 CDA, “social media couldn’t exist,” sites such as Yelp would be “sued to death,” and startups wouldn’t be able to get off the ground. Finally, Wyden encourages his colleagues to forge a different path to hold big tech accountable, such as through a strong privacy law or investigating alleged anti-competitive practices, such as the Facebook-Instagram merger. Read more [here](#).

II. Judicial Updates:

- The Department of Justice (DOJ) filed an amicus brief on Wednesday urging the Supreme Court to rule in favor of Oracle in its copyright infringement case with Google. Justices will consider whether copyright protection extends to a software interface and whether Google’s use of a software interface in the context of creating a new computer program constitutes fair use. The filing claims that Google’s policy arguments are “unpersuasive.” It further asserts that Google “has not identified any industry understanding that software ‘interfaces’ are per se uncopyrightable, and concerns about the interaction of copyright and emerging technology do not justify such an atextual rule.” The high court is slated to hear oral arguments in the case, which has been referred to as the “copyright case of the decade,” on March 24th. Read more [here](#) and [here](#).
- On Tuesday, professional songwriters and recording artists Helienne Lindvall, David Lowery, and Blake Morgan, as well as the Songwriters Guild of America, Inc. (SGA), filed an amicus brief in the *Google v. Oracle* case urging the Supreme Court to affirm the Federal Circuit court’s finding that the nature and purpose of Google’s unlicensed use of Oracle’s code and program was to create a commercial substitute in the form of the Android. The brief reasons that Google, by tying together exceptions to the Copyright Act and analogous laws in other countries, has “amplified its own market power to the great detriment of copyright owners.” It further claims that Google has “throttled” the fair use defense and willful copyright infringement into a business model. The Amici assert that Google has advocated fair use exceptions “so broad as to include its wholesale, verbatim copying of Oracle’s declaring code and structure without license.” The Amici also describe their experience with YouTube, which they write “incorporates an ad hoc and arbitrary exploitation of copyright safe harbors and exceptions like fair use” as part of its ad-supported business model. The brief asserts that this business model incentivizes YouTube to claim fair use on an “extremely expansive basis” to undermine creators’ copyright protections. The Amici likens Google’s business model with YouTube to its “verbatim copying in Android” as examples of what Google’s amici have proclaimed to be the “fair use industries.” The Amici write that this “fair use industries” nomenclature is “Google’s attempt to invent cover for its extremely predatory market practices against creators.” Read the full amicus brief [here](#).

III. Administration Updates:

- On Wednesday, the DOJ and the Federal Bureau of Investigation (FBI) held a joint workshop titled “Section 230- Nurturing Innovation or Fostering Unaccountability.” Attorney General William P. Barr’s opening remarks indicated that the DOJ may support changes to Section 230, although he refrained from offering an official position on the matter. AG Barr noted that the internet has evolved significantly since Section 230 was enacted and questioned whether the statute, as constructed, is equipped to handle the size of current tech platforms. He explained that tech companies are no longer “underdog upstarts,” but rather “titans” of U.S industry. AG Barr also remarked that court decisions have expanded the scope of Section 230 beyond its original intent. The second panel, which addressed illicit activity online, was

the most contentious of the morning. Yita Souras (Senior VP and General Counsel, National Center for Missing and Exploited Children), Professor Mary Anne Franks (University of Miami), and Attorney General Doug Peterson (AG of Nebraska), all took “anti-230” positions, while Computer & Communications Industry Association (CCIA) President Matt Schruers staunchly defended the law. Souras asserted that incentives for content moderation have become purely “aspirational.” Professor Franks noted that Section 230 trumps state criminal law, which AG Peterson acknowledged limits the ability of states to combat illicit activity online. Schruers contested these points and advocated against any amendment to Section 230. The third and final panel also discussed the efficacy of the statute. Professor Eric Goldman (Santa Clara University) argued that Section 230 preserves freedom for innovation and Neil Chilson (Senior Research Fellow, Charles Koch Institute) stated that Section 230 has connected people on an unprecedented scale. Chavern called Section 230 a “market distortion” that benefits a few actors at the expense of many. Chavern was also the lone panelist to support a carveout of Section 230 for smaller entities. More info. [here](#).

- The United States Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA) will host the Fourth Public Meeting on Developing the Digital Marketplace for Copyrighted Works on April 7th from 9:00 a.m. – 5:00 p.m. ET at USPTO headquarters. During the meeting, which will also be livestreamed, representatives from different content industries will discuss “innovative business models and technologies used to facilitate a more robust and collaborative online marketplace for copyrighted works; provide updates regarding the development and use of standards, registries, and databases for identifying rights and content ownership information; and describe impediments to efficient licensing and monetization of creative material for online uses.” More info. [here](#).
- On Wednesday, the U.S. Copyright Office announced a new fee schedule in the areas of registration, recordation, record retrieval, search and certification, the Licensing Division, and other services. The fees will take effect on March 20th. The Copyright Office commenced its cost study in June 2017 and presented a final proposed schedule and analysis of fees for Copyright Office services to Congress last October. The new fee schedule is a product of this cost study and consideration of well over 100 comments. Per the notice, “while a number of fees, including the fee for standard registrations, have increased to permit the Office to more fully recoup its expenses, some fees have decreased, and others, such as the group application for photographs, remain the same.” Read more [here](#).
- On Friday, the Copyright Office unveiled a proposal to amend its regulation governing the group registration option for newsletter issues. Specifically, the proposed rule eliminates the requirement that newsletters must be published at least two days each week to qualify for a group registration. It also updates the address where complimentary subscriptions should be sent for purposes of satisfying the mandatory deposit requirement for newsletters and other serials. The Office is seeking public feedback on the proposal. More info. [here](#).

IV. International Updates:

- All eyes will be on President Trump as he travels to India next week, as the two countries have been working on a deal to de-escalate the trade conflict, which culminated in Trump removing India’s status under the Generalized System of Preferences (GSP) last June. Stakeholders have speculated that a deal could restore India’s preferential GSP treatment in exchange for addressing the country’s price controls on American medical devices and some

tariffs on U.S. agricultural and manufactured goods, like Harley-Davidson motorcycles. Although they were hopeful that such a deal would be announced during Trump's visit, it seems like negotiators still have outstanding issues to work through before striking a final deal. Speaking to reporters this week, President Trump said, "We can have a trade deal with India, but I'm really saving the big deal for later on." Read more [here](#).

V. Industry Updates:

- In an editorial published in the *Financial Times* on Sunday, Facebook CEO Mark Zuckerberg outlines his vision for government regulation of social media platforms. He highlights Facebook's efforts to advance regulation in four areas: elections, harmful content, privacy and data portability. For instance, Facebook has published two white papers setting out questions that the platform believes regulations should address, and is working with governments, including in France and New Zealand, on this vision. Through these efforts, Zuckerberg explains that several major themes have emerged: transparency; openness; and oversight and accountability. Finally, Zuckerberg acknowledges that "good regulation may hurt Facebook's business in the near term but it will be better for everyone, including us, over the long term." Read more [here](#).