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CONTENT & TECHNOLOGY POLICY REPORT MARCH 13, 2020



I. Congressional Updates:

- On Tuesday, the Senate Judiciary IP Subcommittee held a hearing titled “Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy?” Chairman Tillis (R-NC) was the only member to ask questions during the first panel, as Ranking Member Coons (D-DE) left to attend another hearing. Chairman Tillis, Ranking Member Coons, and Sens. Leahy (D-VT) and Blumenthal (D-CT) asked questions during the second panel. In his opening statement, Chairman Tillis highlighted how copyright industries contribute around \$1.3 trillion annually to U.S. GDP and raised concern that digital piracy cuts into that number in a big way. Chairman Tillis went on to say that digital video piracy alone reportedly costs the U.S. economy around \$29.2 billion a year. Finally, Chairman Tillis introduced Brad Greenberg, a new detailee from the U.S. Copyright Office who will be assisting his office with DMCA reform. Senators asked witnesses about notice and takedown and what the U.S. can learn from what other countries are doing; how digital piracy harms the live sporting events industry; site blocking; and the criticism surrounding the inclusion of the DMCA’s 512 safe harbor provisions and 1201 anti-circumvention provisions in the USMCA. More info. [here](#).
- On Tuesday, the Senate Judiciary Antitrust Subcommittee held a hearing dedicated to “Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms.” Witnesses included [Mr. Gene Kimmelman](#) (Senior Advisor, Public Knowledge), [Ms. Sally Hubbard](#) (Director Of Enforcement Strategy, Open Markets Institute), [Professor Thomas Hazlett](#) (H.H. Macaulay Endowed Professor Of Economics, Clemson University), [Mr. Morgan Reed](#) (President, ACT | The App

Headlines and Highlights:

- In second hearing in DMCA modernization series, Senate Judiciary IP Subcommittee considers how other countries are handling digital piracy.
- Senate Judiciary Antitrust Subcommittee holds hearing to examine self-preferencing by digital platforms.
- 9th Circuit Court of Appeals upholds jury verdict that Led Zeppelin’s “Stairway to Heaven” did not infringe the 1968 song “Taurus.”
- Commerce Department and USPTO congratulate Daren Tang on being selected as next WIPO Director General.

In the Blogs:

[Implementing the USMCA/CUSMA: What Copyright-Related Constraints \(and Costs\) Does it Impose on Canada—and the US?](#)

Hugh Stephens Blog
March 9 by Hugh Stephens

[EFF Hits New Low in Response to Child Sexual Abuse Online](#)

David Newhoff
March 12 by David Newhoff

Association), and [Mr. Luther Lowe](#) (Senior Vice President, Public Policy, Yelp Inc.). The discussion focused on tech platforms using the tactic of self-preferencing, in which a platform uses dominance in one area to leverage its other products or services, even if these products or services are not a consumer's best option. For instance, members and witnesses highlighted Google's use of Google Search to promote results from its shopping, advertising, mapping, and local review services, rather than competitors' results. Of note, Subcommittee Chairman Mike Lee (R-UT) said he is interested in holding a separate hearing on online platforms' use of self-preferencing in the online ad market. Sens. Amy Klobuchar (D-MN) and Blumenthal touted their [newly-introduced Anticompetitive Exclusionary Conduct Prevention \(AECPP\) Act](#), which seeks to respond to anticompetitive behavior by Google and other big tech companies. Sens. Josh Hawley (R-MO) and Blumenthal also referenced a [joint letter](#) they sent to the Department of Justice (DOJ) on Tuesday urging it to narrowly focus its Google antitrust investigation on the company's advertising business. More info. [here](#).

- On Wednesday, the Senate Judiciary Committee held a [hearing](#) to consider the [Eliminating Abusive and Rampant Neglect of Interactive Technologies \(EARN IT\) Act](#), which Chairman Lindsey Graham (R-SC) and Senator Blumenthal introduced late last week alongside Ranking Member Dianne Feinstein (D-CA) and Senator Josh Hawley. The bill amends Section 230 of the Communications Decency Act (CDA) to allow companies to “earn” their liability protection for violations of laws related to child sexual abuse material. It also establishes a National Commission on Online Child Sexual Exploitation Prevention, consisting of the heads of the DOJ, Department of Homeland Security (DHS), and the Federal Trade Commission (FTC), among others, to recommend best practices related to identifying and reporting online child sexual exploitation. Sens. Kevin Cramer (R-ND), Doug Jones (D-AL), Joni Ernst (R-IA), Bob Casey (D-PA), Sheldon Whitehouse (D-RI), and Dick Durbin (D-IL) also signed onto the bill. Of note, Senator John Kennedy (R-LA) announced during the hearing that he plans to cosponsor the legislation. The National Center for Missing & Exploited Children ([NCMEC](#)) and [Match Group](#) were supportive of the *EARN IT Act*, the [Internet Association](#) (IA) was critical of the bill, and [Professor Leary](#) (Catholic University of America, Columbus School of Law) did not take an official stance. Members of the Committee challenged IA's claims that the bill would threaten end-to-end encryption or undermine the efforts of law enforcement to hold bad actors accountable. In the beginning of the Q&A segment, Chairman Graham said that he does not buy IA's claims that the tech ecosystem cares about this problem. “All they care about is not getting sued,” he exclaimed.

II. Judicial Updates:

- On Monday, delivering a big win for Led Zeppelin in the “Stairway to Heaven” copyright battle, the 9th Circuit Court of Appeals upheld a 2016 jury verdict finding the song did not infringe the 1968 song “Taurus.” Of note, the appeals court elected to ditch the so-called “inverse ratio rule,” under which the higher degree of access to a work, the lower the bar for proving substantial similarity. The court claims that the idea of “access” has become diluted in the digital age, as millions of works are readily available on Netflix, YouTube, and Spotify. Read more [here](#) and [here](#).
- On Tuesday, the U.S. Court of Appeals for the DC Circuit held oral arguments on Amazon, Google, Pandora, and Spotify's appeal to overturn the Copyright Royalty Board's (CRB) 2018 decision to raise by 44% the royalties paid to songwriters by streaming services. Judges Merrick B. Garland, Patricia A. Millett, and Karen LeCraft Henderson presided over the hearing. Notably, Apple Music, the world's second largest music streaming service, did not

intervene in this case. Counsel for the streaming services argued that the CRB used an unsupported model to determine rates that no party had the opportunity to address or rebut. Furthermore, counsel for the streaming services argued that the CRB did not factor in the record labels' "oligopolistic" position in the market. Counsel defending the CRB argued that the streaming services are engaged in competition for market share and are driving down costs to attract customers. The result of this, she said, is that copyright owners "walk away with less money." Counsel representing the CRB defended its rate determination, arguing that it provided songwriters with a fair share and any lower rate would constitute an "unwarranted subsidy to services at the expense of songwriters." [George Johnson](#), an independent songwriter representing himself, argued for the court to convince the CRB to adjust for inflation the decades old royalty rate of 9.1 cents to about 50 cents. Johnson argued that current royalty rate, along with the concept of limited download, has "decimated" songwriters and has created a system that amounts to songwriters "giving away" their work for "free." While not a party in this matter, National Music Publishers' Association David Israelite called the streaming services' appeal "backroom attempts to slash songwriters' royalties through the court system" in a [Billboard Op-Ed](#). The Songwriters Guild of America released a statement against the actions of streaming services calling it an attempt to "destroy the earning capacities of music creators purely in favor of the companies' short-sighted, unbridled profit." Read more [here](#).

III. Administration Updates:

- All Library of Congress buildings, which includes the U.S. Copyright Office, will be closed until Wednesday, April 1st, at 8:30 a.m. ET to reduce the risk of transmitting COVID-19 coronavirus. Users of Copyright Office services are encouraged to submit their applications online, browse FAQs, and submit emails with questions through [copyright.gov](#). The Copyright Royalty Board (CRB) also will not be receiving courier deliveries during this period and members of the public should file all documents through eCRB. More info. [here](#) and [here](#).
- On Monday, the Department of Commerce and the U.S. Patent and Trademark Office issued a joint statement congratulating Daren Tang, Singapore's Chief Executive of Intellectual Property, on his election to the post of Director General for the World Intellectual Property Organization (WIPO). Both Secretary of Commerce Wilbur Ross and USPTO Director Andrei Iancu lauded the nomination. Secretary Ross called his appointment "good news for the global economy." Director Iancu expressed enthusiasm on collaborating with Mr. Tang to "enhance multilateral cooperation and build consensus on IP issues." Read the statement [here](#).

IV. International Updates:

- The Office of the United States Trade Representative (USTR) is expected to officially notify Congress of its intent to negotiate a comprehensive free trade deal with Kenya as soon as this week. According to *POLITICO*, Lighthizer met with members of the House Ways & Means Committee on Wednesday to discuss the administration's plans to pursue a trade deal with the Kenyan government. President Trump [announced](#) his intention to seek a trade agreement with Kenya after meeting with President Uhuru Kenyatta last month, but the Trade Promotion Authority (TPA) requires the U.S. to notify Congress in writing 90 days before it officially convenes trade talks. Read more [here](#).

- On Thursday, Italy’s antitrust watchdog said that it is investigating Amazon and eBay for an allegedly excessive rise in the price of products such as disinfectant gel and protective masks during the coronavirus crisis. It is also looking into allegations of misleading advertisements about such products being effective against the coronavirus. Read more [here](#).

V. Industry Updates:

- News surfaced this week that UK music industry group BPI has reported its 500 millionth infringing link to Google, becoming the second most active reporter after Rivendell. According to *TorrentFreak*, less than one percent of links reported by BPI to the search giant are rejected, and close to 97 percent are ultimately removed. BPI Chief Executive Geoff Taylor has underscored that this milestone sheds light on the massive piracy problem in the UK. “The fact the BPI has had to delist half a billion infringing music links from Google alone, on behalf of UK artists and labels, highlights the staggering scale of the problem of illegal sites,” Taylor said. He also praised Google’s collaboration with BPI and said it should set an example for online intermediaries and platforms to take on a greater responsibility to combat illegal content. Read more [here](#).