



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT APRIL 28, 2017



### I. Congressional Updates:

- Last week, a group of Democratic members of the Senate Commerce Committee sent a [letter](#) to President Trump urging him appoint staff to the White House Office of Science and Technology Policy (OSTP). The letter notes that President Trump has “yet to name a science adviser, OSTP Director, or Chief Technology Officer,” and that “few staff are currently assigned to OSTP, with only one staff member in the Office of the White House Chief Technology Officer as of last month – a position recently authorized by Congress.” The letter was signed by Senators Hassan (D-NH), Udall (D-NM), Nelson (D-FL), Markey (D-MA), Peters (D-MI), Booker (D-NJ), Cortez Masto (D-NV), and Schatz (D-HI). Read more [here](#).
- On Wednesday, the House of Representatives voted 378-48 to approve H.R. 1695, the Register of Copyrights Selection and Accountability Act of 2017. The House also approved two amendments to the bill. The first, offered by Rep. Deutch (D-FL), requires the Register of Copyrights to be “capable of identifying and supervising a Chief Information Officer” while the second, offered by Rep. Chu (D-CA), specifies that nothing “in the bill shall impact the mandatory deposit requirements of title 17.” Following the vote, Copyright Alliance CEO Keith Kupferschmid [applauded](#) the House for “backing...this importance piece of legislation...” The bill has now been referred to the Senate Committee on Rules. Find the final roll call vote [here](#).
- On Tuesday, Senator Ron Wyden (D-OR) took part in a livestreamed Internet Association interview. Wyden covered topics such as encryption, net neutrality, and regulation of the Internet of Things (IoT). He generally

### Headlines and Highlights:

- House votes 378-48 to approve H.R. 1695, legislation to make Register of Copyrights a presidential appointee.
- Senate Finance Committee unanimously advances nomination of Robert Lighthizer as USTR.
- Author Jonathan Taplin asks “Is It Time to Break Up Google?” in NY Times op-ed.
- Daniel Marti, former IPEC under President Obama, named Head of Government Affairs at RELX Group.

### In the Blogs:

[The Xi-Trump “Mar-a-Lago” Summit: How will it impact US Copyright Industries in China?](#)  
Hugh Stephens Blog  
April 23 by Hugh Stephens

[Yelp Claims Contradictory Rights Illusion of More](#)  
April 24 by David Newhoff

[Why Bing’s DMCA Form is Better Than Google’s](#)  
Plagiarism Today  
April 26 by Jonathan Bailey

called for policy makers to exert a light regulatory touch on the internet and avoid “knee-jerk” regulatory reactions on issues such as piracy and encryption. He made some general remarks on SOPA and PIPA, which he used as examples of “ill-advised” internet policy and issues where citizens become active and engaged on internet policy. He predicted that the public will soon again mobilize on the issue of net neutrality. Watch the interview [here](#).

- On Tuesday, the Senate Finance Committee unanimously advanced—by a 26-0 vote—the nomination of Robert Lighthizer to serve as United States Trade Representative (USTR). Following the vote, Committee [Chairman Orrin Hatch \(R-UT\) said](#) that the U.S. is now “one step closer to advancing a strong trade agenda that benefits American businesses...and protects U.S. intellectual property rights abroad.” Read more [here](#).
- The Senate Judiciary Committee delayed a hearing to consider the nomination of Makan Delrahim to serve as head of the Department of Justice’s Antitrust Division due to missing paperwork, Committee Chairman Chuck Grassley (R-IA) said on Wednesday. The date for a rescheduled hearing has not been set. In related news, in an interview with *The New York Times* on Tuesday, Delrahim spoke at length about his upbringing and potential areas of focus if confirmed as the chief antitrust cop. “[Delrahim]...intimated that he was skeptical of antitrust action against intellectual property rights holders,” the article states, adding that in a 2007 statement Delrahim warned that blending “intellectual property rights with antitrust enforcement could hamper innovation.” Read more [here](#).
- This week, Representatives Tony Cardenas (D-CA) and Blake Farenthold (R-TX) reintroduced the [Trade Protection Not Troll Protection Act](#), which is intended to protect American companies from International Trade Commission (ITC) suits brought by so-called “patent trolls.” The Cardenas/Farenthold bill would amend section 1337 of title 19, concerning unlawful activities in import trade. As [currently](#) written, the statute lists a number of “unlawful activities,” including importation of trademark- and patent-infringing articles and articles made through infringing methods, which the U.S. International Trade Commission shall investigate. The list items concerning IP infringement apply “only if an industry in the United States, relating to the articles protected . . . exists or is in the process of being established.” The statute further establishes that an industry “exists” if, among other options, there is within the United States “substantial investment in [the] exploitation, including engineering, research and development, or *licensing*” of the IP rights. The Cardenas/Farenthold bill would effectively redefine “licensing” to require that there be investment in the adoption and development of articles that incorporate the relevant IP, potentially preventing non-practicing entities from bringing complaints under section 1337.
- On Tuesday, May 2<sup>nd</sup> at 10:15 am House Judiciary Chairman Goodlatte (R-VA) will announce the Committee’s “Innovation and Competitiveness Agenda” in the House Judiciary Committee Hearing room. Chairman Goodlatte will also lay out the innovation agenda items the Committee will address in the coming months.
- On Tuesday, May 2<sup>nd</sup> at 10:00 a.m. the Senate Foreign Relations Committee will meet to [consider the nomination](#) of Iowa Governor Terry Branstad to serve as the next U.S. Ambassador to China.

## II. Judicial Updates:

- The Recording Industry Association of America (RIAA) has filed a lawsuit accusing internet service provider Grande Communications of “refusing to take meaningful action against repeat infringers” who download music illegally. The Digital Millennium Copyright Act (DMCA) requires that internet service providers protected by the act’s safe harbor provisions adopt “a policy that provides for the termination in appropriate circumstances of subscribers and account holders... who are repeat infringers.” Read more [here](#).
- On April 5, 2017, the Ninth Circuit handed down a decision in [Maloney v. T3Media, Inc.](#), holding that claims brought under California’s statutory right of publicity and the common law right of publicity, relating to the sale of non-exclusive licenses for the noncommercial use of certain photos, were preempted under section 301 of the federal Copyright Act. The decision leaves open the door to other statutory and common law right of publicity claims. The case concerned T3Media’s sale of non-exclusive licenses for non-commercial use of photos depicting former student athletes Patrick Maloney and Tim Judge. Maloney and Judge brought action against T3Media in the Central District of California in June 2014, alleging that T3Media exploited their names and likenesses commercially by selling photographs of them. T3Media moved to strike the complaint to California’s anti-SLAPP statute, arguing that the claims were barred by the First Amendment. Maloney and Judge conceded that the suit arose from acts in furtherance of T3Media’s right to free speech, and so they had to demonstrate a reasonable probability of prevailing on their challenged claims, which T3Media insisted were preempted by the federal Copyright Act. The district court held that the claims were indeed preempted. The Ninth Circuit affirmed, noting that “Maloney and Judge do not contend that their likenesses were ever used on merchandise or in advertising [but] challenge instead the copyright holder’s decision to distribute the copyright images themselves,” an act covered under section 106 of the Copyright Act.

## III. Administration Updates:

- On Thursday, President Trump announced that the U.S. will renegotiate the North American Free Trade Agreement (NAFTA) with Canada and Mexico rather than terminate the deal altogether. “We’re going to give renegotiation a good, strong shot,” Trump said, but added that if he is “unable to make a fair deal” that he would “terminate NAFTA.” Read more [here](#).
- On Friday, the Office of the United States Trade Representative (USTR) released the 2017 Special 301 Report, reviewing global developments on trade and intellectual property and identifying trading partners with harmful records on protecting U.S. creators. The report continues to list China on the “Priority Watch List,” citing structural impediments to effective IP enforcement, trade secret theft, and rampant online piracy, amongst other issues. The report also notes that “lack of adequate authority” for customs officials to seize and destroy counterfeit and pirated goods at the border has contributed to increases in IP theft as well. Read the entire report [here](#).

## IV. International Updates:

- On Tuesday, European Union lawmakers voted to ban online retailers from geoblocking, or blocking consumers from accessing online content depending on their location. The EU

also expanded the proposal to include music streaming services such as iTunes and Spotify. The music industry has pushed back against this development, arguing that “extending the geoblocking ban to copyright-protected content could lead to a waterbed effect—pushing up prices in areas that are cheaper now.” Read more [here](#).

- The Creative Industries Federation, a UK advocacy group, has released a ‘manifesto’ for the upcoming UK general election. The document notes that the UK creative industry sector “is the fastest growing part of the UK’s economy, contributing £87bn in GVA [gross value added]”, which is “four times the GVA of the automotive industry, six times as much as the life sciences and nearly 10 times that of aerospace.” The manifesto calls for changes to the UK visa system to address the needs of innovative sectors, support for creative industry exports, the introduction of “creative enterprise zones,” and further investment in culture and the arts, among other requests. The group also asks policy makers to “ensure that the creative industries and arts are a priority sector in Brexit negotiations,” noting that the creative sector will be “particularly vulnerable” if “movement of talent and intellectual property’ are not adequately addressed. Read more [here](#).

## V. Industry Updates:

- This week, Jeremy Useem of *The Atlantic* wrote an article titled “How Online Shopping Makes Suckers of Us All” which outlines how retail websites like Amazon employ complex pricing algorithms and teams of economists to alter prices of products “by the day or even by the hour.” Useem uses a series of examples—from how Amazon prices pumpkin-pie spice to Peter A. Lawrence’s book *The Making of a Fly*—to ask the question: “Could the internet, whose transparency was supposed to empower consumers, be doing the opposite?” Read more [here](#).
- *The New York Times* published an op-ed by Jonathan Taplin this week titled ‘Is It Time to Break Up Google?’ Taplin argues that Apple, Google, Amazon, and Facebook have become monopolies, given that “Google has an 88 percent market share in search advertising, Facebook ...owns 77 percent of mobile social traffic and Amazon has a 74 percent share in the e-book market.” Taplin alleges that “Facebook, Google and Amazon have stymied innovation on a broad scale,” noting that “revenues in media businesses like newspaper publishing or the music business have, since 2001, fallen by 70 percent” while “profits at Google, Facebook and Amazon have soared.” He goes on to suggest three options for regulating these companies: (1) preventing them from acquiring other companies; (2) regulating them like public utilities, including requiring them to license out patents (e.g. for search algorithms) “for a nominal fee”; and (3) removing DMCA safe harbors, which allow “companies like Facebook and Google...to free ride on the content produced by others.” Read more [here](#).
- Daniel Marti, who most recently served as White House Intellectual Property Enforcement Coordinator (IPEC) under President Obama, has been named Head of Government Affairs at RELX Group.