



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT SEPTEMBER 15, 2017



### I. Congressional Updates:

- On Wednesday, the U.S. Congress Joint Economic Committee held a hearing titled “The Dynamic Gains from Free Digital Trade for the U.S. Economy.” The hearing focused primarily on several digital trade issues, including the de minimis thresholds for importing goods, forced data localization requirements, and protectionist measures masquerading as privacy and cyber security measures. Regarding the de minimis thresholds, the prevailing view was best expressed by Daniel Griswold of the Mercatus Center at George Mason University that “Congress should . . . seek higher, more economically and commercially realistic de minimis thresholds for e-commerce shipments to other countries.” No witness or member disagreed with this statement. Sean Heather of the U.S. Chamber of Commerce stated that “data flows are increasingly threatened by data localization requirements,” giving Indonesia, France, and Germany as examples of countries that are limiting market access opportunities for American companies through forced data localization. Former Ambassador Daniel Sepulveda agreed with this assessment, saying that we should “advocate at every international gathering to ensure that data localization [isn’t] used in an anti-competitive manner.”
- On Tuesday, September 19<sup>th</sup> at 10:30 a.m. the Senate Committee on Commerce, Science, and Transportation will hold a hearing on the “Stop Enabling Sex Traffickers Act of 2017.” Witnesses include Eric Goldman, a professor at Santa Clara School of Law; Abigail Slater, General Counsel for the Internet Association; and Yiota Souras, General Counsel for the National Center for Missing and Exploited Children. The legislation—which

### Headlines and Highlights:

- Copyright Office releases Section 108 discussion document.
- FTC Acting Chair gives speech on “Antitrust Enforcement in the Digital Age.”
- Phoenix Center releases study on safe harbor protections for online intermediaries.
- Spain, Italy, France and Germany urge EU to tax large internet companies’ revenue, not profits.
- Sen. Portman, a former USTR, gives speech on NAFTA renegotiation.

### In the Blogs:

#### [Taking a Serious Look at SESTA](#)

The Illusion of More  
September 11 by David Newhoff

#### [Brexit and Copyright: What Happens Next?](#)

Hugh Stephens Blog  
September 11 by Hugh Stephens

#### [EU Copyright Reform Meets Resistance From Stakeholders, Some Governments](#)

IP Watch  
September 13 by Dugie Standeford

would amend Section 230 of the Communications Decency Act to create new legal liability for internet companies whose sites knowingly facilitate sex trafficking and other crimes through content hosted on their platforms—has been [criticized](#) by the Internet Association which called it “overly broad” and counterproductive to fighting human trafficking. Read more [here](#).

- On Tuesday, Sen. Rob Portman (R-OH), a former United States Trade Representative (USTR), delivered remarks at an event titled “NAFTA Renegotiation: Strengthening North America Prosperity and Competitiveness” held at the Center for Strategic and International Studies (CSIS). Read a transcript of his remarks [here](#).
- Senator Amy Klobuchar (D-MN), the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, introduced two antitrust bills on Thursday. The *Consolidation Prevention and Competition Promotion Act* [would require](#) companies seeking “mega-mergers” to prove that their proposed merger does not harm competition. The bill also adds the term “monopsony” to the *Clayton Antitrust Act*, “so single buyers controlling the market are also illegal,” and creates a new “Office of the Competition Advocate” to “help consumers with complaints, encourage antitrust investigations, and analyze and publish reports on merger activity.” The [second bill](#), called the *Merger Enforcement Improvement Act*, is intended to “improv[e] the agencies’ ability to assess the impact of merger settlements, requiring studies of new issues, adjusting merger filing fees to reflect the 21<sup>st</sup> century economy, and providing adequate funding for antitrust agencies to meet their obligations to protect American consumers.” Read more [here](#).

## II. Judicial Updates:

- On Monday, People for the Ethical Treatment of Animals (PETA) and photographer David J. Slater reached a settlement regarding the ownership of a selfie that Naruto, an anonymous macaque in Indonesia, took in 2011 after grabbing Slater’s camera. PETA sued Slater in 2015, alleging that the Naruto owned copyrights to the photos, which had gone viral. As part of the settlement, Slater will donate 25 percent of the photos revenue to charities in Indonesia that protect crested macaques. Read more [here](#).

## III. Administration Updates:

- Federal Trade Commission (FTC) Acting Chair Maureen Ohlhausen gave a speech on Tuesday titled ‘Antitrust Enforcement in the Digital Age.’ Ohlhausen said that although some people fear “we are spiraling towards a dystopian future where a few giant technology companies will ultimately gain sustained control over our economic lives,” she is “concerned about the push to adopt an approach that will disregard consumer benefit in the pursuit of other perhaps even conflicting goals.” Ohlhausen argued that regulators, who “possess no crystal ball,” should avoid trying to steer the digital economy in any certain direction, and that many dominant firms are often more vulnerable to competition than they appear, given that “major shift[s] in technology could very well leave them behind.” She also stressed that, for a number of reasons, “harm to some competitors does not equal harm to competition.” However, Ohlhausen affirmed that if the predictive tools of antitrust policy “suggest that competition will be harmed and consumers made worse off from the behavior of any firm, even a [digital] platform, antitrust enforcers should act.” Read more [here](#).

- Ohlhausen gave two other speeches this week, one on [Monday](#), in which she discussed the theme of regulatory humility in antitrust, and one on [Friday](#), about the link between competition and liberty.

#### IV. International Updates:

- Spanish authorities have fined Facebook \$1.4 million for collecting data on its users without informing them about how that information would be used, and without obtaining their consent for such uses. The fine resulted from an investigation that involved authorities from Belgium, France, Germany, and the Netherlands. Read more [here](#).
- France, Germany, Italy and Spain are urging the European Union to tax large internet companies like Amazon and Google based on their revenue rather than their profits. According to *Reuters*, the four countries' main concern is that "such companies are often taxed on profits booked by subsidiaries in low-tax countries even though the revenue originated from other EU countries." Read more [here](#).

#### V. Industry Updates:

- This week, Yelp sent a [letter](#) to the Federal Trade Commission (FTC) alleging that Google violated a 2012 settlement with the FTC by using photographs from sites such as Yelp in its search results. The 2012 settlement had given those sites the opportunity to opt out of having their content included in Google's search results. Yelp further alleges that the scale of Google's "image content scraping suggests this is not an unintended glitch, but a systematic contravention of Google's commitments to the FTC." The letter urges the FTC "to examine whether Google has strayed from its commitments to the Commission," and states that "Google should be held accountable and subject to remedies sufficient to ensure its anticompetitive conduct does not continue to harm competition and consumers." Read more [here](#).
- The Phoenix Center for Advanced Legal & Economic Public Policy Studies recently released an [economic study](#) on safe harbor protections for online intermediaries. The study found that *de minimis* liability for online intermediaries "promotes infringing platforms to the detriment of responsible ones." This is because "vetting is costly, placing platforms with a conscience at an economic disadvantage in a competitive marketplace." The study suggests that policy makers should increase the risk of liability for online intermediaries, finding that doing so "results in a 'separating equilibrium,' where two types of platforms will arise – those offering only (or mostly) legitimate content, and those offering a market-determined combination of illegal, unsavory and low value content." One of the study's authors, George S. Ford, discussed the findings in a recent *Bloomberg* op-ed, arguing that "an avalanche of unsavory, dangerous and illegal online behavior has raised serious questions about how to continue nurturing the growth of a healthy Internet at a time when we need increased vigilance against illegal content." Read more [here](#).
- The Copyright Office has announced that Sarah Gersten and Emma Kleiner will be joining the Office as Ringer Fellows in the 2017-19 Barbara A. Ringer Copyright Honors Program. The program—named for Barbara A. Ringer, who served as Register from 1973 to 1980—offers promising early-career copyright lawyers an opportunity to work on a variety of advanced legal and policy issues. Read more [here](#).

- *Wired* published an article this week about the role of the White House Office of Science & Technology Policy (OSTP) in federal hurricane response efforts. The article compares OSTP in the Obama Administration, which “played an outsized role” in such efforts, to OSTP in the Trump Administration, which has much fewer staff, whose work on disaster response likely “has little if any connection to the president’s inner circle.” Read more [here](#).
- The Copyright Office has issued a final rule making a non-substantive technical change to the Office’s regulations governing the affixation and position of copyright notice on various types of works. Read the Federal Register notice [here](#).
- On Friday, the Copyright Office has released its [Section 108 Discussion Document](#), which is intended to “provide a concrete framework for further discussion among stakeholders and members of Congress.” The Document includes model statutory language “to guide future discussions...on various discrete issues, such as adding museums to the statute; allowing preservation copies to be made of all works in an eligible entity’s collections; replacing the current three-copy limit with a ‘reasonably necessary’ standard when making copies for preservation and research; clarifying the contract supremacy provision to grant libraries, archives, and museums more flexibility to make preservation and security copies of works covered by licensing and purchasing agreements; and eliminating the exclusion of musical, pictorial, graphic, or sculptural works, and motion pictures or other audiovisual works from the provisions permitting copies made upon the request of users, under certain conditions.”
- The USPTO has announced that on October 18 it will hold a public roundtable about intellectual property infringement at trade shows. The event will include discussion of “approaches, strategies, and effective practices for addressing the kinds of infringement that most often occur at trade fairs and shows, including the infringement of copyright, design, patent, and trademark.” Read the Federal Register notice [here](#).