



AMERICAN CONTINENTAL GROUP

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## CONTENT & TECHNOLOGY POLICY REPORT MAY 17, 2019



### I. Congressional Updates:

- On Tuesday, May 21<sup>st</sup>, at 10:00 a.m., the Senate Judiciary Committee is slated to hold a hearing on “Digital Advertising Ecosystem and the Impact of Data Privacy and Competition Policy.” No witnesses are listed yet. More info. [here](#).
- On Tuesday, May 21<sup>st</sup>, at 2:30 p.m., the Senate Commerce Subcommittee on Communications, Technology, Innovation, and the Internet will convene a hearing on “Optimizing for Engagement: Understanding the Use of Persuasive Technology on Internet Platforms.” The hearing will examine “how algorithmic decision-making and machine learning on internet platforms influence the public.” The witnesses are: Dean Eckles (Assistant Professor of Marketing, MIT Sloan School of Management), Tristan Harris (Co-Founder and Executive Director, Center for Humane Technology), Jason Hreha (Former Head of Behavioral Science, Walmart), and Maggie Stanphill (Director, Google User Experience, Google, Inc.). More info. [here](#).
- On Wednesday, May 22<sup>nd</sup>, at 10:00 a.m., the House Ways & Means Trade Subcommittee is scheduled to hold a hearing on “Enforcement in the new NAFTA.” No witnesses are listed yet. On April 25<sup>th</sup>, House Ways & Means Committee Democrats sent United States Trade Representative (USTR) Robert Lighthizer a letter highlighting their concerns with enforcement provisions in the United States–Mexico–Canada Agreement (USMCA). More info. [here](#).
- Late last week, Representatives Ted Budd (R-NC) and Bennie Thompson (D-MS) signed onto the Copyright

### Headlines and Highlights:

- Supreme Court holds that Apple app buyers can sue the company for allegedly using monopoly power to drive up prices.
- Canada’s House of Commons’ Standing Committee on Canadian Heritage publishes a report on the remuneration models for artists and creative industries.
- Thomas Kennedy, Executive Director of the American Society of Media Photographers urges Congress to advance CASE Act.
- U.S. Copyright Office extends deadline for public comments on *Compendium of U.S. Copyright Office Practices, Third Edition* to May 31<sup>st</sup>.

### In the Blogs:

[Online Book Piracy: “An Offence Against Moral Justice”](#)

Hugh Stephens Blog  
May 13 by Hugh Stephens

[Public Knowledge wants to solve the misinformation problem? That’s adorable.](#)

Illusion of More  
May 9 by David Newhoff

Alternative in Small-Claims Enforcement (CASE) Act of 2019 ([H.R. 2426](#)) as co-sponsors. On Thursday, Reps. Steve Cohen (D-TN), Val Demings (D-FL), and Kenny Marchant (R-TX) also signed onto the proposal. This bipartisan and bicameral legislation was introduced earlier this month and seeks to provide individual creators with an alternative to federal court to protect their work by creating a small claims tribunal under the U.S. Copyright Office.

- After the House Leadership met with United States Trade Representative (USTR) Robert Lighthizer to discuss the USMCA Wednesday afternoon, Chair of the House Democratic Caucus Hakeem Jeffries told reporters that USTR Lighthizer understood the lawmakers' concerns, and the need to reach a resolution with Democrats to advance legislation to implement the pact through Congress. Despite this apparently productive discussion, Jeffries explained that Lighthizer would not speak "one way or the other about the mechanics of reopening the text," and the group did not discuss a timeline for putting implementation legislation to a vote. Notably, Jeffries also told *POLITICO* that "the desire of the overwhelming majority of the Democratic caucus is to try and get to a yes." Read more [here](#).
- On Tuesday, the Senate Judiciary Committee held a hearing titled "5G: National Security Concerns, Intellectual Property Issues, and the Impact on Competition and Innovation." The Committee heard from two panels of witnesses representing the federal government, academia, and industry about the deployment of 5G in the U.S. and the risks associated with using global vendors, particularly with Chinese firms such as Huawei. There seemed to be a consensus among panelists and members on both sides of the aisle that relying on Chinese equipment firms to deploy and maintain 5G technology would pose a significant threat to the United States' telecommunications network. Panelists also seemed to agree that one of the biggest challenges for the U.S. federal government is encouraging its allies and partners to take a risk-based approach to 5G deployment and to recognize the threats posed by relying on Chinese vendors. They pointed out that although it may be cheaper to use Huawei's technology in the short run, the potential lifecycle cost, such as those accrued by responding to vulnerabilities in the network and mitigating other security risks associated with its technology might make relying on Chinese firms for telecom equipment more expensive for countries in the long run. More info. [here](#).
- Several members on the Senate Judiciary Committee announced bills that seek to address some of the issues discussed during the hearing. First, Sen. Josh Hawley (R-MO) announced that he introduced the "[China Technology Transfer Control Act](#)" earlier in the day, which calls for placing China's core technologies on the Commerce Department's export control list and for sanctions on foreign entities and individuals who help U.S. businesses skirt these export controls. Second, Sen. Marsha Blackburn (R-TN) was pleased to announce that she introduced legislation with Sen. John Cornyn (R-TX) to address and better understand the supply chain threats in 5G networks, titled the [SUPPLY CHAIN Act](#).
- On Wednesday, the Senate Committee on Commerce, Science, and Transportation, reported the Preventing Illegal Radio Abuse Through Enforcement (PIRATE) Act ([S. 1228](#)) favorably out of the Committee without any amendments. This legislation, sponsored by Sens. Steve Daines (R-MT) and Gary Peters (D-MI), seeks to better equip the Federal Communications Commission (FCC) to combat pirate radio operations. Read more [here](#).

## II. Judicial Updates:

- In a 5-4 decision announced Monday, the Supreme Court upheld the Ninth Circuit Court of Appeals' decision in *Apple v. Pepper* that Apple app buyers could sue the company for allegedly using monopoly power to drive up prices. In an unusual court alignment, Justice Brett Kavanaugh, who wrote the majority opinion, was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan and Sonia Sotomayor. The class-action lawsuit focuses on the cut of fees that Apple takes from its App store sales. App makers and other consumers have long complained that the fees and other practices are unfair. Apple could be subject to massive damages if it loses the lawsuit, and a ruling that forces Apple to reduce its share of app sales would likely have an even longer-term effect on the company. Read more [here](#).
- On Monday, the U.S. District Court for the Central District of California ruled that Walt Disney Co.'s "Pirates of the Caribbean" movie franchise did not lift copyright protectable elements from a screenplay of the same name that Disney previously rejected. The court granted Disney's motion to dismiss the complaint from 2017, asserting that the "single purported similarity" between the otherwise widely varying plots, cursed pirates, is unprotectable because its an idea that flows naturally from a basic plot premise. "At most, the court plaintiffs have demonstrated random similarities scattered throughout the parties' works," the court decided. Read more [here](#).

## III. Administration Updates:

- Reversing a previous decision, the U.S. Copyright Office Review Board ruled earlier this month that Adidas can register the "2-D artwork and sculpture" of versions 1 and 2 of Kanye West's Yeezy Boost 350. The Copyright Office stated that both shoes contain copyrightable creative elements that can be separated out from the underlying shoe, which cannot be protected. The board cited the 2017 Supreme Court decision in *Athletic v. Varsity Brands*, in which Justice Thomas wrote in the majority opinion that expressive elements are "separable" if they can "be perceived as a two-or three-dimensional work of art separate from the useful article" and can still qualify as protectable expression when "imagined separately from the useful article into which it is incorporated." The Review Board also noted that the threshold for "originality" is very low. Read more [here](#).
- On Monday, the U.S. Copyright Office announced that it is extending the deadline for the public to submit responses to the draft of its administrative manual, the *Compendium of U.S. Copyright Office Practices, Third Edition*. Comments are due no later than 11:59 p.m. on May 31<sup>st</sup>. More info. [here](#).
- In an interview with Tom Temin from the Federal Drive, Register of Copyrights Karyn Temple discussed the need to modernize the U.S. Copyright Office's procedures for reviewing copyrights to reflect the new digital reality of copyrights. Temple noted that most people don't work with pen and paper anymore, which motivated the office to accept digital submissions. To make sure musical works were not already submitted in paper form, the Copyright Office puts these works through paper score sheets and reviews sound recordings. Temple also highlighted the six focus areas from its Strategic Plan: Information Technology Modernization; Optimizing Business Processes; Organization Change Management; Education and Engagement; Impartial Expertise on Copyright Law and Policy; and Measuring Success. Temple also noted that while the amount of copyright applications has

remained steady (around 500k per year), these applications have become increasingly digital. Lastly, Temple noted that the Copyright Office is hiring additional staff and is getting close to the optimum staffing level. Listen to the interview [here](#) and review the strategic plan [here](#).

- On Wednesday, President Trump issued an executive order declaring a national emergency and delegating authority to the Secretary of Commerce to prohibit U.S. companies from buying foreign-made telecommunications equipment deemed a national security risk. Read more [here](#).

#### **IV. International Updates:**

- As part of Canada's review of its Copyright Act, the House of Commons' Standing Committee on Canadian Heritage this week published its report on the remuneration models for artists and creative industries. The major themes in the report include the increasing value gap; decline in the artistic middle class; impact of technology on creative industries; change in consumer culture; and Indigenous perspective on copyright. Additionally, the report identifies some central issues across creative industries, including the creation of Canadian content; copyright literacy and the promotion of copyright; combatting piracy and enforcing existing rules; Copyright Board reform; and copyright term extension. Read more [here](#).

#### **V. Industry Updates:**

- On Monday, *The Hill* published an op-ed from Thomas Kennedy, Executive Director of the American Society of Media Photographers, urging Congress to advance the CASE Act of 2019 (H.R.2426/S.1273). Kennedy cautions that although the U.S. copyright system gives creative artists the rights to protect their creative efforts, they are "routinely unable to *enforce* those rights because of the costs and complexities of bringing a lawsuit in federal court." He claims that the CASE Act would help creators and small businesses enforce their rights by establishing an "affordable, accessible forum to bring legal action against copyright infringers." Read more [here](#).
- In a *Billboard* op-ed this week, Jordan Bromley, partner and leader of entertainment transactions and finance group at law firm Manatt, Phelps & Phillips LLP, makes the case for revising Section 512 of the Digital Millennium Copyright Act (DMCA), which provides safe harbor protections for online service providers (OSPs), to better serve rights holders. Bromley explains that these protections form OSP policy on takedowns. For instance, if a rights holder alerts YouTube about the existence of unauthorized and infringing works, the platform takes down these works immediately. However, Bromley further explains that unless the content owner proves that it has filed a lawsuit against the infringing works within ten days, the video will go back up on the video platform. He reasons that this places an unfair burden on the content owner because litigation is expensive, and cautions that "There is no intellectual property owner in the world who can file a separate lawsuit against every user who uploads an infringing video on YouTube." In conclusion, Bromley urges his colleagues in the music industry to work together to "adjust the law that shields self-serving OSP policies at the expense of our musical works." Read more [here](#).
- On Thursday, May 23<sup>rd</sup>, the Computer & Communications Industry Association (CCIA) is holding an event that will feature a panel discussion on "the future transatlantic digital relationship, notably in areas of cybersecurity, the data economy and investment in future connectivity and infrastructures." Robert L. Strayer (Ambassador & Deputy Assistant

Secretary for Cyber and International Communications and Information Policy, U.S. Department of State) and Roberto Viola (Director-General, Directorate General of Communication, Networks, Content and Technology, European Commission) will deliver special remarks. Read more [here](#).