I. Congressional Updates:

- On Wednesday, the Senate Judiciary IP Subcommittee held its second roundtable on U.S. Copyright Office (USCO) modernization. The roundtable began with a discussion about the Register’s authority and the appropriate structure of the Office. Some participants raised concern that the Register does not have enough authority to oversee and implement modernization efforts, while others contended that the Librarian and the Register are working well together. A few participants called for the naming of a product owner at the Library of Congress, who would own the system and work with stakeholders. The definition of publication was also a topic of discussion, with most people in the room calling for a clarification of the definition. The roundtable featured a discussion about deposit requirements, and copyright community stakeholders and officials at the Library of Congress and the USCO agreed to work together to address this issue. Some stakeholders also raised concern about the lack of transparency surrounding the modernization governance board. Lastly, the group floated a few substantive proposals that could be topics of discussions in future roundtables. Some of the proposals mentioned were: (1) consideration of provisional, group, or delayed registration of works; (2) clarifying the publication definition; (3) discussing necessary statutory language to implement deposit requirement changes; (4) looking at the Fourth Estate issue; and (5) addressing pending time concerns. The third roundtable will likely take place in late October.

- On Wednesday, October 16th the House Energy & Commerce Subcommittees on Communications and Tech and Consumer Protection will hold a joint hearing to

Headlines and Highlights:

- SJC IP Subcommittee holds second USCO modernization roundtable.

- House E&C subpanels on communications and tech, and consumer protection, to hold content moderation hearing on October 16th.

- Register of Temple and Librarian of Congress Hayden respond to Sen. Tillis’ U.S. Copyright Office modernization inquiry letter.

- Solicitor General offers non-binding recommendation that Supreme Court deny certiorari in Google v. Oracle.

In the Blogs:

Copyright Governance Danish Style: Is This “Hygge” in Action?  
Hugh Stephens Blog  
September 24 by Hugh Stephens

Copyright and the Speech Right: Are They in Conflict?  
Illusion of More  
October 2 by David Newhoff

Trump Jr. Blasting Silicon Valley Is Unhelpful  
Illusion of More  
October 2 by David Newhoff
explore “online content moderation practices and whether consumers are adequately protected under current law.” According to a statement from Full Committee Chairman Frank Pallone (D-NJ) and Subcommittee Chairs Mike Doyle (D-PA) and Jan Schakowsky (D-IL), members will examine whether companies appropriately use the tools they have, including Section 230 of the Communications Decency Act, to foster a heathier internet. More info. here.

- As reported by Bloomberg, House Small Business Committee Chairwoman Nydia Velázquez plans to convene a hearing with representatives from Amazon, Google, and Facebook to consider how technology behemoths may be damaging the competitive landscape for small businesses. The hearing, which will most likely take place in late October or early November, will also feature a panel of small businesses who are affected by the larger companies’ actions. Although the specific topics of discussion are forthcoming, a representative for Chairwoman Velázquez explained in an email that the hearing will allow committee members an opportunity to “examine how small businesses are faring given the dominance of big tech companies in areas ranging from e-commerce to internet traffic.” In a letter to Amazon this spring, Chairwoman Velázquez raised concern about reports that the e-commerce platform planned to cease wholesale orders from thousands of smaller suppliers. Read more here.

II. Judicial Updates:

- On Monday, Spotify filed a response to the lawsuit filed against the music streaming platform by Eminem’s publishing company, Eight Mile Style, requesting that the case is dismissed on jurisdiction grounds. Last month, Eight Mile Style filed a lawsuit accusing Spotify of copyright infringement for failing to properly license the mechanical rights in Eminem’s music. Eight Mile alleges that Spotify has not met all the obligations set out in the Music Modernization Act (MMA) to avoid new litigation over past unpaid mechanicals. Furthermore, Eight Mile claims that the elements of the MMA that prevent new litigation of this kind are “unconstitutional and must be struck down.” Spotify has denied the allegations and stated that it will show “at the appropriate time” why Eight Mile’s case is “meritless.” More info. here.

- Last Friday, Solicitor General (SG) Noel Francisco’s office recommended that the Supreme Court deny certiorari in the Google v. Oracle copyright case. The high court asked the SG to offer a non-binding opinion on whether it should take the case in April. In March 2018, the U.S. Court of Appeals for the Federal Circuit found that Google’s use of Java shortcuts to develop Android violated Oracle’s copyright. This is the second time Google has asked the Supreme Court to review the case, as it has prevailed twice in San Diego federal court but lost before the Federal Circuit each time. In 2015, SG Donald Verrilli also recommended that the court deny cert, but left open the possibility for Google to present its fair-use defense. Notably, Francisco’s brief rejects Google’s fair-use argument entirely. “The fair-use doctrine does not permit copying valuable parts of a work to attract fans to a competing commercial product,” last week’s brief asserts. Read more here and here.

III. Administration Updates:

- On Monday, Librarian of Congress Carla Hayden and Register of Copyrights Karyn A. Temple responded to Senate Judiciary IP Subcommittee Chairman Thom Tillis’ (R-NC) letter inquiring about efforts to modernize the U.S. Copyright Office. In their response,
Hayden and Temple assert that modernizing the Office’s antiquated IT systems and improving its complementary work processes “is one of the most significant operational undertakings the Library and the Copyright Office face in the near term.” In addition to describing the modernization initiatives currently underway, the letter underscores that the Copyright Office and Library of Congress are taking a long-term view of modernization to ensure that the system they create “is able to accommodate possible future legal responsibilities or structural changes for the Office that Congress deems necessary.” Register Temple and Dr. Hayden also emphasize that they are carefully considering stakeholder views, on both IT and regulatory matters, which will “likely necessitate a longer development and implementation period” than the suggested 8-12 weeks to implement a pilot program. Read more here.

IV. International Updates:

- On Thursday, the EU’s top court—the European Court of Justice (ECJ)—ruled that national courts can order Facebook to identify and take down duplicate illegal content posted by users globally, if policing the content in question does not violate “the relevant international law.” The case involves a Green party politician in Austria who sued Facebook requesting that the social media platform remove defamatory comments about her, in addition to any “equivalent” messages posted by others globally. Austria’s High Court referred the case to the ECJ, asking the EU’s high court to clarify Facebook’s scope of responsibility to remove illegal content. This week’s ruling upholds a non-binding opinion from an ECJ advisor in June that Facebook criticized for undermining “the longstanding principle that one country should not have the right to limit free expression in other countries.” As the Financial Times points out, countries across the bloc currently have vastly different content moderation laws, and the EU’s e-commerce directive exempts tech groups from direct legal responsibility for user-uploaded material. However, in the Thursday ruling, the ECJ clarifies that this directive does not prevent platforms from actively policing posts that are very close in nature to content that a court has ordered to be taken down. Read more here.

V. Industry Updates:

- Mickey H. Osterreicher, President of the National Press Photographers Association (NPPA), penned an editorial published by The Hill on Monday tackling the American Civil Liberties Union’s (ACLU) concerns with the CASE Act. Osterreicher called out the ACLU for its last-minute participation in this process, pointing out that it did not participate in a meaningful dialogue with the Copyright Office, legislators, and creators as they drafted and revised the bill over the last decade. Osterreicher wrote that the ACLU’s concerns have little to do with free speech or due process, but rather, has “more to do with its donors’ wallets.” He noted in this piece that under the CASE Act, anyone notified of an infringement claim can opt-out if they don’t want to participate in the small claims tribunal. Osterreicher wrote that “free speech and due process are about giving the people the right to choose” and that this is “exactly what the CASE Act does.” Read more here.

- News surfaced late last week that Senator Rob Portman’s (R-OH) Chief of Staff Mark Isakowitz will head Google’s U.S. and Canadian government affairs and public policy. Prior to becoming Portman’s Chief in 2014, Isakowitz was a partner and president at the government relations firm Fierce Isakowitz & Blalock. Read more here.
On Monday, the American Apparel & Footwear Association (AAFA) recommended that various foreign Amazon extensions—including amazon.ca (Canada), amazon.fr (France), and amazon.in (India)—be included in the USTR’s 2019 Notorious Markets List as online markets that facilitate the sale of counterfeit goods. Comments identifying online and physical markets to be considered for inclusion in this year’s notorious markets list, which identifies examples of online and physical markets outside the U.S. that reportedly engage in and facilitate substantial copyright, piracy, or trademark counterfeiting, were due to the USTR on Monday. In its written comments, AAFA notes that even though Amazon has engaged in regular dialogue with the Association since it identified various foreign extensions (Canada, UK, and Germany) of the platform as problematic in its submission last year, further engagement from the e-commerce platform is needed to mitigate their members’ concerns. “Amazon needs to go further, by demonstrating the commitment to the resources and leadership necessary to make their brand protection program scalable, transparent, and most importantly, effective,” the submission insists. AAFA’s members include brands and retailers like Ralph Lauren Corp., Kenneth Cole Productions, Perry Ellis International, Under Armour, Spanx, Lululemon Athletica and Hanesbrands. Read more here.