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AMERICAN CONTINENTAL GROUP

CONTENT & TECHNOLOGY POLICY REPORT OCTOBER 1, 2021



I. Congressional Updates:

- U.S. Senator Ben Ray Luján (D-N.M.) introduced a Senate version of the Creative Economy Revitalization Act along with Senators Kirsten Gillibrand (D-NY), Martin Heinrich (D-N.M.), and Alex Padilla (D-Calif.). The bill aims to help bolster the creative economy through the creation of a workforce grants program to employ artists and writers to create publicly available art. Full text of the legislation can be found [here](#).
- On Tuesday, September 28, 2021, the House Judiciary Committee, Subcommittee on Antitrust, Commercial, and Administrative Law held a hearing titled: Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker. Witnesses included: Mr. Eric A. Posner, Kirkland and Ellis Distinguished Service Professor of Law Arthur and Esther Kane Research Chair, University of Chicago Law School; The Honorable Christine S. Wilson, Commissioner, Federal Trade Commission; Dr. Brian Callaci, Chief Economist, Open Markets Institute; Mr. Bruce H. Kobayashi, Paige V. and Henry N. Butler Chair in Law and Economics, Antonin Scalia Law School, George Mason University; Mr. Daniel Gross, Feed Driver, United Parcel Service, Member, Teamsters Local 177; Ms. Nila Payton, Medical Administrative Assistant, University of Pittsburgh Medical Center. In his opening statement, full Committee Chairman Nadler argued that the U.S. Economy has become highly concentrated in recent decades. Specifically, he stated that “a small number of firms dominate a variety of markets that Americans rely on, including pharmaceuticals, airlines, broadband, online platforms, and meatpacking.” He focused on how, in his view, consolidation has led to high levels of concentration

Headlines and Highlights:

- Senate introduces CERA companion bill
- Drug pricing and competition bills passed favorably out of House Judiciary Committee
- Senators Leahy and Tillis send letters to Google, Amazon, and Facebook regarding ad piracy.
- Cox to Challenge Piracy Verdict
- Jayme White and Sarah Bianchi were confirmed by the U.S. Senate as Deputy USTRs
- Avengers Copyright Dispute
- Publishers Obtain Preliminary Injunction
- Apple Stock Connected to Creator Economy

In the Blogs:

- Hugh Stephens Blog: [Canada's Pointless Pandemic Election and its Implications for Copyright, Content Industries and Digital Platforms](#)

in labor markets. Chairman Nadler praised President Biden’s Executive Order on competition ([14036](#)) and called on Congress to enact comprehensive legislation to guarantee equal pay for equal work, prohibit forced arbitration agreements in employment contracts and worker misclassification, establish a living wage, and strengthen unions. Watch the full hearing [here](#).

- On Tuesday, September 28th, from 10:00 a.m. – 12:00 p.m. ET, the United States Senate, Committee on Banking, Housing, and Urban Affairs held a hearing titled “CARES Act Oversight of the Treasury and Federal Reserve: Supporting an Equitable Pandemic Recovery.” The witnesses were: The Honorable Janet L. Yellen, Secretary, Department of the Treasury; and The Honorable Jerome H. Powell, Chairman, Board of Governors of the Federal Reserve System. The hearing discussed raising the debt ceiling and a series of bills and packages that were passed to assist Americans, how it has benefited them as well as the economy. These include PPP, CARES, and the Child Tax Credit. Most of the conversation pertained to payments not being received yet in states such as Montana and Nevada. There was no discussion on unemployment or improper payments.
- On Wednesday, September 29th, from 10:00 a.m. to 12:45 p.m. ET, the Senate Committee on Commerce, Science, and Transportation held a hearing titled: “Protecting Consumer Privacy.” The hearing featured testimony from the following witnesses: David Vladeck (Professor and Faculty Director the Center on Privacy and Technology, Georgetown Law), Morgan Reed (President, The App Association), Maureen Ohlhausen (Partner and Section Chair (Antitrust & Competition Law), Baker Botts), and Ashkan Soltani (Independent Researcher and Technologist). Chair Cantwell (D-WA) advocated for a compliance-centric approach to privacy which placed the Federal Trade Commission at the center of enforcement under [Consumer Online Privacy Rights Act](#) (COPRA). Additionally, Cantwell supported \$1 B in reconciliation funding towards FTC privacy enforcement. Ranking Member Wicker (R-MS) [led](#) the minority in advocating for a narrow interpretation of private right of action. Further, Wicker and Republicans opposed the Democrats’ support for an FTC rulemaking on privacy. Sen. Baldwin (D-WI) teed up further action by the Senate Commerce Committee on data security in her questions, asking witnesses how Congress can protect consumers’ data security. Sen. Klobuchar (D-MN) supported her [Merger Filing Fee Modernization Act](#) with Sen. Grassley (R-IA) as a means of supporting privacy efforts, arguing that privacy violations and the need for antitrust reform often go hand-in-hand. Sen. Markey (D-MA) supported reforms to Children's Online Privacy Protection Act (COPPA) and received support for revising children’s online privacy this year from witnesses. David Vladeck (Professor and Faculty Director the Center on Privacy and Technology) then supported changes outlined in Markey’s bill, the [Children and Teens’ Online Privacy Protection Act](#), that would revise COPPA to the constructive knowledge standard. Sen. Thune (R-SD) supported his [Filter Bubble Transparency Act](#) with witnesses – witnesses were largely supportive.
- From Wednesday, September 29th through Thursday, September 30th, the House Judiciary Committee held a markup on a variety of bills, including the SHOP SAFE Act and several drug pricing and competition bills. The Stop Stalling Access to Affordable Medications ([H.R. 2883](#)) was reported favorably out, as amended by a [substitute amendment](#) offered by Chairman Nadler, by a 31-9 vote. The bill would create a rebuttal presumption that a citizen petition is a “sham” and thus a violation of the FTC Act if the FDA first determines that a petition was “submitted with the primary purpose of delaying approval” of a generic or biosimilar drug. The Preserve Access to Affordable Generics and Biosimilars Act ([H.R.](#)

[2891](#)) was reported favorably out, as amended by a [substitute amendment](#), by a 28-13 vote. Most members of the committee expressed support for the bill and the need for increased enforcement against pay-for-delay agreements. A few members expressed concern over the amount of power it would give the FTC. Next, the Affordable Prescriptions for Patients Through Promoting Competition Act of 2021 ([H.R. 2873](#)) was reported favorably out as amended by a substitute amendment by a 27-16 vote. Chairman Nadler offered an [amendment in the nature of a substitute](#) that is a compromise with the Committee’s Senate counterpart. It conforms the text of H.R. 2873 with [S. 1435](#), which was advanced favorably by the Senate Judiciary Committee on a unanimous basis on July 29th. Among other changes, the substitute amendment defines a follow-on product as one that treats a condition that is identical or substantively similar to the reference product. Finally, the Affordable Prescriptions for Patients Through Improvements to Patent Litigation Act ([H.R. 2884](#)) was reported favorably out, as amended by a [substitute amendment](#), by a voice vote. Watch the full markup [here](#).

- On Thursday, September 30, the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Data Security held a hearing titled “Protecting Kids Online: Facebook, Instagram, and Mental Health Harms.” Recent Wall Street Journal investigations revealed troubling insights regarding what Facebook knows about how Instagram affects young users, including their mental health. Senators utilized the recent Wall Street Journal “[Facebook files](#)” as evidence that Facebook and its products like Instagram have longstanding mental health effects on today’s youth. According to the report, Facebook has been aware of the detriments of its service for several years and has not acted because certain changes may reduce the engagement of users and thereby the profit of Facebook. Click [here](#) to watch the full hearing. Also, the identity of the Facebook whistleblower who turned over a trove of documents to Congress and The Wall Street Journal, revealing what the company knows about its effects on young users’ mental health, is expected to be revealed soon. She is set to [testify before Blumenthal’s subcommittee](#) early next week, following a [scheduled appearance Sunday on “60 Minutes.”](#)
- On Thursday, September 30, Senators Thom Tillis (R-NC) and Patrick Leahy (D-VT), sent letters to Sundar Pichai of Google, Andy Jassy of Amazon, and Mark Zuckerberg of Facebook, regarding the “pervasive, ongoing theft of American creativity and innovation financed by complex online advertising networks.” Read the letters [here](#) and [here](#).

II. USCO Updates:

- On September 23, the U.S. Copyright Office [announced](#) that Keyana Pusey joined the Office as a fellow (2021–2023) in the Barbara A. Ringer Copyright Honors Program, effective this month. Pusey will receive assignments from numerous departments within the Office, including the Office of Policy and International Affairs, Office of the General Counsel, Office of the Register, Office of Public Information and Education, and Office of Registration Policy and Practice. 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.”

- On September 24, the U.S. Copyright Office posted a [job announcement](#) for the remaining two Copyright Claims Attorney positions to provide legal advice and counsel on matters related to the policies and procedures of the Copyright Claims Board. According to the Office's announcement and per the CASE Act, each applicant “must be an attorney...who has no fewer than three years of substantial experience in copyright law.” Each Copyright Claims Attorney will report to the Supervisory Copyright Claims Attorney-Advisor and “serve as an expert on legal and factual matters on administrative proceedings in the areas of copyright, civil procedure, alternative dispute resolution, and the policies, regulations, and procedures of the Copyright Claims Board and Copyright Office.” The application period is opened through October 15, 2021.
- On Wednesday, September 29, the U.S. Copyright Office (USCO) will publish a [notice of proposed rulemaking](#) (NPRM) “to establish procedures governing the initial stages of a proceeding before the Copyright Claims Board.” The proposed rule addresses requirements relating to “the filing of a claim, the Board’s compliance review of the claim, service, issuance of notice of the claim, the respondent’s opt-out election, responses, and counterclaims.” Additional procedures for pursuing a case will be addressed in future rulemakings by the Office. Comments are due by October 29 and reply comments are due by November 15.
- On September 30, the U.S. Copyright Office [announced](#) that it is seeking to fill the new position of Chief Economist, which will focus on economic research and related matters. Specifically, the position “will be responsible for advising the Register of Copyrights the Associate Register for the Office of Policy and International Affairs, and other Copyright Office officials on the economic implications of policies and programs affecting the United States’ intellectual property (IP) system and the international copyright framework.” The position will also “oversee economic analysis on topics of copyright protection and enforcement, and on the provision of Copyright Office services, to assist the Office in effectively fulfilling its statutory obligations to administer the U.S. copyright system and advise on copyright policy.”
- The U.S. Copyright Office has issued a [proposed rule](#) to establish procedures governing the initial stages of proceedings before the Copyright Claims Board (CCB). The proposed rule also establishes requirements regarding the directory for designated service agents. Initial public comments are due on October 29, 2021. Reply comments are due on November 15, 2021. For additional information, please visit the Office’s [website](#). You can also read more [here](#) in an article published by Bloomberg Law.

III. Judicial Updates

- Internet provider Cox Communications believes that several record labels may have concealed key information at the 2019 piracy trial, which led to a \$1 billion verdict. Based on information that surfaced in the Charter lawsuit, Cox now believes that the hard drive evidence was recreated at a later date. “[I]t appears that Plaintiffs failed to produce to Cox certain documents related to a key exhibit underlying Plaintiffs’ showing of direct infringement: A hard drive allegedly containing contemporaneously downloaded files that Plaintiffs claim were infringed by Cox’s subscribers... Discovery in this action has revealed

a strong likelihood that Plaintiffs in Cox concealed materials and information that would have demonstrated that all the files on the hard drive were downloaded in 2016 — and not as contemporaneous verification of alleged infringement before the notices were sent between 2012 and 2014.” Cox is now asking the court for permission to intervene in the Charter lawsuit so it can obtain the required information, which is not publicly available. Read more [here](#).

IV. Administration Updates

- Last week, Jayme White and Sarah Bianchi were confirmed by the U.S. Senate as Deputy USTRs, with White being sworn in on September 27. Deputy Ambassador White’s portfolio will include the Western Hemisphere, Europe, the Middle East, Labor, and Environment, while Bianchi’s portfolio is likely to include Asia, Africa, services, investment, textiles, and industrial competitiveness. Since 2014, White served as the chief trade advisor for the Senate Committee on Finance under the leadership of Senator Wyden (D-OR). More information is available [here](#) and [here](#).
- A coalition of 11 progressive groups, are calling on Attorney General Merrick Garland to give Jonathan Kanter, “sufficient independence and discretion” in the role. “Independence includes making decisions on who to sue, when and how to settle, and who to hire. And, in particular, that means limiting interference from officials at DOJ who have histories representing Big Tech companies,” they wrote [in a letter Wednesday](#). The Senate Judiciary Committee is scheduled to hold a nomination hearing for Jonathan Kanter to be Assistant Attorney General, Antitrust Division, next Wednesday, October 6, at 10:00 a.m. ET. More info [here](#).
- Sen. Roger Wicker (R-MS), Rep. Cathy McMorris Rodgers (R-WA) and GOP FTC Commissioner Noah Phillips argue in a Washington Examiner op-ed that “FTC must leave privacy legislating to Congress.” Read the op-ed [here](#).
- Amanda Lewis, an FTC detailee to the House Judiciary antitrust panel, is returning to the agency after nearly three years with the subcommittee, where she worked on the probe into the big tech companies and the resulting antitrust package. Subcommittee Chair David Cicilline gave her a send-off at Wednesday’s House Judiciary markup.
- In a press release on Thursday, September 30, the FTC announced the Communications Security, Reliability, and Interoperability Council VIII working groups. A full description of each working group’s task is available on the CSRIC VIII webpage [here](#).
 - **Working Group 1:** 5G Signaling Protocols Security
 - Co-chairs: Brian Daly, AT&T & Travis Russell, Oracle
 - **Working Group 2:** Promoting Security, Reliability, and Interoperability of Open Radio Access Network Equipment
 - Co-chairs: Mike Barnes, Mavenir & George Woodward, RWA
 - **Working Group 3:** Leveraging Virtualization Technology to Promote Secure, Reliable 5G Networks
 - Co-chairs: Micaela Giuhart, Microsoft & John Roes, Dell
 - **Working Group 4:** 911 Service Over Wi-Fi

- Co-chairs: Mary Boyd, Intrado & Mark Reddish, APCO
 - **Working Group 5:** Managing Software & Cloud Services Supply Chain Security for Communications Infrastructure
 - Chair: Rittwik Jana, VMWare
 - **Working Group 6:** Leveraging Mobile Device Applications and Firmware to Enhance Wireless Emergency Alerts
 - Co-chairs: Farrokh Khatibi, Qualcomm & Francisco Sanchez, Harris County OHSEM
- On Friday, October 1, it was reported by POLITICO that FTC Commissioner, Rohit Chopra, was confirmed by the Senate to lead the Consumer Financial Protection Bureau. Her departure with the confirmation of Alvaro Bedoya still pending, FTC Chair Lina Khan will no longer have a Democratic majority. The Senate Commerce Committee has not yet announced a hearing to consider Bedoya's nomination. In other FTC news, Maneesha Mithal and Daniel Kaufman, two longtime privacy staffers resigned.

V. International Updates:

- The EU's plans to modernize copyright law in Europe are moving ahead. The Parliament Committee on Legal Affairs (JURI) adopted a draft of the new Digital Services Act (DSA) that would implement new copyright restrictions. In recent years the European Commission has proposed and adopted various legislative changes to help combat online piracy such as the [Copyright Directive](#) which passed in 2019 as well as the [Digital Services Act](#), which was officially unveiled last December. However, it is reported that neither side is fully satisfied with the proposed DSA legislation. Copyright holders say it doesn't go far enough, while others warn that it will lead to unnecessary restrictions on freedom of speech. Read more [here](#).

VI. Industry Updates:

- Disney's Marvel unit is suing to hold on to full control of Avengers characters including Iron Man, Spider-Man, Dr. Strange, Ant-Man, Hawkeye, Black Widow, Falcon, Thor, and others. The suits seek declaratory relief that these blockbuster characters are ineligible for copyright termination as works made for hire. In August, the administrator of Ditko's estate filed a notice of termination on Spider-Man, which first appeared in comic book form in 1962. Under the termination provisions of copyright law, authors or their heirs can reclaim rights once granted to publishers after waiting a statutory set period of time. According to the termination notice, Marvel would have to give up Ditko's rights to its iconic character in June 2023. Marc Toberoff is representing the heirs of Ditko and other creators suing Marvel. "At the core of these cases is an anachronistic and highly criticized interpretation of 'work-made-for-hire' under the 1909 Copyright Act that needs to be rectified," Toberoff said in a statement. Read more [here](#).
- Educational publishers, Macmillan Learning, Cengage Group, Elsevier, McGraw Hill, and Pearson have obtained a Preliminary Injunction from the United States District Court for the

Southern District of New York against 60 websites that sell illegal, unlicensed copies of eBooks. The operators of the pirate eBook websites use online ads to attract customers searching for legitimate content. Read more [here](#).

- In an article posted in Seeking Alpha, Mark Roussin states that Apple's stock will rise due to its new product releases as well as the recent boom of the creator economy that has been caused by the COVID-19 pandemic. "One key reason to be bullish on MacBook Pro sales moving forward is due to the explosion of content creators. The likes of YouTube and social media influencers were on the rise prior to the pandemic, but the pandemic brought an explosion of new content creators... Many refer to content creators as having their own economy, the creator economy. We have seen the explosion in the creator content from companies such as Fiverr International, which is a freelance website." Read more [here](#).
- On September 29 at 12:30 p.m. PT/3:30 p.m. ET, the LA Copyright Society will host a discussion on the CASE Act, featuring Congressman Hakeem Jeffries (D-NY) along with Copyright Alliance VP of Policy and Copyright Counsel Terrica Carrington. Congressman Jeffries will discuss the CASE Act's path to passage, and why he championed it; and Carrington will offer additional insight into the CASE Act, explaining the Copyright Alliance's efforts to secure its passage, the current state of the U.S. Copyright Office's efforts to implement the legislation, and how the small claims process will operate in practice. More information is available [here](#).