

CONTENT & TECHNOLOGY POLICY REPORT JANUARY 21, 2022



I. Congressional Updates:

- On Thursday, the Senate Judiciary Committee [reported](#) the American Innovation and Choice Online Act ([S. 2992](#)) favorably out by a 16-6 vote. The manager’s amendment offered by Sens. Klobuchar (D-MN) and Grassley (R-GA) was adopted by a voice vote. The only other amendment that was approved by the Committee was one offered by Senator Cornyn (R-TX), after it was revised by a second-degree amendment offered by Sens. Klobuchar (D-MN) and Grassley (R-IA), that seeks to prevent a covered platform from transferring consumer data to China or other foreign adversaries. The bill would prohibit tech platforms from elevating themselves over rivals from product placement to search results. According to Politico, the bill would apply to companies with a massive user base (at least 50 million people based in the U.S., or 100,000 U.S.-based business users) and economic heft (either a \$550 billion market capitalization or \$550 billion in U.S. sales). Many see that language as specifically targeting Apple, Amazon, Facebook, Google and potentially Microsoft. But it’s unclear whether a brick-and-mortar retailer like Walmart, one of the country’s largest employers, would also fall under the bill’s jurisdiction.
- The top Senate Commerce Republican Roger Wicker, called for a new hearing on Gigi Sohn’s FCC nomination, citing his desire to dig into additional ethics questions. “The possibility of the nominee’s future financial liability to a number of companies regulated by the FCC, and the timing of this settlement in relation to her nomination, demands a full discussion by the committee.” Sohn has had her fair share of obstacles during her nomination process, and it does not appear the road is any smoother for her ahead. The National Association of Broadcasters are not

Headlines and Highlights:

- The American Innovation and Choice Online Act Reported Favorably Out by 16-6 Vote
- USICA Gaining Traction Again
- FTC and DOJ Outline New Merger Guidelines
- European Parliament Passes First Draft of DSA Legislation
- Microsoft Agrees to Buy Activision for \$75 billion

In the Blogs:

- Hugh Stephens Blog: [Winnie the Pooh, the Public Domain and Winnie’s Canadian Connection](#)

actively asking Senators to oppose Sohn, but they also have concerns about her nomination. Committee Chair Maria Cantwell hopes to hold a committee vote on her nomination next week.

- On Tuesday January 18, Reps. Anna Eshoo (D-CA) and Jan Schakowsky (D-IL) along with Sen. Cory Booker (D-NJ), introduced the Banning Surveillance Advertising Act which would prohibit platforms from using personal user information to target them with digital ads.
- On Wednesday January 19, Senator Thom Tillis sent a letter to Attorney General Merrick Garland and Assistant Attorney General Jonathan Kanter regarding the DOJ's request for comment on their SEP/FRAND Policy statement. Senator Tillis stated, "I am very concerned by what appears to be the DOJ's attempt to diminish patent holders' statutory rights and undermine the judicial process by substituting the courts' judgement for its own... Antitrust and intellectual property policies need to work together to create a balanced, strong, innovation ecosystem. Unfortunately, this Draft Policy seeks to undermine the patent system... I support efforts to encourage good faith negotiation in standards licensing and I fully believe in the F/RAND process."
- Congress is still figuring out what final provisions might land in the United States Innovation and Competition Act (USICA), a top priority for tech policy leaders like Senate Commerce Chair Maria Cantwell (D-WA). Although the Senate passed a version last June, the chambers are still figuring out how to combine competing visions of the bill. There is no timing yet on a vote, but there is general agreement that sooner is better. The administration has been pressing House leadership to act on the measure, as Commerce Secretary Gina Raimondo and President Joe Biden were expected to reach out to Pelosi directly on the package, according to Sen. John Cornyn (R-TX). According to Bloomberg, Pelosi has told the chairs of several committees—including Science, Foreign Affairs and Energy and Commerce—to draft proposals for a piece of legislation the House can take to conference with the Senate, with the aim of getting a bill both chambers agree on. We are hearing that the Speaker's office hopes to introduce a House counteroffer/proposal on USICA as early as next week.
- On Wednesday, the House Small Business Committee held a [hearing](#) titled: *The Power, Peril, and Promise of the Creative Economy*. The hearing featured testimony from the following witnesses: [Carson Elrod](#) (Co-Founder of #BeAnArtsHero, and Arts Workers United), [Nataki Garrett](#) (Artistic Director of the Oregon Shakespeare Festival), [Sandra Karas](#) (Secretary-Treasurer of the Actors' Equity Association), and [Raeanne Presley](#) (Co-Owner of Presley's Theater and former Mayor of Branson). The hearing involved lawmakers evaluating the impact of the COVID-19 pandemic on the arts sector and creative economy. Witnesses provided recommendations on investments for key infrastructure and spoke about the impact of the pandemic on their small businesses and the performing arts. Legislation mentioned included The Shuttered Venue Operators Grant Program (SVOG), The Performing Arts Tax Parity Act, The HITS Act, The Arts Education for All Act, The Creative Economy and Revitalization Act, and The 21st Century Federal Writers Project.
- On Thursday, Representatives Gerry Connolly (D-VA) and Darrell Issa (R-CA) launched the bipartisan Congressional IT Modernization Caucus to help bring awareness to government's need to embrace technology and analytics to better deliver services to the American public. "The recent COVID-19 pandemic has highlighted the consequence of this inaction from the

Small Business Administrations' loan processing system crashing multiple times to the state of Connecticut website not handling more than 8,300 unemployment applications,” said Connolly. “It has become abundantly clear that to generate the necessary resilience against future crises effectively, governments at all levels must fully embrace cutting-edge technology and data analytics.” Rep. Issa added, “Our nation should not be satisfied only with a leading position in global IT modernization. America must instead commit to the pinnacle of invention, innovation, and discovery. This is the best way to meet and exceed competition from China and safeguard our technological independence. This bipartisan caucus has a key role to play.” Read more [here](#) and [here](#).

II. USCO Updates:

- Librarian of Congress Carla Hayden reappointed Judge David R. Strickler as Copyright Royalty Judge (economics) to a six-year term. Judge Strickler has served in the position since May 2013, when then-Librarian James H. Billington appointed him to fill a vacancy and complete the term of his predecessor. In 2016, Hayden reappointed Judge Strickler to a six-year term.
- On January 20, 2022, the U.S. Copyright Office released its [2022–2026 Strategic Plan, *Fostering Creativity and Enriching Culture*](#), which sets out its goals for the next five years. The plan seeks to benefit the public by expanding the Office’s outreach, improving integration of data and technology, and continuing to provide expertise to the copyright community as a whole. The plan articulates four overarching goals: Copyright for All, Continuous Development, Impartial Expertise, and Enhanced Use of Data. “The Office is adapting and responding to new demands, needs, and expectations,” said Shira Perlmutter, Register of Copyrights. “This strategic plan builds on our strong foundations and charts a course for future initiatives.” For more information about the strategic plan, download or view the complete document [here](#).

III. Judicial Updates

- In a State Attorneys General suit that was unsealed last Friday, alleges that Google deceived both advertisers and website publishers by manipulating online ad auctions to ensure that Google would profit. This will add fuel to the fire for antitrust advocates on the Hill. Read more [here](#).
- On Wednesday, Texas Attorney General Ken Paxton filed another suit against Google, alleging they violated state law with radio ads by demanding that iHeartRadio personalities record personal endorsements of their new Pixel 4 phone even though they had never used them.
- On Thursday, Epic Games filed its opening brief to the Ninth Circuit Court of Appeals, which seeks to overturn their previous ruling that Apple’s control of the App Store does not qualify as a monopoly. “Epic proved at trial that Apple restrains

trade...by contractually requiring developers to exclusively use Apple’s App Store to distribute apps and Apple’s IAP for payments for digital content within apps,” the filing reads. “If not overturned, [the district court] decision would upend established principles of antitrust law and... undermine sound antitrust policy... The district court’s factual findings make clear, that Apple’s conduct is precisely what the antitrust laws prohibit.” Read more [here](#).

IV. Administration Updates:

- On January 18, 2022, a joint virtual press conference was held by the FTC and DOJ, which laid out how both agencies will review and update guidelines on mergers. FTC Chair Lina Khan began by stating that global deal-making soared to \$5.8 trillion in 2021, and the DOJ received more than double the merger filings over the past five years. She emphasized that consolidation and weakened competition from illegal mergers deny Americans the benefits of open economies, leading to massive fees for investment banks, and a lack of competition leaving segments of the economy brittle. The FTC wants merger guidelines to fit the modern economy. Jonathan Kanter, the Assistant Attorney General of the Antitrust Division, presented the DOJ and FTC’s goals for learning from market participants about what is working, and what is not. He stated both agencies want to learn from the general public and that the American people should share their views with the agencies, and that after an initial comment period the agencies would be releasing a draft of the guidelines to seek even further comment before finalizing.

V. International Updates:

- This week, the European Parliament approved the Digital Services Act (DSA) with several key changes. The legislation adds a right for people to use and pay for online services anonymously while the amendments to ban site blocking and upload filters were voted down by the majority. While the act itself passed by a wide majority, the aforementioned amendment was blocked by a 242-434 vote. According to TorrentFreak, the adopted text is not final yet, but will serve as a starting point for negotiations with the European Council and Commission where future changes could be adopted. Read more [here](#).
- Earlier this week the Guardian reported that the UK Intellectual Property office has paused its plans to change UK Copyright laws post Brexit at the request of authors. Writers and publishers had feared that if the “copyright exhaustion” rule were changed, governing when the control of a rights holder over the distribution of their property expires, it could lead to a flood of cheap international editions of books. The news was welcomed by the Save Our Books campaign, organized by the Publishers Association. “We are delighted that the government has chosen to maintain the UK’s gold standard copyright regime, which our world-leading creative industries are built on, and that ministers have listened to authors, readers and the wider industry on the risks of any change,” said PA chief executive Stephen Loting. Read more [here](#).

VI. Industry Updates:

- On Wednesday, January 12, 28 property rights advocacy groups sent a letter addressed to US Attorney Merrick Garland and US Assistant Attorney General for Antitrust Jonathan Kanter, stating their concerns that the draft policy statement on licensing negotiations for standard essential patents (SEPs) subject to fair, reasonable and non-discriminatory (FRAND) licensing obligations weakens IP rights in favour of big tech implementers and Chinese manufacturers infringing on IP rights. Read the full letter [here](#).
- The Wall Street Journal reported on Tuesday that Microsoft has agreed to buy Activision in an all-cash deal valued at \$75 billion. Read more [here](#).
- On Thursday, TIME magazine reported that Intel has committed \$20 billion to build a semiconductor manufacturing plant in New Albany, Ohio. Construction will begin this year with the expectation that the plant will be operational by 2025. Intel expects to hire at least 3,000 new employees that will manage two factories on the 1,000-acre site. “Our expectation is that this becomes the largest silicon manufacturing location on the planet,” Intel CEO Pat Gelsinger told TIME; the company has the option to eventually expand to 2,000 acres and up to eight fabs. “We helped to establish the Silicon Valley,” he said. “Now we’re going to do the Silicon Heartland.” Read the full article [here](#).