

## CONTENT & TECHNOLOGY POLICY REPORT JULY 19, 2019



### I. Congressional Updates:

- On Thursday, the Senate Judiciary Committee reported the *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019* ([S. 1273](#)) favorably out of the Committee by a voice vote. This bipartisan and bicameral legislation, which enjoys broad support across creative industries, would 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. During the markup, Ranking Member Dianne Feinstein (D-CA), as well as Sens. John Cornyn (R-TX), Ted Cruz (R-TX), and Richard Blumenthal (D-CT) signed onto the bill as co-sponsors.
- Next Tuesday, July 23<sup>rd</sup> at 2:30 p.m. ET, the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights will hold a hearing titled, “Oversight of the Enforcement of the Antitrust Laws.” Federal Trade Commission (FTC) Chairman Joseph Simons and Department of Justice (DOJ) Antitrust Division Assistant Attorney General Makan Delrahim are slated to testify before the subpanel. More info. [here](#).
- On Tuesday, July 30<sup>th</sup>, at 2:20 p.m. ET, the Senate Judiciary Subcommittee on IP will hold a hearing titled “Oversight of the United States Copyright Office.” Register of Copyrights and Director of the U.S. Copyright Office Karyn Temple is the sole witness scheduled to testify before the Subcommittee. More info. [here](#).
- On Tuesday, the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law held a hearing titled “Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship.” The purpose of the

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- Senate Judiciary Committee reports *CASE Act* favorably out of Committee by a voice vote.
- Senate Judiciary antitrust subpanel to convene hearing titled “Oversight of the Enforcement of the Antitrust Laws” next Tuesday, July 23<sup>rd</sup>.
- Senate Judiciary IP Subcommittee to hold oversight hearing of U.S. Copyright Office on July 30<sup>th</sup>.
- Rep. Mary Gay Scanlon raises concerns about copyright infringement on YouTube during hearing.
- YouTube changes manual copyright claims process to address creators’ concerns.

### In the Blogs:

[Google’s “Stoush” with New Zealand: Who Will Prevail?](#)

Hugh Stephens Blog  
July 16 by Hugh Stephens

[EFF Sides With Goliath \(again\) in Opposition to CASE Act](#)

Illusion of More  
July 11 by David Newhoff

hearing was to examine the current state of the marketplace for digital platforms, and to determine whether the current dominant players in the market (Google, Facebook, Amazon, and Apple) are engaged in anti-competitive conduct or are otherwise negatively affecting innovation in the startup economy. Amazon received a significant share of the questioning, as it was accused of not properly policing its marketplace, using seller data to inform its own decisions about its private brand, and prioritizing its own products in the platform's search function. Google was also questioned about using search optimization to steer consumers towards Google services. Facebook did not receive as much attention, although one notable moment occurred when Facebook had difficulty naming a competitor in the social media marketplace. Apple was questioned about its App Store being a barrier to entry for developers, but otherwise almost completely avoided the spotlight. More info. [here](#).

- During the hearing in the House Judiciary Antitrust Subcommittee on Tuesday, Representative Mary Gay Scanlon (D-PA) asked about the impact of copyright theft on the competitive process, relaying concerns raised to her by [Creative Future](#). She specifically noted that YouTube does not have an “economic incentive to combat” this type of theft, and asked Google to explain its process for addressing online piracy. Adam Cohen, Director of Economic Policy at Google, responded by stating that YouTube uses a tool called “content ID” that recognizes copyrighted material and “instantaneously” prevents it from being uploaded, in addition to taking down infringed material. Rep. Scanlon also expressed concern that there is a discrepancy between the enforcement of copyrighted TV shows produced by Google and other platforms, but Google stated that there was no evidence of such a discrepancy.
- On Tuesday, the Senate Judiciary Subcommittee on the Constitution held a hearing titled “Google and Censorship through Search Engines.” There appeared to be a bipartisan consensus that Google routinely fails to sufficiently enforce or clearly communicate their standards for content moderation, although Democrats and Republicans disagreed about whether Google's content moderation policies are politically biased. Republicans, such as Chairman Ted Cruz (R-TX) and Senator Josh Hawley (R-MO), attributed this failure to regularly enforce content standards as evidence that Google stifles conservative opinions. Conversely, Democrats generally argued that while Google's inconsistent enforcement of their content guidelines and unwillingness to cooperate with legislators sets a dangerous precedent, there is little evidence that Google moderates their content in a way that demonstrates political bias. Revising Section 230 of the Communications Decency Act was floated as a means of addressing both Google's political bias and their alleged unwillingness to heighten enforcement standards throughout the hearing. In the first panel, Republicans referenced leaked internal documents from Google, Google's unwillingness to submit to an independent audit, and Google's irregular enforcement of takedown policies for political content as evidence of the necessity of Section 230 revisions. Republicans argued that by diminishing big tech platforms' access to the liability shield afforded to them by Section 230, big tech platforms would be forced to take an active approach to politically neutral content moderation. While Democrats were not entirely dismissive of revising Section 230, they focused on revising Section 230 as a means of holding platforms' accountable for policing incendiary content found on their services. More info. [here](#).
- On Thursday, the House Judiciary IP Subcommittee held a hearing titled “Counterfeits and Cluttering: Emerging Threats to the Integrity of the Trademark System and the Impact on American Consumers and Businesses.” The hearing featured testimony from the following witnesses: [Mary Boney Denison](#) (Commissioner for Trademarks, USPTO), [Jeanne Fromer](#)

(Professor of Law, New York University School of Law), [Peter M. Brody](#) (Partner, Ropes & Gray, LLP), [Joseph Cammiso](#) (President, Automotive Anti-Counterfeiting Council, Inc), [Robert Barchiesi](#) (President, International AntiCounterfeiting Coalition), and [Rebecca Mond](#) (Vice President, Federal Government Affairs, The Toy Association). Members focused on the apparent influx in fraudulent trademark applications from China, as well as the spread of counterfeit products through e-commerce platforms. Full Committee Ranking Member Doug Collins (R-GA) called out American e-commerce platforms for not participating in the discussion, stating, “I know that Amazon, eBay and Walmart are listening.” Ranking Member Collins also pointed out that the e-commerce platform Alibaba, which is headquartered in China, has worked to curb counterfeit products by leveraging cutting-edge technology and expressed his disappointment that “U.S. counterparts are so far behind.” More info. [here](#).

- In a letter to the FTC on Tuesday, Senators Edward Markey (D-MA), Josh Hawley (R-MO), and Richard Blumenthal (D-CT) claim that the Facebook settlement with the FTC, as reported by *The Wall Street Journal*, is “woefully inadequate.” The Senators caution that a \$5 billion fine is not a sufficient monetary penalty to “alter the incentives and behavior of Facebook and its peers.” The group of lawmakers ask the FTC commissioners a series of questions, including “What was the FTC’s process for determining the size of the monetary fine in this settlement?”— and ask to receive answers to their questions by August 6<sup>th</sup>, 2019. Read more [here](#).

## II. Judicial Updates:

- On Thursday, U.S. District Judge Pamela Chen dismissed a copyright infringement complaint brought by Xclusive-Lee against supermodel Gigi Hadid for posting a paparazzi photo of herself on Instagram because Xclusive-Lee did not obtain a copyright registration of the work before filing the lawsuit. Furthermore, Judge Chen declined to allow the agency to refile the complaint once receiving a copyright registration with the U.S. Copyright Office. Chen cites a federal court decision from April that suggested that such an action would make the registration requirement a “meaningless formality.” Read more [here](#).
- A copyright infringement trial over Katy Perry’s song “Dark Horse” convened this week. Christian rapper Marcus Gray, along with co-writers Chike Ojukwu and Emanuel Lambert, claim that Katy Perry’s 2013 hit infringes Gray’s trademark on “Joyful Noise” by copying its underlying beat. U.S. District Court Judge Christina Snyder had previously denied the defendants’ motion for summary judgment, claiming that the plaintiffs “demonstrated a triable issue of fact as to access because ‘Joyful Noise’ achieved critical success, including a Grammy nomination, and was readily available and viewed millions of times on YouTube and Myspace.” Attorney Christine Lepera has countered that it is not “common sense” that the defendants in the case, including Katy Perry and producer Lukasz "Dr. Luke" Gottwald, would have heard head “Joyful Noise” prior to writing and producing “Dark Horse.” She has also argued that “Joyful Noise” is a derivative work because its instrumental track was created by Ojukwu separately, and the copyright therefore does not extend to the pre-existing beat. Read more [here](#) and [here](#).

## III. Administration Updates:

- On Friday, Register Karyn Temple penned a blog for the Library of Congress highlighting recent Copyright Office activity and discussing next steps to implement the Orrin G. Hatch–

Bob Goodlatte Music Modernization Act (MMA). Register Temple highlighted the recent designations of both a mechanical licensing collective (MLC) and a digital licensee coordinator (DLC). Temple wrote that the appointed entities, the Mechanical Licensing Collective Inc. and the Digital Licensing Collective Inc., for the MLC and DLC respectively, will work together to make the implementation of the new licensing scheme a success. Register Temple pointed out that the Copyright Office will now turn “toward ensuring that the proper regulatory procedures are in place prior to the upcoming license availability date of January 2021.” Specifically, Temple noted that the Copyright Office will begin rulemakings relevant to the MMA, and substantial public outreach. More info. [here](#).

- Reports surfaced late last week that the Federal Trade Commission (FTC) voted to approve a \$5 billion settlement with Facebook over the social media platform’s alleged privacy missteps. Commissioners apparently approved the settlement on a party-line vote, with three Republicans endorsing the proposal and the two Democrats on the panel rejecting it. The FTC’s investigation focused on whether Facebook’s actions surrounding the Cambridge Analytica scandal, in which tens of millions of users’ data improperly wound up in the hands of the data firm that worked on President Trump’s 2016 campaign, violated a 2012 consent decree with the agency where Facebook agreed to better protect user privacy. Read more [here](#).
- On Monday, President Trump told reporters that he has backup plans if legislation to implement the United States–Mexico–Canada Agreement (USMCA) fails to advance in Congress. “If it doesn’t happen, I have a better plan, okay?” Trump insisted. “So don’t worry about it. You always have to have plan B, plan C – especially in politics.” President Trump did not elaborate on what his backup plans might entail, although some stakeholders have questioned whether he is referencing his earlier threat to pull out of the North American Free Trade Agreement (NAFTA) if Congress does not send legislation to implement the USMCA to his desk. Read more [here](#).
- In an editorial in *The Washington Post* published Sunday, Vice President Mike Pence urged Congress to pass legislation to implement the USMCA. He touts the pact’s expected benefits, citing the U.S. International Trade Commission (ITC) analysis projecting that the deal would add \$68 billion to the U.S. economy once fully implemented and help create more than 176,000 jobs. He also underscores the labor and environmental standards enshrined in the pact, which have been a point of concern for Democrats. Vice President Pence writes that the “historic trade deal” would “help ensure that workers’ rights are protected, that America’s wildlife and natural resources are better preserved, and that hard-working Americans who are the nation’s backbone – from workers to family farmers – have the chance to succeed and thrive.” Read more [here](#).

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

- *POLITICO* reports that European Commission Director General for Trade Sabine Weyand will travel to DC next week to continue talks with the Trump Administration as part of an ongoing effort to negotiate a free trade agreement. Weyand is expected to arrive in town on Sunday, July 21<sup>st</sup>, and stay until Tuesday, July 23<sup>rd</sup>. In addition to attempting to restart the currently stalled free trade negotiations, Weyand is expected to discuss other contentious issues with her U.S. counterparts, including the threat of U.S. section 232 auto and auto part tariffs, as well as the Airbus-Boeing trade subsidy dispute. Read more [here](#).

- House Ways & Means Trade Subcommittee Earl Blumenauer (D-CT) is traveling with a bipartisan group of House lawmakers to Mexico this weekend to study the country's current labor standards. Trip participants include Reps. Ron Kind (D-WI), Terri Sewell (D-AL), Judy Chu (D-CA), Don Beyer (D-VA), Stephanie Murray (D-FL), Jimmy Gomez (D-CA), Rosa DeLauro (D-CT), Filemón Vela (D-TX), and George Holding (R-NC). Mexico's labor standards have been a focal concern for Democrats reviewing the USMCA. At a Ways & Means Trade Subcommittee [hearing](#) last month, Democrats seemed united in their concern that Mexico's four-year implementation plan for its recently-passed labor reform legislation is too ambitious, given that policymakers in Mexico are facing severe spending cuts and entrenched institutions that benefit from the current system have already launched legal challenges against the reforms.

## V. Industry Updates:

- Last week, YouTube announced that it is revamping how it processes manual copyright claims to address concerns raised by creators about the current system. As reported by *The Verge*, copyright owners will now need to specify where their copyrighted material allegedly appears in a video, which is intended to help creators swiftly verify the infringement claims and edit out the infringing content to avoid potential repercussions. Read more [here](#).
- Senator Marsha Blackburn (R-TN) told *POLITICO* that her new Senate Judiciary tech task force is planning to hold a roundtable before the August congressional recess to consider potential competition issues in the tech sector. "We want to hear from businesses of each size, large to small, that are utilizing the virtual marketplace and hear how they view competition," Sen. Blackburn said. Read more [here](#).
- Speaking at the National Conservatism Conference on Sunday, billionaire investor and Facebook board member Peter Thiel urged the federal government to investigate Google for allegedly aiding the Chinese military. Thiel indicated that the internet search company's artificial intelligence project known as DeepMind has been "infiltrated" by foreign intelligence operators, and claimed that Google's decision to help China develop a censored search engine while not renewing a contract with the U.S. government was "seemingly treasonous." President Trump responded to Thiel's call to action on Twitter Tuesday, announcing that the Administration "will take a look!" Peter Thiel is considered one of Silicon Valley's highest-profile Trump supporters. Read more [here](#) and [here](#).