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CONTENT & TECHNOLOGY POLICY REPORT OCTOBER 2, 2020



I. Congressional Updates:

- On Wednesday, the House Judiciary Committee held a hearing titled “Copyright and the Internet in 2020: Reactions to the Copyright Office’s Report on the Efficacy of 17 U.S.C. 512 After Two Decades.” [Jeffrey Sedlik](#) (PLUS Coalition) testified that service providers have refused to use the readily available technologies to identify and mitigate copyright infringement and instead hide in the safe harbor of 512. Meanwhile, Sedlik lamented that enforcing rights under the Digital Millennium Copyright Act (DMCA) is an impossible task for all creators. [Meredith Rose](#) (Public Knowledge) said that while the Copyright Office’s “herculean” effort to evaluate Section 512 was appreciated, their report dismisses, in her eyes, the concerns of everyday users by “presenting user interests as co-extensive with those of platforms.” [Jonathan Band](#) (Library Copyright Alliance) disagreed with the U.S. Copyright Office’s assessment that the balance in section 512 is “askew” and argued that it is “entirely speculative” whether changing the safe harbors would even benefit copyright owners economically given that “the majority of infringing content is hosted overseas, beyond the reach of U.S. law.” Like Band and Rose, [Matt Schruers](#) (CCIA) was critical of the Copyright Office’s 512 report, which he called of “limited use for policymaking.” [Terrica Carrington](#) (Copyright Alliance) testified that, although Section 512 seemed to have achieved Congress’ purpose when it was first enacted, over the past twenty-two years, court rulings and other unanticipated changes have rendered these provisions less effective. Carrington further stated that the online service providers’ (OSP) statements that the Section 512 regime is working just fine juxtaposed with the creative community lamenting its ineffectiveness is proof that the system is broken. Among her suggestions

Headlines and Highlights:

- House Judiciary Committee holds hearing on Section 512 Report.
- Ahead of releasing the Big Tech antitrust probe report, House Judiciary Antitrust Subcommittee holds hearings on proposals to strengthen antitrust laws.
- Sens. Manchin and Cornyn introduce Section 230 CDA reform bill targeting illicit sale of opioids and other drugs.
- Copyright Office hosts third and final STM discussion.
- Google says it is close to deal with Australian authorities on controversial news proposal.

In the Blogs:

[Giving the Middle Finger to the Middle Kingdom, and Others: A Tale of “Public Morality, Design, and Just Possibly Copyright](#)

Hugh Stephens Blog

September 28 by Hugh Stephens

[DMCA Hearing 5: More Consensus Than You Might Think on Section 1201](#)

Illusion of More

September 24 by David Newhoff

for improving the 512 regime, Carrington urged Congress to pass the *CASE Act* to present an alternative forum for copyright dispute settlement and implement Standard Technical Measures that OSPs are incentivized to use and implement. Finally, [Morgan Grace Kibby](#) (Singer and Songwriter) testified that Section 512 it is jeopardizing the livelihood of musicians and sabotaging the legitimate marketplace that they rely on. Watch the full hearing [here](#).

- On Thursday, the House Judiciary Antitrust Subcommittee held a hearing titled, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online.” Witnesses included [William Baer](#) (Visiting Fellow – Governance Studies Brookings Institution); [Zephyr Teachout](#) (Associate Professor of Law Fordham University School of Law); [Michael Kades](#) (Director of Markets and Competition Policy Washington Center for Equitable Growth); [Sabeel Rahman](#) (President Demos); [Christopher Yoo](#) (John H. Chestnut Professor of Law, Communication, and Information Science University of Pennsylvania Carey Law School); [Rachel Bovard](#) (Senior Director of Policy Conservative Partnership Institute); [Tad Lipsky](#) (Antonin Scalia Law School George Mason University); and [Sally Hubbard](#) (Director of Enforcement Strategy Open Markets Institute). Although the committee is [reportedly](#) planning to release the report from its big tech antitrust probe next week, Chairman David Cicilline’s (D-RI) testimony may have shed insight into what the forthcoming report will include. Reforms discussed during the hearing fell into five areas: changing some antitrust statutes to shift the burden of proof, separating the lines of business, more rigorous enforcement of antitrust law, a reversal of court decisions that have allegedly misinterpreted the intent of Congress, and provisions to prohibit discriminatory behavior. Rep. Ken Buck (R-CO) has emerged as the leader on the Republican side in calling for bipartisan antitrust reforms. While defending the consumer welfare standard, he acknowledged that there is a breakdown in the digital economy as a small number of tech giants are using anticompetitive means to grow their market dominance and control the channels of distribution. As such, Buck signaled support for moderate changes, such as increasing the resources given to antitrust enforcers and possibly “shifting the burden of proof” on what constitutes an anticompetitive merger. Watch the full hearing [here](#).
- On Wednesday, the Senate Commerce Committee unanimously approved authorizations to issue subpoenas to compel testimony of Jack Dorsey (Chief Executive Officer, Twitter); Sundar Pichai (Chief Executive Officer, Alphabet Inc., Google); and Mark Zuckerberg (Chief Executive Officer, Facebook). A statement from the committee explains that the CEOs had not agreed to repeated requests to testify at a hearing on Section 230 of the Communications Decency Act (CDA). “Technology companies argue that their broad liability shield should remain in place,” Chairman Roger Wicker (R-MS) declared. “However, they disproportionately suppress and censor conservative views online. Public testimony from these CEOs is critical as the Committee considers several proposals to reform the Communications Decency Act.” Read the full statement [here](#).
- On Tuesday, Senators Joe Manchin (D-WV) and John Cornyn (R-TX) introduced legislation to stop the illicit sale of opioids and other drugs online by amending CDA Section 230 to require companies to report illegal activity on their online platforms. The *See Something, Say Something Act* seeks to create a system similar to the Bank Secrecy Act by authorizing the creation of an office within the Department of Justice (DOJ) to act as the clearinghouse for reports of suspicious activity, similar to the Financial Crimes Enforcement Network (FinCEN) within the Department of Treasury. This is the latest in a flurry of proposals over the last few months to reform the 1996 statute. Read a press release from Manchin’s office

[here](#), and a one-pager on the bill [here](#).

- On Wednesday, dozens of influential filmmakers joined the National Association of Theatre Owners, the Directors Guild of America, and the Motion Picture Association in a letter urging congressional leadership to help struggling theater owners impacted by COVID-19. The letter cautions that without federal assistance, cinemas may not survive. 93% of exhibition companies weathered losses of 75% in Q2 2020 after moviegoing came to an unprecedented stop in mid-March. Furthermore, while more than half of theaters have now reopened, Hollywood continues to delay its major fall releases due to the pandemic. The letter also underscores that theaters support “millions of jobs in movie production and distribution, and countless others in surrounding restaurants and retailers that rely on theaters for foot traffic.” Theaters are also leaders in employing individuals with disabilities, senior citizens, and first-time job holders. The letter therefore urges congressional leadership to work in a bipartisan fashion to redirect unallocated funds from the *CARES Act*, or authorize new assistance programs for those businesses that have suffered the steepest revenue drops as a result of COVID-19. Read more [here](#).

II. Judicial Updates:

- Last Saturday, an Illinois federal judge issued a partial summary judgement determining that WWE and Take-Two Interactive Software, the publisher of the WWE 2K series of video games, copied tattoo artist Catherine Alexander’s work in its video game. Now a jury will decide whether that rises to copyright infringement. Alexander, the tattoo artist for WWE superstar Randy Orton, said she was “laughed at” when she reached out to negotiate with the video game maker after she learned that it was planning to roll out a feature offering faux sleeves for players pretending to be their favorite wrestler. *The Hollywood Reporter* points out that in a similar case last March, a New York judge decided that the small display of tattoos on NBA stars LeBron James, Kenyon Martin, and Eric Bledsoe were not substantially similar to what were on the basketball players, and even otherwise, the use of copyrighted material was *de minimis*, there was a reasonable inference of an implied license, and the video game maker had a good case for fair use. Read more [here](#).
- On Monday, the federal judge presiding over the antitrust lawsuit between Apple and Epic Games repeatedly slammed Epic on its legal theories and tactics. Epic – the maker of the video game Fortnite – is seeking a temporary court order to force Apple to unblock the video game from its iOS App Store. Apple removed Fortnite this summer after Epic pushed a software update allowing players to circumvent Apple’s proprietary in-app payment system. Judge Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California did not offer a timeframe for a decision on the injunction, but indicated that given her schedule, the case is not likely to go to trial until July 2021. She also said that she would prefer the case to be tried before a jury. Read more [here](#).

III. Administration Updates:

- On Wednesday, the U.S. Copyright Office launched a webpage dedicated to DMCA. In a recent report on Section 512 of Title 17, USCO found that educational initiatives and resources might help to address certain imbalances under the current framework by reducing the number of inappropriate notices and counter-claims that appear to arise from a lack of awareness or understanding of the law. The new webpage consolidates information and resources on various aspects of the DMCA, including section 512’s safe harbors and notice-

and-takedown system, section 1201's anticircumvention provisions, and section 1202's copyright management information protections. Find the new webpage [here](#).

- On Tuesday, USCO held its third and final discussion on Standard Technical Measures (STM). The panel was moderated by Katie Alvarez, Counsel for Policy and International Affairs with USCO, and featured remarks from Jonathan Band (Owner, Jonathan Band PLLC, representing Library Copyright Alliance); Heather Johnson (CEO, Ninety9Lives); Joshua Lamel (Executive Director, Re:Create); and Braxton Perkins (Senior Vice President, Intellectual Property Analytics, Operations & Technology, NBCUniversal). Band argued that the establishment of STMs may be unnecessary, as sections 1201 and 1202 have evolved to take on the protections of Section 512. Perkins argued that Band's characterization of the viability of Section 512 misses the current reality of Section 512 protections. Perkins stated that filtering is already being applied at scale, and STMs would be valuable, as standardizing the use of technology like automatic content recognition technology would strengthen copyright protections. Johnson supported smaller creators, arguing that STMs would help strike a balance and provide better representation to participants currently left out of the dialogue. Finally, Lamel focused his remarks on providing future, actionable solutions for the Copyright Office. Lamel supported further panel discussions where a cross section of the copyright environment is represented.
- On Thursday, the Office of the United States Trade Representative (USTR) published a request for comments identifying online and physical markets to be considered for inclusion in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (Notorious Markets List). The Notorious Markets List identifies examples of online and physical markets that reportedly engage in and facilitate substantial copyright piracy or trademark counterfeiting. The issue focus for the 2020 Notorious Markets List will examine the use of e-commerce platforms and other third-party intermediaries to facilitate the importation of counterfeit and pirated goods into the United States. Written comments are due by November 22nd. Read the Federal Register notice [here](#).

IV. International Updates:

- Reports surfaced this week that China is preparing to launch an antitrust probe into Google over allegations that the search company has leveraged the dominance of its Android mobile operating system to stifle competition. Sources told *Reuters* that the case was proposed by Huawei last year and has been submitted by China's top market regulator to the State Council's antitrust committee for review. The investigation comes as the country embarks on a major revamp of its antitrust laws, with potential dramatic increases in maximum fines and expanded criteria for judging a company's control of the market. The States Administration for Market Regulation and the State Council did not immediately respond to *Reuters*' requests for comments. Furthermore, Google did not provide immediate comment, and Huawei declined to comment. Read more [here](#).
- Google said on Tuesday that it is close to reaching a deal with Australian authorities on proposed legislation that would force the search giant to pay publishers to distribute portions of their content. Google's approach to the controversial proposal stands in contrast to Facebook's [threat](#) to block users in Australia from sharing news on the social media platform if the reforms are enacted. Mel Silva, Google's managing director for Australia and New Zealand, said that Google is looking to revise the proposal to make it fair, rather than scrap it entirely. Silva claimed that in its current form, the Australian code would compromise

popular Google services like Search and YouTube. The search giant is therefore advocating for changes to the proposal in three main areas: (1) negotiations should take into account the value both sides bring to the table; (2) Google shouldn't have to share any data beyond what publishers are already entitled to see; and (3) requirements for platforms to share algorithm changes with publishers should be less onerous. "We really do think we can get there," Silva declared. Read more [here](#).

- The *South China Morning Post* reports that despite a summer spending spree, China is not on track to meet the purchase commitments agreed upon under the limited "phase one" trade deal signed earlier this year. Specifically, analyzing data through August, researchers found that China had bought less than one-third of U.S. exports that President Donald Trump pledged that it would purchase this year under the "historic" deal. Nevertheless, figures suggest that China is making a good faith effort to bolster purchases and keep the trade deal alive. Sales of corn to China soared 513% in August compared with June, while soybean sales surged 432% and car sales were up 97%. Of particular interest were China's imports of U.S. cotton, which rose 44% in the two months leading to August, despite the U.S. placing Chinese apparel and garment companies on an Entity List, banning them from accessing U.S. goods. Read more [here](#).

V. Industry Updates:

- *Billboard* reports that Ceci Kurtzman has been elected to Warner Music Group's (WMG) board of directors, including the nominating and corporate governance committee, effective October 1st. Kurtzman is the founder of Nexus Management Group, a former talent management and current investment company where she has worked with brands and superstar artists including Shakira and Alicia Keys. Prior to founding Nexus, she worked as director of artist development and special projects at Arista Records and as VP of worldwide marketing at Epic/Sony Music. Kurtzman is the first WMG board appointment since the company went public in June. "Music already has unprecedented reach and impact across the globe, and every day the opportunities grow more dynamic, disruptive, and ubiquitous," Kurtzman said in a statement. "Warner is uniquely positioned in this exciting environment, with an extraordinary roster of artists and songwriters, backed by a forward-thinking leadership team across both recorded music and music publishing. I'm looking forward to working with my new colleagues on the WMG Board to help the company innovate and achieve its ambitious vision." Read more [here](#).