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CONTENT & TECHNOLOGY POLICY REPORT OCTOBER 9, 2020



I. Congressional Updates:

- On Tuesday evening, the majority staff of the House Judiciary Antitrust Subcommittee issued their final report in the Big Tech investigation, titled “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations.” Finding that Apple, Amazon, Google, and Facebook have abused their market power, the 449-page memo proposes many sweeping legislative reforms to combat their alleged monopolistic practices. This includes proposals to impose structural separations and prohibit dominant platforms from entering adjacent lines of businesses; change the presumption for mergers by dominant platforms; prevent dominant platforms from preferencing their own services; and to increase the Federal Trade Commission (FTC) and Department of Justice Antitrust Division budgets. Read the full report [here](#).
- Following the release of the Democratic antitrust report, House Judiciary Committee Republicans released two reports of their own. First, the minority staff, led by Ranking Member Jim Jordan (R-OH), issued a memo titled “[Reining in Big Tech’s Censorship of Conservatives](#).” Reps. Doug Collins (R-GA), Ken Buck (R-CO), Matt Gaetz (R-FL), and Greg Steube (R-FL) signed onto the memo, which expressed concern about bias, censorship, and “cancel culture.” The memo claims that antitrust laws do not need to be updated and instead calls on Congress to reconfigure liability protections under Section 230 of the Communications Decency Act (CDA). Additionally, Reps. Buck, Collins, Gaetz, and Andy Biggs (R-AZ) released a memo titled “[The Third Way](#).” The memo outlines areas where the members agree with the majority. Specifically, the Republicans agree that more resources should be allocated for federal antitrust agencies, as long as this is not

Headlines and Highlights:

- House Judiciary Antitrust Subcommittee majority staff release Big Tech report.
- House E&C Democrats demand in letter to Bezos details on how Amazon notifies customers of counterfeit products.
- Apple TV + joins anti-piracy coalition ACE.
- Supreme Court hears oral arguments in copyright dispute between Google and Oracle.
- Google poised to reach deal to pay French publishers for their news.
- USCO to hold tenth modernization webinar on October 28th.

In the Blogs:

[Did Google Just Blink?](#)

Hugh Stephens Blog
October 5 by Hugh Stephens

[DMCA Review Should Be About Copyright, No?](#)

Illusion of More
October 4 by David Newhoff

coupled with “a new regulatory agency or other harmful rulemaking that will only serve to further benefit Big Tech.” Furthermore, they urge conservatives to consider supporting “very limited” legislative changes to provide consumers with a data portability standard “that is similar to transferring cell phone numbers.” Finally, Rep. Buck and his colleagues assert that it would be appropriate for Congress to remind the antitrust agencies and the courts of the original Congressional intent behind antitrust laws, namely that enforcement agencies should be able to bring cases based on potential competition doctrine without facing impossible evidentiary burdens.

- News surfaced this week that the Senate Commerce Committee is planning to hear testimony from the CEOs of Facebook, Google, and Twitter on October 28th. The Committee voted last week to authorize subpoenas for Mark Zuckerberg, Sundar Pichai, and Jack Dorsey to force them to testify if they did not agree to do so voluntarily. A [statement](#) from Chairman Roger Wicker (R-MS) suggests that CDA Section 230 will be the main focus of the hearing. Read more [here](#).
- On Wednesday, House E&C Chairman Frank Pallone Jr. (D-NJ) and Consumer Protection and Commerce Subcommittee Chair Jan Schakowsky (D-IL) wrote to Amazon CEO Jeff Bezos urging him to investigate why AmazonBasics products have been exploding and starting fires. “We have long been concerned with the proliferation of recalled, defective, mislabeled, counterfeit, and fundamentally unsafe products sold on Amazon.com,” the letter declares. Furthermore, while AmazonBasics products often garner “Amazon’s Choice” or “Bestseller” labels, the lawmakers note that many of these products are manufactured in China. The letter provides a series of questions on the matter for Amazon to answer by October 21st. For instance, it asks for details on how Amazon notifies customers who have purchased products later recalled, or found to be counterfeit, mislabeled, or otherwise unsafe. Read the full letter [here](#).
- *Morning Consult* reports that Reps. Michael Burgess (R-TX), Bob Latta (R-OH), and Cathy McMorris Rodgers (R-WA) are all vying to step into Rep. Greg Walden’s (R-OH) post as top Republican on the House Energy & Commerce Committee after he retires at the end of the year. *Morning Consult* spoke with each of the candidates about their tech priorities and how they would lead the wide-reaching committee. Rep. Burgess, the most senior, eligible Republican member for the E&C post, explained that the increased reliance on internet access and connectivity across the U.S. is informing his approach to legislating on tech. He would work to ensure that medical providers and patients can access telehealth. Rep. Latta, on the other hand, is well known for his work in the communications sector, as well as his continued push for autonomous vehicle legislation. Looking ahead, Rep. Latta said he would focus on pursuing “light-touch regulations” to help entrepreneurs pursue emerging technologies, while also weighing potential consumer protection ramifications. Finally, Rep. McMorris Rodgers said that one of the “big disappointments” of this Congress has been the lack of progress on a national privacy standard. Read more [here](#).

II. Judicial Updates:

- On Wednesday, the Supreme Court heard oral arguments in the high-profile, \$9 billion copyright dispute between Google and Oracle. Oracle argues that Google infringed its copyrights on its Java application programming interface to build out its Android mobile operating system. Google contends that the code it copied was purely functional, and the search giant’s engineers authored all parts of the code that could be said to be creative and

subject to copyright protection. *CNBC* reports that Justice Stephen Breyer appeared to lean toward Google during the hour-and-a-half session, while Chief Justice John Roberts seemed sympathetic to Oracle's copyright claims. Justices Brett Kavanaugh and Samuel Alito noted that some of Google's allies warned that the "sky will fall" if Oracle won, although the justices seemed somewhat skeptical of these claims. "I'm not aware that the sky has fallen in the last five or six years," Kavanaugh said. Read more [here](#).

III. Administration Updates:

- On October 28th, at 1:00 p.m. ET, the U.S. Copyright Office will host its tenth public modernization webinar. The presentation will discuss the planning that went into the new 40,000 square foot warehouse that is opening in October, as well as the steps taken to move the 90,000 boxes from the current Landover, Maryland facility during the COVID-19 pandemic. Interested participants must register online [here](#).
- On Tuesday, USPTO released a report titled "Public Views on Artificial Intelligence and Intellectual Property Policy." The USPTO does not take a position on AI and IP in the report, but rather summarizes the 197 submissions it received on the topic from a wide cross-section of organizations and individuals, from academia to trade associations and even foreign patent offices. On copyright, USPTO reports that many of the comments submitted expressed that the use of copyrighted material to "train" AI may violate the reproduction right of a copyright owner under 17 U.S.C. §106(1), and that this use may or may not be a non-infringing fair use. Furthermore, most commenters found that existing fair use law does not require modification, as fair use is a flexible doctrine and is capable of adapting to the use of copyrighted works in the context of AI. Finally, on the question of whether mass ingestion of copyrighted works for AI constitutes infringement, the USPTO report states that "existing statutory and case law should adequately address the legality of machine "ingestion" in AI scenarios." Read the full report [here](#).
- On Thursday, the Office of the U.S. Trade Representative (USTR) published two Federal Register notices initiating an investigation into Vietnam's acts, policies, and practices surrounding timber that is illegally harvested or traded, as well as those that may contribute to the undervaluation of its currency. Comments on both probes are due to USTR by November 12th. Find the full timber notice [here](#) and the currency valuation [here](#).

IV. International Updates:

- Google said on Wednesday that it is poised to reach a deal to pay French publishers for their news. This comes after Google rolled out "News Showcase" last week, under which it plans to pay \$1 billion to publishers globally over the next three years for their news, starting with German and Brazilian media groups. The deal would also come on the eve of a ruling by an appeals court in France on a so-called neighboring right enshrined in revamped EU copyright claims. The search giant has said that the deal with French publishers will include acceptance of the neighboring right, as well as French group's participation in the News Showcase program. Read more [here](#).
- Yoo Myung-hee from South Korea and Ngozi Okonjo-Iweala from Nigeria are the last two candidates left in the race for the World Trade Organization's (WTO) top job, paving the way for the first female global trade chief. Okonjo-Iweala is an economist and former finance minister of Nigeria who served at the World Bank for 25 years, rising to become the

organization's director of operations. She was also named to the board of Twitter in 2018. Yoo Myung-hee is the first woman to serve as South Korea's trade minister. She presents herself as a "bridge" candidate who can help overcome the divide between the United States and China, as well as between rich countries and developing nations. The WTO hopes to have a final candidate for the top post by November 7th. Read more [here](#).

V. Industry Updates:

- *Bloomberg* reports that while internet piracy has surged during the pandemic, federal policymakers have been considering how they can better combat this practice. Studios have tried to salvage some of their big-budget films this year by selling them through streaming services, but that business model has apparently made it easier for pirates to illegally copy and share new releases. For instance, compared with "The Lion King," which came out last year in theaters, "Mulan" saw about twice as many downloads in the days and weeks after its release on September 4th. Robert Lento, CEO of Limelight Networks Inc., which provides digital distribution of entertainment content and applies antipiracy measures, told *Bloomberg* that he has seen piracy rise "dramatically" in recent months. To combat internet piracy, Frank Cullen Jr. with the U.S. Chamber of Commerce's Global Innovation Policy Center told *Bloomberg* that Congress has been considering closing the loophole of copyright law that allows streaming pirates off with only a misdemeanor offense, although talks are ongoing. Meanwhile, last month U.S. Immigration and Customs Enforcement launched an ad campaign with several industry trade groups to educate consumers about the risks to digital security and fraud when accessing pirated content. Read more [here](#).
- News surfaced this week that Apple TV + has joined the Motion Picture Association of America's (MPA) anti-piracy coalition, the Alliance for Creativity and Entertainment (ACE). The streaming service will also serve on the alliance's governing board. ACE was founded in June 2017 and now has dozens of members, including Amazon, Comcast, Walt Disney Studios Motion Pictures, Discovery, Fox, NBC Universal, Netflix, Paramount Pictures, Univision Communications Inc., ViacomCBS, and more. Read more [here](#).