

## CONTENT & TECHNOLOGY POLICY REPORT

### SEPTEMBER 29, 2017



#### I. Congressional Updates:

- On Wednesday, the Senate confirmed Makan Delrahim to lead the Department of Justice (DOJ) Antitrust Division by a [vote](#) of 73-21. In a [statement](#), Senator Orrin Hatch (R-UT) said that “amid the rising controversy over competition law in the 21<sup>st</sup> century,” Makan Delrahim “is precisely who we need at the helm.” Last Friday, *Reuters reported* that Senator Elizabeth Warren (D-MA) had lifted the hold she had placed on Delrahim’s nomination.
- Rep. Marsha Blackburn (R-TN), the Vice-Chair of the House Energy & Commerce Committee, announced on Tuesday that she is considering a run for the Senate seat of retiring senator Bob Corker (R-TN). In a statement, Rep. Blackburn’s campaign spokeswoman said that “over the next week” Rep. Blackburn “will take a look at the Senate race and decide, how, and where, she believes she can best serve her state and her nation.” Read more [here](#).
- The Senate is expected to confirm Federal Communications Commission (FCC) Chairman Ajit Pai for another term early next week, after [voting](#) 55-41 for cloture on his nomination on Thursday. Read more [here](#).
- The Senate Intelligence Committee has [invited](#) Facebook, Google, and Twitter to testify in a November 1 open hearing on Russian interference in the 2016 election. Committee Chairman Richard Burr (R-NC) said that Facebook CEO Mark Zuckerberg need not represent Facebook at the hearing, as “it’s more important that we get the person who’s most capable of talking about the technical aspects of what they need to do to identify foreign money that may come in and what procedures, if

#### Headlines and Highlights:

- Senate confirms Delrahim to lead DOJ Antitrust Division.
- Rep. Blackburn considering Senate run.
- Facebook, Twitter, and Google under increasing congressional scrutiny over election interference.
- Reps. Issa and Lofgren file amicus brief in copyright case before D.C. Circuit.
- U.S. reportedly declines to include certain safe harbor provisions in proposed NAFTA language.

#### In the Blogs:

[Turkewitz: What to Make of “Unearthed” EU Piracy Study](#)

Illusion of More  
September 27 by David Newhoff

[The Monkey Selfie Case: Will It Have Broader Repercussions for AI and Copyright?](#)

Hugh Stephens Blog  
September 25 by Hugh Stephens

[New Report Highlights Danger of Stream-Based Infringement](#)

Mister Copyright  
September 23 by Kevin R. Madigan

any, need to be put in law that make sure elections are not intruded by foreign entities.” Twitter [briefed](#) Senate Intelligence Committee staff privately on Thursday, and afterwards, Ranking Member Mark Warner (D-VA) [called](#) Twitter’s presentation “inadequate on almost every level” and “deeply disappointing.” Additionally, the House Intelligence Committee announced on Wednesday that in October it will hold a public hearing with technology company representatives on Russian election interference, but has not yet named the companies it would like to testify. And a third committee – the House Science Committee – is also scrutinizing Facebook, Google, and Twitter, asking the companies to provide information about Russian purchases of advertisements opposing fracking and fossil fuels. Read more [here](#) and [here](#).

- Facebook CEO Mark Zuckerberg issued [a public response](#) on Wednesday to President Trump’s recent [tweet](#) stating that “Facebook was always anti-Trump.” While Zuckerberg apologized for his previous comment calling “the idea misinformation on Facebook changed the outcome of the election” a “crazy idea,” he remained somewhat defiant, championing the fact that “both sides” – President Trump and liberals – “are upset about ideas and content they don’t like.” That, he writes, is “what running a platform for all ideas looks like.”
- Senators Mark Warner (D-VA) and Amy Klobuchar (D-MN) are reportedly drafting legislation that would require online platforms like Facebook, Google, and Twitter make public the identities of entities spending over \$10,000 on political ads. Read more [here](#).
- On Tuesday, the Senate Commerce Committee held a hearing on Federal Trade Commission (FTC) reform proposals. During the hearing, Senator Richard Blumenthal (D-CT) criticized the FTC for failing to take action against Google for demoting its competitors content in search results, saying that the FTC has “a duty to investigate and discipline Google for any illegal actions that may have unfairly disadvantaged competitors and limited consumer choice.” The hearing largely focused on topics such as the FTC’s role in privacy and data security in the wake of the recent Equifax breach. Read more [here](#).
- On Monday, Senator Orrin Hatch (R-UT) delivered a [floor speech](#) on antitrust policy, a follow up to a speech he [made in early August](#) notable for its use of the term “hipster antitrust” to describe antitrust policy that seeks a mandate broader than that provided by the consumer welfare standard. In his speech on Monday, Hatch struck the same notes, praising the consumer welfare standard and urging “caution, especially to some of the more zealous advocates for reform, hipster or otherwise.” He said, “I’ll gladly sample the avocado toast. I really will. But nobody should get the idea we’ve moved on from the meat and potatoes.”
- The newly-formed [ACTION for Trade](#) coalition, which seeks to ensure that U.S. trade policy and trade agreements advance a “pro-creativity and innovation agenda,” held its official launch event Tuesday on Capitol Hill. Senator Orrin Hatch (R-UT) delivered remarks at the event, and, [according](#) to *Politico*, indicated that he would fight for 12 years of data protections for biologics in a renegotiated North American Free Trade Agreement (NAFTA), and expressed his approval that the administration has said it will push for stronger intellectual property protections in NAFTA. He also said that strong intellectual property language in a renegotiated NAFTA should be used in future trade agreements. The event also featured remarks from Reps. Doug Collins (R-GA) and Scott Peters (D-CA).

- On Thursday, the Senate approved the nomination of former Utah Governor Jon Huntsman to be U.S Ambassador to Russia by voice vote. Read more [here](#).
- On Tuesday, October 3, the House Judiciary Committee will hold a [hearing](#) on online sex trafficking and the Communications Decency Act. The hearing comes after the Senate Commerce Committee held a high-profile hearing on the Stop Online Sex Trafficking Act (S. 1693) on September 19.
- On Wednesday, October 4, the Senate Commerce Committee will [vote](#) on the nominations of David Redl to lead the National Telecommunications and Information Administration (NTIA) and Walter Copan to lead the National Institute of Standards and Technology (NIST).
- On Thursday, October 5, the Senate Finance Committee will hold a [hearing](#) on the nominations of Jeffrey Gerrish to be Deputy U.S. Trade Representative for Asia, Europe, The Middle East, and Industrial Competitiveness, and Jason Kearns to be a member of the International Trade Commission.

## **II. Judicial Updates:**

- House Judiciary Subcommittee on Intellectual Property Chairman Darrell Issa (R-CA) and Rep. Zoe Lofgren (D-CA) filed an amicus [brief](#) in the case *American Society for Testing and Materials v. Public.Resource.org*, which is currently before the U.S. Court of Appeals for the D.C. Circuit. The case concerns whether certain legal and regulatory standards and codes developed by standards development organizations (SDOs) are protected by copyright. Issa and Lofgren argue that once such a code “is incorporated into public law, all citizens of the relevant jurisdiction are under an obligation to follow it to the letter.” Thus, “extending copyright protection” to such codes “privileg[es] the purported copyright of SDOs over the rights of members of the public to due process and access to the laws that bind them.” The brief also advances arguments to the effect that the right to due process “outweighs any copyright interests in the law,” and that even if “law may be subject to copyright, publication of the law would be an inherently fair use.” The amicus brief was filed on behalf of Issa and Lofgren by the Cyberlaw Clinic at Harvard Law School’s Berkman Klein Center for Internet & Society, which has published a blog post about the brief [here](#).

## **III. Administration Updates:**

- The *Wall Street Journal* reported this week that in the latest round of North American Free Trade Agreement (NAFTA) renegotiations in Ottawa, the United States “formally introduced language that didn’t include some of the well-established safeguards that protect... YouTube and other service providers from liability over pirated content by users.” This “omission” of safe harbor language “is adding to tech company concerns that the administration is shifting highly sensitive copyright law toward Hollywood studios, the recording industry, and the owners of intellectual property.” The *Journal* cites congressional aides as saying that U.S. Trade Representative Robert Lighthizer is “eager to boost intellectual property provisions in NAFTA.” In a [tweet](#), Senator Ron Wyden (D-OR) said he is “deeply concerned the Trump administration is using NAFTA 2.0 to undermine the

internet as a platform for speech, innovation, and US jobs.” Read more [here](#).

- White House Chief of Staff John Kelly has moved Peter Navarro and his Office of Trade and Manufacturing Policy (OTMP) into the National Economic Council (NEC), meaning that Navarro will now report to NEC Director Gary Cohn. Read more [here](#).
- Commerce Secretary Wilbur Ross met with Chinese Government officials in Beijing this week. According to a Commerce Department [statement](#), Ross “relayed the ongoing concerns of the U.S. business community at forced technology transfers, data localization, and other intellectual property rights issues.” Ross also “highlighted his intention to lead a senior level trade mission to China in November.” The Commerce Department has issued a [Federal Register notice](#) inviting companies to apply to participate in the mission. President Trump also [plans](#) to visit China in November. Read more [here](#).
- The White House has been engaged in a “comprehensive review of its approach to China,” according to *Politico*. The review has been ongoing “for months,” and is being led by the National Security Council and the National Economic Council. *Politico* reports that the review is focusing on issues such as intellectual property, forced joint ventures, trade secret and scientific research theft, and cybersecurity. The review will result in a report to the President, that is “expected to include hundreds of policy options, ranging in severity.” Read more [here](#).
- *Bloomberg* reports that former White House Chief Strategist Steve Bannon, now back at *Breitbart News*, “is preparing a project to sound an alarm about what he views as the primary economic threat to America: China.” Bannon told *Bloomberg* that “the forced technology transfer of American innovation to China is the single biggest economic and business issue of our time. Until we sort that out, they will continue to appropriate our innovation to their own system and leave us as a colony – our Jamestown to their Great Britain, a tributary state.” He has been consulting with foreign policy experts such as Henry Kissinger, hoping to apply pressure and “tilt Trump toward action.” In particular, Bannon is considering starting a “global conference series” in locales around the world, including East Asia. Read more [here](#).
- On Monday, President Trump signed a [memorandum](#) about increasing access to Science, Technology, Engineering, and Mathematics (STEM) Education. The memorandum directs the Department of Education to “establish a goal of devoting at least \$200 million in grant funds per year to the promotion” of STEM education, and computer science in particular. It also directs the Department of Education to prioritize STEM education, with a particular focus on computer science and the recruitment and training of STEM teachers. In connection with President Trump’s memorandum, a number of technology companies, [including Internet Association members](#) Facebook, Google, Amazon, and Microsoft, have committed to spend \$300 million on computer science education programs over the next five years. Read more [here](#).
- The State Department has named Robert Strayer as Deputy Assistant Secretary for Cyber and International Communications and Information Policy. Strayer formerly worked as a general counsel on Senator Bob Corker’s (R-TN) Foreign Relations Committee staff, and as director of the Bipartisan Policy Center’s Homeland Security project. Read more [here](#).

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

- The European Commission has published a set of guidelines for online platforms to combat illegal content on their services. The guidelines state broadly that “online platforms which mediate access to content for most internet users carry a significant societal responsibility in terms of protecting users and society at large and preventing criminals and other persons involved in infringing activities online from exploiting their services.” The Commission proposes that online platforms take measures such as increasing their use of automatic detection technologies – including to ensure that content already removed does not reappear; facilitating the use of specialized, trusted entities with specific expertise in identifying and flagging illegal content ('trusted flaggers'); and taking voluntary, proactive measures to detect and remove illegal content. Over the next six months, the Commission will “monitor progress and assess whether additional measures are needed...including possible legislative measures.” This will be completed by May 2018. Read a fact sheet on the guidelines [here](#), and the guidelines themselves [here](#). Read more [here](#).
- Google announced on Wednesday that in order to comply with European Union antitrust policy, it will no longer favor its own shopping service over others in the process of bidding for ads on search results. The Commission had given Google until September 28 to change its ways before receiving further penalties, after having been fined \$2.8 billion in June of this year. Read more [here](#).

#### **V. Industry Updates:**

- The Copyright Office has released an updated version of its *Compendium of U.S. Copyright Office Practices*, which goes into effect as of September 29, 2017. The Office had previously requested public comments on a draft version in June 2017. Read the Federal Register notice [here](#).
- On Tuesday, the AT&T Policy Forum held an [event](#) titled ‘Privacy in a World of Data Evolution and Technology Convergence.’ The event featured remarks from Jonathan Taplin, the author of ‘Move Fast and Break Things: How Google, Facebook, and Amazon Have Cornered Culture and Undermined Democracy.’ Taplin spoke about the negative effects of large technology companies like Facebook and Google, criticizing them on antitrust and copyright grounds, among others. He called current online safe harbor laws “a joke,” given that content owners are forced to play “an endless game of whack-a-mole” with their takedown notices. Notably, Taplin argued that Facebook and Google are “holding up” content producers by leveraging their function as content aggregators, forcing newspapers, for example, to agree to excessive demands in order to access their large user bases.
- The Copyright Office has issued a new release of its electronic system to designate and search for agents to receive notifications of claimed infringement under the Digital Millennium Copyright Act (DMCA). The new release contains updates designed to enhance user experience. Read more [here](#).
- On Thursday, October 5, the New America foundation will hold an event featuring Franklin Foer, the author of ‘World Without Mind: The Existential Threat of Big Tech.’ Read more [here](#).