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Terrible Tech Bills from the 117th Congress

Congressional Efforts to Regulate Technology Companies Are Unnecessary at Best, Harmful to Consumers at Worst

By Alex Reinauer[*]

Congress is considering an onslaught of legislation targeting the largest tech platforms in the U.S., addressing topics such as mobile apps, advertising, merger review, content moderation, liability protection, algorithms, and data collection. Many of the bills empower the chief antitrust enforcers, the Department of Justice (DOJ) and the Federal Trade Commission (FTC).[1]

From the looks of it, Congress seeks to follow the misguided European playbook on antitrust and tech regulation.[2] The European Union (EU) recently adopted the Digital Markets Act (DMA) and Digital Services Act (DSA),[3] two legislative measures that will likely transform the digital economy.[4] The DMA is predicated on the dubious premise that there is a considerable distinction between online and brick-and-mortar businesses. It also codifies the novel legal concept of "gatekeeper," which would likely be applied to large digital platforms considered by regulators to have an entrenched dominant position in the digital economy, including "search engines, social networks, operating systems, intermediating platforms (connecting sellers and buyers), video sharing sites, communication services, cloud computing, and advertising services."[5]

Some U.S. lawmakers seem willing to follow the EU's lead. In many ways, some of the tech bills introduced in the 117th Congress are piecemeal versions of the EU's DMA and DSA.[6] At a June 2002 hearing of the Senate Commerce, Science, and Transportations Committee's Subcommittee on Communications, Media, and Broadband, Sen. Amy Klobuchar (D-MN), a sponsor of several bills on this list, said:

> Right now, we have four major gatekeeper monopolies. ... with vertical dominance on their platforms. And they buy stuff, and then they're self-preferencing it above other competitive businesses.[7]

While these bills are being advanced in the names of innovation, competition, and choice, they will accomplish the opposite. Consumers will risk paying the increased costs incurred in complying with these legislative measures while the products they enjoy decline in quality, functionality, and variety.

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American Innovation and Choice Online Act. The American Innovation and Choice Online Act (H.R. 3816, S. 2992), sponsored by Rep. David Cicilline (D-RI) and Sens. Amy Klobuchar (D-MN) and Charles Grassley (R-IA), would prohibit self-preferencing by companies that allow competitors to distribute goods and services on their platform.[8] It would bar practices like Google's promotion of Google Maps and Apple's preinstalling of its iMessage and FaceTime apps.

Support from the Biden administration is strong. Commerce Secretary Gina Raimondo endorsed the proposal while testifying before the Senate Commerce Committee in April.[9] And in March the DOJ issued a letter expressing support,[10] its first public backing of an antitrust bill.[11]

The DOJ's letter states that congressional direction on discriminatory and self-preferencing tactics "would enhance the ability of the DOJ and FTC to challenge that conduct efficiently and effectively and better enable them to promote competition in digital markets."[12]

The antitrust focus on large technology platforms rests heavily on the assumption that there is a substantial difference between in-person and online commerce. As CEI Senior Fellow Ryan Young points out, the bill's narrow focus on online commerce is misplaced:

> Sure, you buy store brand products all the time at the grocery store and from Costco, but have you ever bought store brand products—ONLINE?! The distinction between in-person commerce and online commerce is silly. ... Nearly every business, big or small, has at least some online presence, and they have for a while. Sellers sell and buyers buy. Whether in person, by phone, by mail, or online are just different means to the same end.[13]

The legislation would limit a company like Amazon from displaying its generic brand products, such as Amazon Basics, while a user shops on its platform. The practice is no different than Walmart stocking its Great Value brand strategically on its store shelves. It may even place its products closer to the entrance than competing name-brand items. Walmart markets its private brand AAA batteries at about half the price of its competitors' products.[14] Yet, consumers still choose to purchase name-brand options like Energizer and Duracell. There is nothing different or more concerning when the same thing happens online.

Sen. Klobuchar released a substitute amendment to the American Innovation and Choice Online Act on May 25, but the new language does little to address these and other criticisms.[15] As Josh Withrow of the R Street Institute points out, the changes to the bill are more strategic in nature and have little if any substantive effect. As he puts it, "the original bill as a whole was economically unsound, and it is difficult to conceive of an amendment that would make it supportable from a free market point of view."[16]

Of the big tech bills introduced during the 117th Congress, the American Innovation and Choice Online Act appears to be the centerpiece of the antitrust agenda, and its proponents expect a push to pass the bill before the midterm elections in November.[17] The American Innovation and Choice Online Act, its title notwithstanding, would lead to less innovation and less consumer choice.[18]

Open App Markets Act. The Open App Markets Act (H.R. 7030, S. 2710) is a particularly intrusive piece of legislation that would force companies to change the way their products are designed. Sponsored by Rep. Henry C. "Hank" Johnson, Jr. (D-GA) and Sens. Richard Blumenthal (D-CT), Marsha Blackburn (R-TN), and Amy Klobuchar (D-MN), it has garnered bipartisan support in both the House and Senate.[19]

The bill requires large covered platforms to allow sideloading, which enables users to download third-party apps and app stores. Apple has been at the center of the sideloading discussion, having prohibited the practice altogether, but Google has also been criticized for a series of security warnings associated with sideloading on Google-certified Android devices.[20] Ultimately, as CEI's Jessica Melugin points out, the bill would limit consumer choice:

> Apple has long prioritized security and integration for its customers over the more open approach this legislation would mandate. The advantage for Apple users is a "walled garden" that offers increased peace of mind thanks to a more closed and heavily vetted online ecosystem. ... But for those who would rather trade away some safety for more choice and flexibility, there's the Google Play store and its Android operating system.[21]

The Open App Markets Act shows little faith in consumers' ability to make choices. Consumers can already avoid app store fees by using Web browsers to download apps and pay for subscriptions. Such downloads come without the official app stores' security and quality guarantees—which those fees pay for—but consumers are capable of making their own decisions.

Additionally, the legislation ignores the security risks associated with sideloading applications. Sideloading apps is a risky practice, because it increases users' potential exposure to malware.[22] Apple has been very vocal on this point, even releasing a 30-page threat analysis in October 2021.[23]

Interestingly, iPhone users have sideloaded applications since 2008. Four months before Apple launched its App Store, a third-party app store emerged through a process called "jailbreaking."[24] It essentially involved hacking one's device and allowed users to sideload games and applications from outside of Apple's walled garden.

Jailbreaking was on shaky legal grounds until 2010, when federal regulators made clear that the process did not violate the Digital Millennium Copyrights Act.[25] But now, the Open App Markets Act would make sideloading mandatory.

Tech platforms should be allowed to maximize user security when designing their products, but with this bill, Congress continues to either misunderstand those threats or ignore them altogether.

Prohibiting Anti-Competitive Mergers Act of 2022. The Prohibiting Anti-Competitive Mergers Act of 2022 (H.R. 7101, S. 3847) is one of the more partisan bills included on the list. Introduced in March by Sen. Elizabeth Warren (D-MA) and Rep. Mondaire Jones (D-NY), the bill has zero Republican sponsors.[26]

The legislation outright bans, without review, mergers that:

1. Are worth more than $5 billion;
2. Lead to a company having a 33 percent market share in a relevant market;
3. Lead to a company having a 25 percent market share in a relevant labor market; and
4. Reach certain increases on the Herfindahl-Hirschman Index.[27]

Here we find what is known as the relevant market fallacy.[28] If antitrust regulators want to find a monopoly, they need only to define the relevant market as narrowly as necessary, which often involves excluding some potential competitors. And the Prohibiting Anti-Competitive Mergers Act would grant more power to the already emboldened FTC and Department of Justice to do so.

The bill's prohibition on mergers worth more than $5 billion would inhibit companies from improving products on behalf of their consumers. Google's acquisition of the cybersecurity firm Mandiant, announced in March and valued at $5.4 billion, is a prime example. Google sought to fortify its cloud computing services by purchasing and integrating Mandiant.[29] That acquisition, even if more vertical in nature, would be prohibited.[30]

Affected companies would have the opportunity to appeal. However, as CEI's Ryan Young points out, the prospect of success is less than optimistic:

> While companies could appeal this automatic denial in court, they would have to prove the Federal Trade Commission, the Justice Department, or both acted in an "arbitrary and capricious" manner in denying a merger. That is an uphill climb that stacks the deck against companies, and may dissuade many from even trying.[31]

Furthermore, the bill allows for retroactive review and unwinding of completed mergers that could lead to a market share over 50 percent, which raises constitutional concerns on the prohibition of *ex post facto* laws.

The bill's sponsors appear to have large tech platforms in mind. Rep. Mondaire Jones, lead sponsor of the House version, mentioned Facebook's acquisition of Instagram as supposed justification for this bill.[32]

The problems with the Prohibiting Anti-Competitive Mergers Act are abundant. Fortunately, the bill is unlikely to gain traction. It may also be intended to draw a contrast to make other legislation, like the American Innovation and Choice Online Act, appear more moderate in comparison, and more to make a statement than to become actual policy. For competition's sake, let's hope it stays that way.

EARN IT Act. There is no shortage of legislation addressing Section 230 of the Communications Decency Act introduced in the 117th Congress, with some legislators seeking to amend the liability provisions and others seeking to repeal it altogether. Sen. Lindsey Graham (R-SC) is trying to do both.[33] The Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act (H.R. 6544, S. 3538) was introduced at the start of 2022 with bipartisan support.[34] The bill would limit liability protections for online platforms for alleged online exploitation of children.

The purported goal of the bill is noble, but, as CEI's Jessica Melugin points out, "Bad policy made with good intentions still delivers poor results."

Section 230 of the Communications Decency Act of 1996, which provides liability protection to websites and Internet service providers for content posted by their users, is credited with creating the modern Internet.[35] In large part, the provision was meant to encourage the moderation of pornography, violence, and other content harmful to children.

Before Section 230 was enacted, online providers were faced with the "moderator's dilemma."[36] One could avoid liability by refraining from moderating content on a given platform. However, once someone takes active steps to moderate a platform, that website or provider could be held liable for failing to remove certain content.

The EARN IT Act mimics past attempts to curb Section 230 protection. Graham introduced a similar version of the bill in 2020 during the 116th Congress.[37] The most recent version makes the same mistakes as the Fight Online Sex Trafficking Act (FOSTA), which was passed in 2018. As Melugin points out:

> FOSTA's reduced liability protections made hosting borderline or questionable content too risky for many websites. That pushed online interactions between sex workers and clients offline and back onto the streets, where they are often more dangerous. FOSTA shows how curtailing liability in this way will have unintended consequences, no matter how noble the goals of the legislation. That should be a red flag for those considering adopting the same approach with the EARN IT Act.

The most recent reintroduction of the EARN IT Act also raises significant privacy concerns. Some have contended that the legislation would disincentivize the use of encryption services by Internet companies, an important tool in protecting user data and privacy from both private and government actors.[38]

It also would encourage affected companies to scan all user messages, essentially pressuring private entities to do what government officials are prohibiting from doing. As Ari Cohn and Berin Szóka of TechFreedom point out, the EARN IT Act would likely undermine both user privacy and criminal prosecution of crimes against children:

> [T]he bill will, for the first time, compel private companies to monitor their users' communications. This may sound like an improvement, but it will convert the voluntary efforts of companies into state action subject to the Fourth Amendment's warrant requirement. Because private companies do not, and cannot, obtain warrants before conducting such monitoring, any evidence they obtain will be tainted, and courts will have no choice but to toss out any criminal prosecutions based on such evidence.[39]

Furthermore, the EARN IT Act would disproportionally affect smaller Internet companies. While complying with the legislation would pose logistical problems for large tech platforms, the effect on small companies and startups could be fatal.

Protecting children from violent crimes and sexual exploitation is of paramount importance, but it is also important that legislation accomplishes what it is intended to accomplish. The EARN IT act does neither.

Platform Competition and Opportunity Act of 2021. The Platform Competition and Opportunity Act of 2021 (S. 3197, H.R. 3826), introduced by Sen. Amy Klobuchar (D-MN) and Rep. Hakim Jeffries (D-NY) with bipartisan support, would prohibit certain covered platforms from acquiring current, nascent, and even potential competitors.[40] Proponents of the legislation view these acquisitions as anticompetitive attempts by established platforms to maintain their dominance. The bill covers platforms with over $600 billion in annual sales or capitalization that also have either 50 million active users or 100,000 active business users a month in the U.S. In the purported pursuit of competition, the Platform Competition and Opportunity Act dampens opportunities for startups and innovative new products.

Tech startups are thriving. In January 2022, *The New York Times* reported that over 900 tech startups are valued at over $1 billion, up from 80 in 2015.[41] The COVID-19 pandemic and the corresponding government response created unique problems for facilitating communication, goods, and services. Fortunately, tech innovation helped fill the void by making it easier for people to work, shop, and be entertained at home, so much so that investors are lining up to get involved.

Veteran tech entrepreneur Bettina Hein pointed out—in December 2021 written testimony on the legislation submitted to the Senate Judiciary Committee's Subcommittee on Competition Policy, Antitrust, and Consumer Rights—that the bill would have unintended consequences by disincentivizing tech startups that are ultimately seeking to be acquired by a larger platform:

> For fragile startups, there are three principal outcomes: fail, go public, or be acquired. Failure is the most common outcome. Many entrepreneurs dream of taking their company public, but most startups never achieve the scale that going public requires. Acquisition, therefore, is by far the most likely avenue for entrepreneurs and their employees to realize the value of what they have created through years of hard work and sacrifice. In a typical year, ten times as many startups are acquired as go public.[42]

Hein points to a February 2020 report by Silicon Valley Bank that found that over half of startups in the U.S. consider acquisition to be their long-term goal.[43] The Sarbanes-Oxley and Dodd Frank Acts have made initial public offerings, or IPOs, too expensive for many smaller companies and startups, making acquisition a more obtainable goal for entrepreneurs and investors.

The bill also overlooks the risks taken by established tech companies when acquiring smaller platforms. Mergers and acquisitions fail more often than antitrust proponents tend to acknowledge.[44]

Twitter purchased the video sharing app Vine in 2012 for $30 million and shut it down after only four years. *Fortune* reported that Vine cost Twitter $10 million a month and never turned a profit.[45] Twitter and Vine failed to keep up with the growing presence of Snapchat and Instagram, which led to the project's demise.[46]

Facebook, now branded Meta, is also taking risks with its virtual reality acquisitions. The FTC is taking a strong interest in the social media platform's purchase of the virtual reality company Oculus.[47] The company appears to be going all in on the "Metaverse," a fluid concept involving a mixture of virtual and augmented reality that implements other emerging technologies like virtual headsets and cryptocurrency.[48] However, doubts regarding the venture are widespread, and it remains to be seen if it will pan out.[49]

Furthermore, some startups opt not to sell out. Snapchat, founded in 2011, rebuffed two attempts by Facebook to purchase it. In 2013, it made zero revenue and rejected a $3 billion offer from Facebook.[50] Then in 2016, Snapchat purportedly again declined Facebook's invitations to sell and went public the following year.[51]

Nearly every tech platform began as a startup. Some seek to be acquired, and others don't. No platform is the same, and each offers varied products and services. Their success or failure should be determined by consumer choice, not arbitrary government designations.

ACCESS Act. The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act (H.R. 3849) is the most convolutedly named bill on the list. Introduced by Reps. Mary Scanlon (D-PA) and Burgess Owens (R-UT),[52] it would require some of the largest social media platforms to maintain accessible interfaces that allow for portability and interoperability.

The interoperability requirements would allow competitors, or potential competitors, to access the platforms' user data in compliance with FTC standards. That raises obvious privacy concerns for users, something Congress has claimed to care about. Covered platforms would need to make data transferable to its users or to a third-party business with users' consent.

Both Facebook and Twitter already allow users to download an archive of their data.[53] The problem occurs when user data are connected to the data of other users who have not consented to a data transfer, usually in the form of comments, tags, and likes.

The legislation delegates substantial power to the FTC to both promulgate applicable standards and enforce them. It would enable the FTC to carry out a managerial role over social media platforms.[54] Online platforms would have to first petition the FTC for review and approval before they are allowed to make a design change that "may affect its interoperability interface."

It also entrusts the FTC to define "data," which raises other issues. While the transfer of a photo or video may seem like a simple concept, it is unclear what other user data will be included in the FTC's definition. No social media platform is the same. Each offers unique and varying products and services.

Standardizing that data for portability and interoperability will likely prove difficult in practice. As Samuel Bowman of the International Center for Law and Economics points out, achieving data interoperability is harder than it looks.[55] Sometimes it may be beneficial, and companies often interoperate their networks voluntarily. Microsoft and Yahoo!, after several years of delay, announced that they had achieved interoperability between their instant messaging services in 2006. By then, it was too late. With the growing presence of text messaging, Myspace, and Facebook, classic instant messengers fell into obscurity. The companies later abandoned the interoperability feature to focus on modernizing their own respective products.

Standardization will also lead to less choice and innovation, as deployment of new code would require FTC approval. As Bowman puts it:

> [M]andatory interoperability might limit differentiation among competitors–like, for example, how imposing the old micro-USB standard on Apple might have stopped us from getting the Lightning port. … But if we could entrust this degree of product design to regulators, weighing the costs of a feature against its benefits, we wouldn't need markets or competition at all.[56]

The ACCESS Act essentially attempts to mandate a service for which consumers have shown little demand.[57] Considering that the average social media user engages in at least six different social media services, the ACCESS Act would only lead to costly regulation, diminished user security, and less innovation.[58]

Filter Bubble Transparency Act. Social media platforms typically customize content feeds based on users' previous interactions and viewing history. For example, if your significant other changes his or her profile picture on Facebook, the post will often be displayed first on your newsfeed.

Congress has a problem with this, and the Filter Bubble Transparency Act (H.R. 5921, S. 2024)—sponsored by Sens. John Thune (R-SD) and Richard Blumenthal (D-CT) and Rep. Ken Buck (R-CO) with bipartisan support—is the proposed solution.[59]

It would force social media platforms to provide an option to view feeds and postings chronologically as an alternative to the use of algorithms and personal data to display personalized content. The obligation would apply to platforms with more than 500 employees, at least $50 million in annual revenue, and more than 1 million users annually. The bill would exclude platforms that are "operated for the sole purpose of conducting research that is not made for profit either directly or indirectly."

Lawmakers have depicted algorithms as nefarious and politically biased. As Melugin points out, "politicians have blamed algorithms for everything from addictiveness, privacy violations, and political extremism to being a tool for censorship."[60] But algorithms are more accurately understood as a crucial tool for curating the online experience and pleasing users.

Platforms like Facebook, Twitter, YouTube, and Reddit already provide options to view feeds chronologically. Instagram announced that it would bring back the chronological view option shortly after the introduction of the Filter Bubble Transparency Act in the House, showing that Congress can cyberbully, too.

Additionally, the legislation would more likely do the opposite of its intended effect. Klon Kitchen of the American Enterprise Institute points to an internal experiment conducted by Facebook in which the algorithmic newsfeed was disabled for 0.05 percent of users:

> Its findings showed that engagement dropped precipitously, users hid 50 percent more posts (meaning they found these posts to be irrelevant or uninteresting), use of Facebook Groups—where some of the most extreme and concerning content resides—skyrocketed, and Facebook actually made more money on advertising because users had to scroll longer to find the content they were looking for, and therefore, were exposed to more ads.[61]

Consumers are more than capable of choosing social media platforms of their liking. If a platform does not provide users with the chronological view they want, they can take their business to one that does. The Filter Bubble Transparency Act wants to make that choice on consumers' behalf. Instead of allowing companies to compete, the bill would make all social media platforms more alike.

Ending Platform Monopolies Act. The Ending Platform Monopolies Act (H.R. 3825)—introduced in the House in June of 2021 and sponsored by Reps. Pramila Jayapal (D-WA) and Lance Gooden (R-TX), [62] with bipartisan support from over a dozen cosponsors—takes an approach similar to the American Innovation and Choice Act (H.R. 3816, S. 2992), by limiting a company's ability to operate a business that competes with other companies on its platform.[63]

But it goes further than banning self-preferencing. It also prohibits companies from distributing products that compete with third parties on their platform. If a covered platform violates the provisions of the bill, the FTC and DOJ could impose civil penalties, move to break up the platform, or both. As TechFreedom's Berin Szóka and Corbin K. Barthold put it, "This is, in effect, common carriage regulation on steroids."[64]

Appearing on the GeekWire podcast in September 2021, Rep. Jayapal attempted to explain the legislation's rationale in simpler terms:

> It's sort of like when you have two teams on a field and the person that is the referee [is] the person that sets the rules for the game, the person that calls all of the plays, and the person that happens to play on one of the teams.[65]

The sports analogy is a poor one. There are more than two teams or one referee. In addition to laws created by Congress, the FTC and DOJ both referee and set rules using their adjudication and rulemaking powers. And no team is forced to play any particular game on any particular field.

Here is a better analogy: You purchase a Trek bike after evaluating the options, user reviews, and specifications, but the bicycle is delivered without tires. You attempt to purchase tires from Bontrager, a Trek-owned brand. The company informs you that it cannot sell you tires for your Trek bike because federal law prohibits it. Bontrager can sell you tires for a Schwinn bike, but the same company selling you both a bike and tires would constitute a conflict of interest and could prompt the Federal Trade Commission to file a civil action against it.

That is what this bill would do. It would deter platform companies like Apple and Google from preinstalling apps on their hardware.[66] Apple iPhones would no longer come out of the box with its iMessage, FaceTime, and Find My iPhone apps installed. Likewise, Google's Android operating system would exclude popular apps like Google Maps and Chrome. And Amazon may be limited in its ability to offer free shipping on eligible Prime products or distribute its Amazon Basics brand.

Furthermore, depending on how the law is enforced, both Apple's iOS and App Store could be designated as covered platforms. Thus, the company would be prohibited from both preinstalling and distributing Apple apps. The same would apply to Google's Android OS and Play Store. In theory, one could download the Google Maps app, but not Apple Maps, onto an Apple device, while an Android user could download the Apple TV app, but not Google's YouTube app.

The legislation would also disincentivize brick-and-mortar retailers from growing their online presence to compete with Amazon. If they grow to meet the monthly threshold of 50 million users or 100,000 business users in the U.S., it would bring them under the purview of the Act. That would discourage innovation and competition.

Online platforms have created a ripe ecosystem for startups, small businesses, developers, and entrepreneurs to reach customers and deliver their products. But, according to the Ending Platforms Monopolies Act, opening up your platform to competitors is a bad thing.

Banning Surveillance Advertising Act of 2022. As its name implies, The Banning Surveillance Advertising Act of 2022 (H.R. 6416, S. 3520)—sponsored by Rep. Anna Eshoo (D-CA) and Sens. Cory Booker (D-NJ) and Mazie Hirono (D-HI)—seeks to ban surveillance advertising.[67] The practice, also called targeted or behavioral advertising, directs personalized ads to specific users based upon their prior online activity.

Congress has long had its eye on targeted advertising. In 2008, following hearings in both the House and Senate on behavioral advertising, the House Energy and Commerce Committee sent letters to over 30 cable and Internet companies requesting information on their privacy policies.[68] As CEI's Wayne Crews points out, targeted advertising "helps fuel today's flood of information, frictionless e-commerce, and the global blogger soapbox."[69] Also, privacy between two private parties is not something to legislate and a one-size-fits-all privacy policy would undermine consumer choice.

Companies like Google and Facebook use behavioral advertising to benefit both producers and consumers. Banning the practice would only hurt the internet economy. The bill would lead to both less effective advertising and less revenue for websites and apps that depend on ads to keep their products free of charge.[70] Targeted advertising uses cookies to direct ad content that is relevant to a user's interests and preferences. Some estimates have found that digital ads without cookies receive half the revenue as those with cookies.[71]

Furthermore, the Act would likely disproportionally harm smaller companies that rely on targeted advertising to attract new customers. It may require some to increase their marketing budgets, which would leave them with fewer resources to invest in producing innovative and quality products. Established brands with more robust advertising budgets would be less affected.

For users who prefer to evade behavioral advertising, there are alternative products on the market, such as DuckDuckGo. Launched in 2008, the online search engine has centered its product around privacy. It proudly proclaims, "We don't collect or share personal information."[72] The company is a success story. Last year, its annual search queries surpassed 35 billion, an impressive uptick from just under 6 billion in 2017.[73]

DuckDuckGo has been heralded by proponents of the bill as what should become the standard, not just an option.[74] The privacy search engine uses contextual advertising, which displays advertisements based upon the content of the website being visited. DuckDuckGo, quite obviously, was named after the game Duck, Duck, Goose—which is appropriate (even if the metaphor is unintentional),[75] because the popular playground game hinges on choice. The Banning Surveillance Advertising Act seeks to make all search engines like DuckDuckGo, eliminating consumer choice altogether.

Fair Repair Act. The Fair Repair Act (H.R. 4006, S. 3830)—sponsored by Rep. Joseph Morelle (D-NY) and Sens. Ben Ray Luján (D-NM), Cynthia Lummis (R-WY), and Ron Wyden (D-OR)—has garnered less attention in the mire of tech bills this congressional session.[76] This bill would require manufactures of mobile phones, tablets, and laptops to make certain diagnostic material, tools, and parts available for sale to users and repair shops.

The bill is part of the larger "right to repair" movement.[77] Yet, users already have the right to repair their electronic devices, and the Fair Repair Act contains nothing suggesting the contrary. There may be room for improvement in the realm of copyright law and the application of the Digital Millennium Copyright Act (DMCA), an issue addressed in a separate House bill.[78] Rather, the Fair Repair Act would force companies like Apple and Samsung to contract the sale of parts and information.

The text of the legislation raises significant security concerns, as it applies to "digital electronic equipment that contains an electronic security lock or other security-related function." It requires manufactures to provide "any special documentation, tools, and parts needed to disable the lock or function." These security features exist to protect user data and devices. The Fair Repair Act would weaken them.

Proponents of right to repair legislation often equate repair inconvenience with prohibition. Speaking on the bill, Sen. Luján said, "Too many manufacturers have made it nearly impossible for consumers to service their own equipment or seek independent repairs."[79]

Some electronic devices are easier to repair than others. That is just one feature that consumers consider when purchasing those products. Furthermore, the price range for devices vary widely. Affordable smartphones and tablets are available for under $150, a lower price than the cost of some Apple device repairs.

Even so, the independent electronic repair industry is vibrant, with cell phone repair comprising an estimated $4 billion market with nearly 10,000 businesses across the U.S.[80] Electronic and computer repair is estimated to be $19 billion with over 40,000 businesses.[81]

The Fair Repair Act is a solution in search of a problem. *The Wall Street Journal* reported last year that an independent repair shop can provide services for as little as one third of the cost charged by the original manufacturer.[82] The prevalence of high-end personal electronic devices in the market has created the demand for affordable repair services, a win-win for both consumers and thousands of small businesses.

Conclusion. The above terrible tech bills from the 117th Congress illustrate an eagerness by lawmakers to embrace the European Union's flawed model of protecting competitors, rather than consumers. This flurry of legislation targeting "big tech" is unlikely to halt when the 118th Congress convenes in 2023. One can expect to see these bills, or similar versions of them, reintroduced. That is unfortunate.

The free market has provided an environment for unparalleled innovation in technological goods and services. Government intervention has not. Congress should resist the temptation to enact these statutory and regulatory hurdles that will ultimately stifle innovation and harm consumers.

Notes

[1] A few bills did not make the list, either due to low co-sponsorship or too distant a relation to the tech industry. Legislation like the Digital Services Oversight and Safety Act of 2022 (H.R. 6796), which would increase the size of the FTC by one-third and require hiring dozens of "technologists" and "sociotechnical experts," attracted only two cosponsors and never made its way to the Senate floor. Others bills, like the Merger Filing Fee Modernization Act of 2021 (S. 228), seek to bolster the budgets of the DOJ and FTC by increasing filing fees for proposed mergers. H.R. 6796 – Digital Services Oversight and Safety Act of 2022, 117th Congress, Second Session, https://www.congress.gov/bill/117th-congress/house-bill/6796. H.R. 3843 – Merger Filing Fee Modernization Act of 2021, 117th Congress, Second Session, https://www.congress.gov/bill/117th-congress/house-bill/3843;
S. 228 – Merger Filing Fee Modernization Act of 2021, 117th Congress, Second Session, https://www.congress.gov/bill/117th-congress/senate-bill/228.

[2] Jessica Melugin, "Don't Follow Europe on Tech Regulation," *National Review*, May 31, 2022, https://www.nationalreview.com/2022/05/dont-follow-europe-on-tech-regulation/.

[3] Sam Schechner and Kim Mackrael, "EU Lawmakers Approve Sweeping Digital Regulations," *Wall Street Journal*, updated July 5, 2022, https://www.wsj.com/articles/eu-lawmakers-approve-sweeping-new-digital-regulations-11657040485?mod=tech_lead_pos1.

[4] Jaume Duch Guillot, European Parliament, "EU Digital Markets Act and Digital Services Act Explained," reference no. 20211209STO19124, April 25, 2022, https://www.europarl.europa.eu/pdfs/news/expert/2021/12/story/20211209STO19124/20211209STO19124_en.pdf.

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[6] Some European lawmakers have voiced support for these efforts in the U.S. In May 2022, Andreas Schwab, a member of the European Parliament from Germany who helped lead the negotiations on the DMA, met with Rep. Cicilline, and Sens. Klobuchar and Marsha Blackburn (R-TN). Emphasizing the importance of cooperation in regulating digital platforms, he said: "We want this to be done together because it's a common Western world principle. ... The more we can partner, the better for everyone." Leah Nylen, "EU Parliamentarian Welcomes Tech Antitrust Push in Congress," *Bloomberg*, May 12, 2022, https://www.bloomberg.com/news/articles/2022-05-12/eu-parliamentarian-welcomes-tech-antitrust-push-in-congress.

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