

The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone!

We're going to have a new president, which naturally [raises all kinds of questions](#) about how things will change as we leave the turmoil of the Trump era. The Biden administration will hopefully be less chaotic, but could be even more focused on tech regulation. There is plenty of commentary out there about Joe Biden's likely approaches to [intellectual property](#), to [antitrust issues](#), to [privacy and intermediary liability](#), and to other issues. We can look at the people Biden [taps for his transition team](#), his [likely appointments to agency positions](#), Kamala Harris' [history with big tech in California](#), and so on.

But we still have a month and a half of the Trump administration left. As we'll discuss later in this issue, there's a lot still happening as we come down to the end and it's getting pretty intense. The Republican-controlled Senate is maneuvering to deadlock Biden's FCC and FTC, while the Democrat-controlled House has taken steps to rein in Trump's FCC and FTC before the inauguration. Trump has attempted to ram through a repeal of Section 230 by threatening to kneecap U.S. military funding. (I thought hard about whether that last sentence is an exaggeration, and no, it isn't.) The fate of Chinese-owned social media apps remains in doubt in the midst of injunctions, pending appeals, and regulators who seem to have lost interest.

So let's get to it and through it.

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I. Privacy

A. Anonymity

Nothing to report this month.

B. Personal Information

We saw a flurry of activity in the ongoing dispute between the U.S. government and Chinese-owned apps TikTok and WeChat, which ended on a question mark this month. The government hit another wall in its attempt to block TikTok in the United States, with an [injunction issued](#) in E.D. Pa. in a case brought by users claiming their First Amendment rights would be violated by the ban. Meanwhile, the government has [asked the Ninth Circuit](#) to flip a preliminary injunction issued in a similar case filed by WeChat users, while [filing a motion to dismiss](#) the case at the district court level.

With respect to the Trump administration's separate directive that TikTok's Chinese parent divest itself of control over the app's U.S.-based operations (and an accompanying order to that effect issued by the Committee on Foreign Investment in the United States), TikTok and its parent [filed a petition for review](#) with the D.C. Circuit. That petition was filed in part because [CFIUS had not acted](#) on a proposal by TikTok to comply with the order despite a looming Nov. 12 deadline; CFIUS subsequently [put enforcement of its order on hold](#) pending the results of the assorted litigation.

Incidentally, if you've lost track of the whole TikTok/WeChat dispute, I've got a write-up in my article in this month's Media Law Letter.

In other news, a judge in C.D. Cal. ruled that Facebook users in the United Kingdom [must bring privacy claims against Facebook in the UK](#) rather than in U.S. federal court based on a forum selection clause. In E.D. Cal., Blizzard Entertainment was [hit with a new complaint](#) accusing it of using a tracking code to surveil clicks and keystrokes from World of Warcraft players.

Speaking of California, Prop 24, a/k/a the California Privacy Rights and Enforcement Act, [passed in the November elections](#) despite warnings from civil society organizations and privacy experts. The new law prevents the state's legislature from rolling back the protections of the California Consumer Privacy Act, locking the earlier law in place – subject, that is, to federal preemption, which could conceivably prompt activity in Congress. Prop 24 also [created the California Privacy Protection Agency](#), the first of its kind in the U.S. (though somewhat similar to an EU data protection authority). The new law also makes a number of substantive changes to

businesses' privacy obligations, [detailed here](#); it applies to data collected from January 1, 2022 despite an effective date of January 1, 2023.

A class action lawsuit in W.D.N.C. against LexisNexis over the alleged sale of personal data culled from state DMVs [has settled](#) for \$5 million. And in Virginia state court, a former state house candidate took a plea deal in a revenge porn prosecution arising out of her alleged distribution of explicit photos of her husband's mistress.

C. [Children's Privacy](#)

D. [Biometrics](#)

Nothing to report in these sections this month.

E. [Manipulated Media](#)

The [Senate passed](#) the Identifying Outputs of Generative Adversarial Networks (or "IOGAN") Act this month, which would support research into technology to identify and stop the use of realistic digital fakes for deception and harassment. The measure now heads to the House.

F. [Hacking, Scraping & Data Breach](#)

The U.S. Supreme Court [heard argument](#) for the first time this month on the meaning of the federal Computer Fraud and Abuse Act. The case, *Van Buren v. United States*, involves the CFAA's prohibition on exceeding authorized access to a protected computer (in this case, a police officer who took bribes to run searches of confidential information in a police database and was nailed in an FBI sting). The justices seemed cautious about the range of behavior that could be deemed criminal under the government's reading of the statute, particularly as it applied to violations of website terms of service; the government then [threw the justices \(and many observers\) a curve ball](#) by arguing the provision doesn't apply to access granted via the ToS of publicly facing websites – even those that are password-protected. (This, to put it mildly, marks [a significant change of tune](#) for the government.)

Three Facebook cases in N.D. Cal.: Judge Alsup [granted preliminary approval](#) of a settlement of class action claims arising out of a 2018 hack of Facebook user accounts; Judge Spero [denied a TRO](#) sought by the developer of a Chrome browser extension that allegedly scraped data from users' Facebook and Instagram accounts, thus allowing Facebook to keep blocking the extension; and Facebook [sued the Turkish operator](#) of a network of Instagram clone websites populated with data scraped from the real Instagram.

G. Other Intrusion

Nothing to report this month.

II. Intellectual Property

A. Copyright

A magazine whose Instagram account was shut down by DMCA notices from the agent of various photography clearinghouses will be [allowed to continue a 512\(f\) claim](#) against the agent, with a judge in C.D. Cal. ruling that it is not necessary that a 512(f) claim be pleaded with particularity per Fed. R. Civ. P. 9(b).

A company that created a library of 3D digital renderings of everyday objects [took a third shot](#) at asserting copyright claims in N.D. Cal. against Facebook and Princeton University, alleging misappropriation of the dataset for the purpose of training computers to recognize these objects.

A judge in D. Colo. [bounced a 512\(f\) counterclaim](#) filed by Charter Communications in a dispute with major record labels, holding that the labels' dropping of claims related to 455 songs and recordings as to which they had earlier alleged infringement did not indicate that the labels' DMCA notices as to those 455 works had been filed in bad faith.

Bad luck for Strike 3 in N.D. Ill., with a judge [denying the company expedited discovery to subpoena](#) an ISP to identify an alleged infringer based upon an IP address. Note, however, that Strike 3 has managed to flip such rulings in the past, and has historically done more work to substantiate the connection between an IP address and the alleged infringement than other companies in a similar position.

We have a new data point on the question of embedding photos from Instagram, with [a judge in E.D.N.Y. holding](#) that Long Island Tennis Magazine's embedding of a photo of tennis pro Caroline Wozniacki was a fair use. This was a Richard Liebowitz case, and it's been a rough month for Liebowitz in other respects as well. Although he [managed to fight off fees and sanctions](#) in one case that he lost in S.D.N.Y., the Committee on Grievances for the district [suspended Liebowitz from practice in S.D.N.Y.](#) on an interim basis pending further proceedings. Mene mene tekel upharsin, as they say. Or, rather, write.

The fact that a jury in S.D.N.Y., spurred by fears of COVID-19, was eager to finish its work on a copyright trial over the unauthorized streaming of music concert performances was [not a basis for granting a new trial](#), even though the jury returned a remarkably low damage award following deliberation of less than an hour.

A Pulitzer-winning photog [dropped his copyright claim](#) in E.D. Pa. against a law firm that allegedly used one of his photos on its website without authorization. In W.D. Pa., a dispute over ownership photos of an activist group's trip to Washington, D.C., [produced the unsurprising result](#) that a volunteer photographer for the group who was not under any form of contract was the author of the photos he took.

A company specializing in stock photography of food [dropped its lawsuit in W.D. Tex.](#) against a vaping company that allegedly used the plaintiff's pic of ice cream without permission to sell an e-liquid roduct.

Nintendo [filed suit](#) in W.D. Wash. against the seller of a device that allows the Nintendo Switch game system to play pirated games by circumventing copyright protection systems.

Following his surprise win in the November elections, Sen. Thom Tillis (R-NC) is [seeking comments](#) on how to reform the DMCA. [Techdirt surveys](#) some of Tillis's thoughts on the topic, and reports a mix of the promising and the troubling.

I normally don't cover individual takedown disputes that have not resulted in litigation, but this one seemed notable enough to, well, note. Code repository GitHub [has reversed course](#) on a takedown notice submitted by the RIAA demanding the removal of the code for a tool called YouTube-dl, which allows users to download YouTube videos for offline viewing. Initially acceding to the request, GitHub decided to restore the code to its repository after determining that the tool had substantial non-infringing uses and as a technological matter did not circumvent digital rights management systems. On top of that, GitHub will launch a \$1M legal defense fund for software developers targeted by meritless § 1201 claims.

B. Trademark

The appearance of an airplane in Ubisoft's videogame "The Crew 2" [drew trademark and right-of-publicity claims](#) in C.D. Cal. from the owner and pilot of the unique real-life plane on which the game's plane was modeled. Both the virtual and real-life planes share the same name as well as non-functional design elements.

Amazon [filed a lawsuit](#) in W.D. Wash. against members of a counterfeiting ring that used social media to evade Amazon's trademark protection systems. See, the idea was that you'd go on social media and find a post saying "Order product X on Amazon, but you'll actually get product Y." X is a legit product, Y is an unrelated luxury product. The third-party seller who receives an order for X knows to send you Y, but what you aren't told is that Y is counterfeit. Amazon's counterfeiting detection systems couldn't readily spot the scheme because the offer for X on Amazon appeared legitimate, but Amazon's investigators ordered the products and discovered the fraud.

C. Patent

The Supreme Court [denied cert](#) in *Personal Audio v. CBS*, which involved the question of the district court's jurisdiction to hear a challenge to a Patent Trial and Appeal Board decision on a podcasting patent.

The Federal Circuit [flipped a district court win](#) by Apple in a case over messaging patents, [upheld a verdict](#) that Ubisoft didn't infringe a virtual reality patent, [knocked out claims](#) in a patent for building virtual cities, and [affirmed a PTAB ruling](#) that a social media patent allegedly infringed by Twitter was invalid.

In N.D. Cal., Facebook [settled a case](#) brought by Software Rights Archive over patents for data indexing, search, and display, following a ruling earlier this year that the patents were invalid as claiming abstract ideas. The Stipulation of Dismissal notes that the parties entered into a Patent License and Settlement Agreement and that Facebook withdrew its claim for attorneys' fees.

A judge in C.D. Cal. [denied a TRO](#) sought by a company against defunct streaming service Quibi, which was intended to prevent Quibi from selling allegedly infringing technology to others. Also in C.D. Cal., [Facebook](#), [Twitter](#) and [Snap](#) are facing a trio of lawsuits filed by Palo Alto Research Center alleging infringement of patents relating to core website functions.

Finally, a [jury in E.D. Tex. found](#) that YouTube did not infringe four patents for video technology.

D. Trade Secrets/Misappropriation/Conversion

Nothing to report this month.

III. Platform Management

A. Section 230

A judge in N.D. Cal. [tentatively held](#) during a hearing that Section 230 barred a class action against Google based on games available through its Play Store offering "loot boxes" (allegedly in violation of California gambling law).

[This case from S.D.N.Y.](#) raises an issue that I'm surprised we don't see more frequently – namely, that a Section 230 defense might be avoided on rule 12(b)(6) with allegations that the defendant controls (or is controlled by) the "information content provider" whose statements are at issue, such that the ICP is not "another" ICP under the statute. Here, a claim against the Saraca Media Group overcame a 230 motion to dismiss based on allegations that SMG was owned and controlled by the speaker of allegedly defamatory statements.

Possibly as a result of a [recent admonition by House overseers](#) not to work on controversial issues following the election, [the agenda](#) for the FCC's final Open Commission meeting of 2020 makes no mention of Section 230. We'll have a lot more on the FCC next month, including the fallout from Ajit Pai's announcement that he will be [leaving the FCC on January 20](#). For now, I'll note a [minor flap](#) about the recent revelation that over the summer FCC nominee Nathan Simington attempted to enlist Fox's Laura Ingraham to support Trump's desired repeal of Section 230.

Speaking of which, as Trump sees his FCC end-run around Congress on Section 230 failing, he's taken a more direct approach. First, he [offered not to fight](#) a provision in the must-pass defense appropriations bill that requires the renaming of military bases currently named after Confederate leaders if Congress also included a repeal of Section 230 in the bill. Senate Republicans [took a shot](#) at attempting to include lesser reforms of the statute, but it looks like that wasn't satisfactory; Trump threatened to veto the bill and [block the funding of the U.S. military](#) if Congress does not bend to his wishes. I'm bleeding into December a bit here, but as of December 4th when I'm writing this, it looks like Senate Republicans have decided [to ignore that threat](#) and move forward with the bill as is.

B. Elections & Political Advertising

We've got a [mess of a case](#) in D. Mass. involving Massachusetts election officials asking Twitter to block false comments by a Senate candidate about the November election. A [TRO was denied](#) based on the Mass. Secretary of the Commonwealth agreeing in court that it would not report further tweets until after the election.

The bigger question going into the elections this year was how social media would cope with disinformation and attempts to manipulate voters. The answer [turned out to be](#) "pretty well," all things considered, largely as a result of platforms slowing their roll with respect to the rapid and automatic amplification of content. Facebook [turned off algorithmic content recommendations](#) for political and social issue groups, a feature that had raised concerns about pushing people to extremist content; it also [blocked hashtags](#) associated with unsupported allegations about election fraud. With Trump's refusal to concede and upcoming Senate run-offs in Georgia, Facebook and Google [extended their bans](#) on political advertising. Wikipedia [locked down editor access](#) to pages about the presidential and vice-presidential candidates. Twitter took the step [of labeling a tweet from Trump himself](#) as "disputed" and limited sharing of the tweet.

YouTube received criticism, including [from Democrats in the Senate](#), for its decision [to leave up videos](#) purveying misinformation about voter fraud and election results. YouTube [responded](#) that the most popular videos were from "authoritative news organizations," though I'm not sure that responds to the concern.

It's fair to say that Facebook and Twitter were the [targets of greater fury](#) from Trump supporters outraged by the platforms' efforts to stymie purveyors of falsehood. Zuckerberg and Dorsey were [hailed back before Congress](#) for another gripe-fest that only in part dealt with the election.

To my mind, what will be really interesting is how long Trump has a Twitter account after he leaves office, given Twitter's statement this month that he [will lose special consideration of his posts](#) after Inauguration Day. [Enjoy Parler](#), Don!

C. Content Moderation

A judge in N.D. Cal. [denied a TRO](#) in yet another conservative censorship lawsuit against YouTube, finding that the plaintiffs had failed to show a likelihood of success on either contractual or constitutional claims.

Steve Bannon managed to get himself [banned from Twitter](#) with a comment about sticking the heads of Christopher Wray and Anthony Fauci on pikes, and several Bannon-relate pages were [removed from Facebook](#) due to efforts to misrepresent the popularity of those pages. (To be fair, Bannon's Twitter comments strike me as pretty obvious hyperbole in the rough-and-tumble of political discourse; but Twitter is a private actor and can moderate however it wishes.)

Meanwhile, OANN was [suspended from posting new videos on YouTube](#) and had existing videos demonetized after it posted a video advertising a false cure for the coronavirus.

D. Terms of Service & Other Contracts

An attempt by Eventbrite to force arbitration in a case filed in N.D. Cal. [failed](#) because the company didn't establish what its online contract formation process looked like at the time the plaintiff allegedly agreed to it; thus, the court couldn't find that an enforceable agreement to arbitrate was formed.

In contrast, a judge in D. Nev. found an arbitration clause in a [blackjack app's terms of service](#) to be enforceable, and a class action in W.D. Wash over data leaked by networked home security devices was [kicked to arbitration](#) based on the defendant's accepting an online user agreement.

IV. Other Content Liability

A. Defamation

I don't know where or how to start describing this [pro se complaint](#) against Reddit in N.D. Cal., apparently arising out of a dispute over a car parked with its road-side tires impinging on a bike lane. I saw the case, it's within the subject matter of this article, I'm reporting it, enough said. Read at your own risk.

A law professor who sued commenters on a legal blog in W.D. Ky. over criticism of his handling of a trademark proceeding [has dropped his case](#).

A [fascinating decision](#) from the Massachusetts Appeals Court held that allegedly defamatory statements about a member of a chat group were not of and concerning the plaintiff when (1) the statements referred only to the plaintiff's pseudonym in the group and (2) the plaintiff failed to allege that anyone in the group besides the defendant had connected the pseudonym with the plaintiff. The court noted that a pseudonym can sue to defend an independent reputation, but that was not the case here.

I'm still puzzling over this one. Might the plaintiff have a presently viable emotional distress claim because she knows that these statements are out there like a time bomb, with the possibility that others could make the connection at any time? Can the statements later become actionable as defamation if others do connect the pseudonym to the plaintiff at some point? When does the statute of limitations begin to run on time bomb defamation like this? Should the plaintiff in such a case be allowed to proceed under a pseudonym in court to avoid outing herself? What if the connection between pseudonym and real identity is revealed anyway because of the lawsuit? There's your exam question, MLRC professors.

In happier news, N.Y. Gov. Cuomo [signed a robust anti-SLAPP law](#), expanding the speech protected under the state's narrow first-generation anti-SLAPP law. Protected speech [now includes](#) "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." Even in 2020, good things can happen.

A man who fabricated racist and sexually explicit texts that he attributed to his ex-girlfriend, thus causing her to be suspended from her job, is [facing a criminal defamation charge](#) in North Dakota state court.

B. Commercial Speech

An advertising company has been [allowed to amend its complaint](#) against Facebook in N.D. Cal. arising out of Facebook's alleged representations as to how it would handle charges for advertising clicks from fake accounts.

A judge in C.D. Cal. [held](#) that a cybersecurity company did not engage in advertising (and thus, could not have engaged in *false* advertising) or make defamatory statements by reporting that the defendant publisher's online ad buys were invalid.

A claim against Peloton over its assertion that its library of fitness classes is “ever-growing” [will be allowed to proceed](#) in S.D.N.Y., given Peloton’s removal of 57% of the available classes from its library in March 2019 in response to a copyright lawsuit.

In a dispute between manufacturers of nutritional supplements, a judge in D. Utah [ruled](#), inter alia, that the defendant engaged in false advertising by artificially inflating the number of votes marking positive reviews of its products on Amazon as “helpful.”

Apple has [settled a case](#) brought by a coalition of states led by California’s attorney general alleging that the company made misrepresentations about iPhone batteries and software updates in connection with a practice of throttling processing speed as an antidote to battery power for its devices being insufficient. The price tag for the deal is \$133 million.

Zoom has [settled FTC allegations](#) that it misrepresented the availability of end-to-end encryption on its services.

C. Threats, Harassment, and Incitement

Nothing to report this month.

V. Infrastructure

A. Accessibility

Nothing to report this month.

B. Antitrust

Google has indicated that it [will not file a motion to dismiss](#) the DOJ’s antitrust claim against it in D.D.C.; the company’s answer is due on or before December 21. An independent state-based antitrust probe into Google [appears to have hit a stumbling block](#), however, with Texas AG Ken Paxton, the nominal lead in the probe, having substantial legal problems of his own.

It [still looks like](#) there will be state and/or federal antitrust action against Facebook, particularly with respect to its acquisitions of Instagram and WhatsApp. Whatever action the Federal Trade Commission might take, however, has been [thrown into question](#) by Biden’s presidential win. I mentioned up above in Section 230 the directive to the FCC to avoid work on controversial issues; [a similar directive](#) was sent to the FTC. Moreover, with Commissioner Joe Simons [likely to step down](#), we will see a similar power struggle in the Senate over the appointment of commissioners and a similar potential deadlock that could stymie any effort against Facebook.

You know, as I look at these antitrust actions, it strikes me that, notwithstanding all the sturm und drang, the government is facing an uphill battle. We know, of course, that market power – and even market dominance – is not by itself evidence of an antitrust violation. Rather, the government needs to show that such a market position has been obtained or is being preserved through some illicit means. That is likely to be particularly difficult in a case involving mass communications platforms, which can naturally tend toward monopoly.

Think about it this way: Your choice of what kind of car to buy, or where to shop for groceries, is more or less independent of where your friends and relatives shop and what they buy. Sure, there can be social pressures (“We’re a Ford family”), but ultimately it doesn’t change the nature of the goods or services acquired. That is not the case with communications platforms, however. The more people use a social media site, the more effective the site is; most people join Facebook because their friends and family are there. That effect snowballs, so that in any particular sector of social media (microblogging on Twitter, status updates on Facebook, photos on Instagram, short videos on TikTok, and so on), a dominant player will tend to emerge as the “place where everyone goes” even without illegal monopolization efforts. That dominant player will likewise enjoy an advantage in ancillary markets such as advertising.

These effects might justify other forms of market regulation (the tariffing of telephone companies comes to mind, though I don’t think edge services like social media sites should be treated as common carriers for other reasons). However, they don’t support an antitrust lawsuit. That’s not to say that tech companies *couldn’t* engage in illegal monopolization efforts, but it would be harder to establish that any perceived anticompetitive effects were not the natural result of the industry.

Turning to private antitrust lawsuits, a judge in N.D. Cal. [dismissed](#) Apple’s conversion and intentional interference counterclaims in its battle with Epic Games over alleged antitrust violations related to App Store fees.

C. Net Neutrality

Biden’s win also [raised hopes among net neutrality proponents](#) that a Democrat-led FCC could repeal the Pai-era FCC’s repeal of the Wheeler-era FCC’s net neutrality order. As with all agency issues discussed so far this issue, this turns on what happens with nominations and confirmations of new commissioners – so if you’re a fan of either Section 230 or net neutrality tell your friends in Georgia to vote Democrat in the Senate runoffs.

D. Domain Name System

Nothing to report this month.

E. Taxation

A battle over an attempt by Indiana cities to collect “franchise fees” from streaming services, which had previously been removed to S.D. Ind., has been [remanded to state court](#) under principles of comity.

F. Wire & Wireless Deployment

Verizon and New York City have [settled a New York state lawsuit](#) over Verizon’s alleged breach of a franchise agreement to bring fiber service to the entire city. Per the settlement, Verizon has committed to connect 500,000 households to its FiOS service by July 2023.

G. Artificial Intelligence & Machine Learning

Nothing to report this month.

H. Blockchain & Cryptocurrency

A judge in N.D. Cal. [dismissed](#) contributory trademark infringement and publicity claims against YouTube arising out of a cryptocurrency scam. The complaint alleged that scammers hijacked accounts associated with the plaintiff (a cryptocurrency developer) and encouraged holders of the plaintiff’s tokens to transfer them to accounts from which they were then stolen. The court found that YouTube’s alleged delays in responding to the plaintiff’s informal complaints did not support a finding of contributory infringement, and that Section 230 blocked other claims.

In N.D. Ga., a trio of men will [pay \\$103K to settle claims](#) by the SEC that they unlawfully pumped investment in an initial coin offering of worthless cryptocurrency tokens.

A cryptocurrency exchange [sued Forbes and two of its journalists](#) in D.N.J. over an allegedly defamatory article accusing the exchange of scheming to avoid regulators.

Finally, the U.S. federal government was [revealed as the mystery party](#) who transferred almost \$1 billion of bitcoin out of a digital wallet associated with defunct black market Silk Road. That’s a tidy sum to collect in a single forfeiture, no? And the fact that the U.S. government now holds that much bitcoin must give a boost to its legitimacy as a currency; one wonders if that’s related to bitcoin’s value [going through the roof](#) lately.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

The Ninth Circuit [heard argument this month](#) in a long-running case brought by five Verizon and AT&T customers over the NSA's use of mass surveillance techniques on American citizens. The key question for the court seemed to be whether the government's invocation of the state secrets privilege as to the question of whether the individual plaintiffs had been surveilled required the dismissal of the lawsuit, or instead required the court to proceed in camera to preserve the secrets.

A magistrate judge in N.D. Cal. [ruled](#) that Google was required to produce an account holder's emails for the purposes of a UK divorce proceeding notwithstanding the provisions of the Stored Communications Act. The court found that the account holder's statements before the English court demonstrated "express consent" for the disclosures; Google had objected that expressions of consent provided outside of its verified-consent process could not be assumed to be trustworthy.

B. Encryption

Nothing to report this month.

C. Biometric Tracking

Portland, Maine, has joined the list of cities banning governmental use of facial recognition with the [passage of a ballot initiative](#).

D. Domain Seizure

Nothing to report this month.

E. Content Blocking & Prior Restraints

The murder of a federal judge's son spurred the [passage of a New Jersey law](#) that, among other things, prohibits the knowing publication on the internet of the home address or unpublished home telephone number of any active or retired judge or prosecutor. It also allows police officers, prosecutors, and judges to demand that individuals remove such posts within 72 hours. Tragedy begetting bad law, I fear; I can't see how this is constitutional. The law also excludes from the state's Open Records law any portion of a record disclosing the home address of any active or retired judge, prosecutor or law enforcement officer, which isn't strictly speaking a constitutional issue but conceivably could interfere with legitimate news investigations.

A Missouri state representative [argued before the Eighth Circuit](#) that her Twitter page was not a public forum and that a district court injunction barring her from blocking a critic was improper.

Prof. Volokh has continued his valiant effort to track cases involving anti-libel injunctions and other injunctions dealing with online speech, and this month noted the following: an [anti-libel injunction](#) in S.D. Cal. that the court took specific steps to narrow and that the court noted could not be enforced against digital platforms; a district court judge in E.D. Tenn. [accepting a magistrate judge's recommendation](#) to reject a preliminary injunction against alleged libel; [a TRO](#) in Cal. Super. against a gripe site that accused a lawyer of being a fraud, a coward, and untrustworthy; an [injunction in a property lawsuit](#) in Fla. Cir. that seems to have been drafted by the parties to confuse internet services into thinking they had been ordered to remove content about the plaintiff or her husband; and a [temporary injunction](#) in Okla. Dist. prohibiting one grandmother of a child from talking about her dispute with the child's other grandmother.

F. Online Access to Government Information

Our friends at the Reporters Committee for Freedom of the Press encouraged the Administrative Office of Pennsylvania Courts to [keep court proceedings relating to the election open to the public](#). Speaking of which, [this from The Onion](#).

Meanwhile, prosecutors in the trial of the four Minneapolis police officers charged in the death of George Floyd [sought precisely the opposite](#), asking a Minn. Dist. judge to reverse his earlier decision to livestream the proceedings to guarantee public rights of access.

VII. Global

A. Europe

The EU's Competition Commission [announced](#) preliminary findings this month that Amazon unlawfully used information that it gathered about third-party sellers to preference its own products, as well as announcing a new investigation into whether Amazon preferences its own retail offers in displays to users. Competition Commissioner Margrethe Vestager also [announced proposed rules](#) that would require tech companies to explain their advertising algorithms and make their ad archives available to regulators.

Alphabet CEO Sundar Pichai [apologized this month](#) for a leaked memo that appeared to set forth a plan targeting EU Commissioner for Internal Market Thierry Breton for "pushback" in response to fears of greater restrictions under the forthcoming Digital Services Act and other regulations. Pichai took responsibility for but disclaimed knowledge of the document, stating that it did not represent Google's approach for dealing with the EU. This comes at a time when [EU ministers are pushing](#) to require rapid removal of extremist content from digital platforms.

The European Data Protection Board has [issued guidance](#) for digital companies operating in the wake of the *Schrems II* decision striking down the EU-U.S. Privacy Shield, focusing primarily on the use of Standard Contractual Clauses. Meanwhile, the upcoming ePrivacy Directive is working its way through the drafting process; a [recent iteration](#) eliminates a provision that would allow the “use [of] processing and storage capabilities of terminal equipment or [the collection of] information from an end-user's terminal equipment” to serve a service provider’s “legitimate interests.” A European consumer protection group has [criticized EU privacy regulators](#) for failures of GDPR enforcement against major tech companies. And concerns that the Council of the European Union was planning to propose a ban on end-to-end encryption of digital communications in response to terrorist threats [appears to have been overblown](#).

A [new report](#) from Gesellschaft für Freiheitsrechte e.V. (Society for Civil Rights) raises significant concerns about the impact of Article 17 of the Directive on Copyright in the Digital Single Market on freedom of expression and information.

Finally, Booking.com [lost a jurisdictional dispute](#) before the European Court of Justice regarding which EU member’s courts had the authority to resolve a fight with a German hotel over the website’s unilateral changes to its terms and conditions.

B. Australia

Australia’s federal government is reviewing the [need for a right to data erasure](#) as part of a review of the country’s privacy laws.

Public broadcasters ABC and SBS are [no longer excluded from the draft mandatory news code](#) that would require Facebook and Google to pay news publishers for use of their content. Meanwhile, a separate Senate inquiry is exploring how tech companies should be regulated [if they expand into the banking field](#).

Facebook [apologized to Mildura MP Anne Webster](#) for delays in removing content posted by a conspiracy theorist suggesting Webster was part of a “paedophile network.”

C. Austria

Following last year’s CJEU ruling that worldwide takedown orders in defamation cases do not violate European law, the Austrian Supreme Court has rejected Facebook’s appeal and [ordered the company to remove globally](#) the defamatory statements at issue in Green Party politician Eva Glawischnig’s case as well as any identical or equivalent statements.

D. Brazil

Brazilian writer J.P. Cuenca has been [targeted with more than 130 lawsuits](#) from evangelical pastors over a satirical, albeit vivid, Twitter post.

E. China

China is [attempting to regulate anticompetitive behavior](#) by tech companies, proposing a draft regulation addressing data sharing, collusive market activity, and compulsory exclusive partnerships.

More troublingly, Communist Party officials have been cracking down on Chinese citizens' [use of foreign social media sites](#), up to and including jailing users.

F. Denmark

Danish news agency Ritzau [was knocked offline](#) by a ransomware attack; at least at the time of initial reports, it refused to capitulate to the hackers' demands.

G. Ethiopia

After Ethiopia's government sent troops into the country's Tigray region and shut down the internet, [citizens turned to Twitter](#) to let the world know what was happening.

H. France

Media and free press organizations in France [raised an alarm](#) about a pending legislative proposal that would have made it illegal to disseminate images of law enforcement officers. God bless the French, they [took to the streets](#) in protest. President Macron's party [agreed to reconsider](#) the proposal.

Google [reached a deal](#) with six French news organizations to pay for the use of their content. Reports suggest the company will pay [~€150m over three years](#). Meanwhile, France has [lifted its suspension of collection of taxes](#) on large digital companies, informing platforms that the country would collect the tax in December if a deal with the United States had not been reached. Yeah, I don't think that's high on Trump's agenda right now.

I. India

The Competition Commission of India has [opened an investigation](#) into whether Google has leveraged the dominance of Android in the country to promote its Google Pay service as well as into the design of the Play Store's billing system.

India's Ministry of Information and Broadcasting has been [granted authority](#) over streaming platforms and digital news outlets, leading to [concerns over censorship](#).

Speaking of censorship, comic Kunal Kamra is [facing a potential jail sentence](#) under the Indian Contempt of Courts Act for his tweets criticizing a Supreme Court decision. Then there was an

[ordinance](#) passed by the Kerala government imposing 5 years in prison for offensive or malicious social media posts. After widespread protest, the government [agreed not to enforce the ordinance](#), which is good – but governments have a way of forgetting these promises when they have someone they really want to make disappear.

I was invited to India some years ago to talk about freedom of speech. If I had to characterize where the country’s law on free expression stood at the time, I’d say it was roughly comparable to where the U.S. stood at around the time of *Abrams*. I was so hopeful that it would follow a similar trajectory, but the early 21st century is very different from the early 20th as an environment for the growth of free speech principles.

J. Ireland

A 2014 data leak on Twitter is likely to be the basis of the [first GDPR penalty against the company](#), with a majority of EU data protection authorities agreeing to a settlement drafted by Ireland’s Data Protection Commission.

Former TD Frank O’Rourke [filed proceedings against Facebook and Twitter](#) seeking Norwich Pharmacal orders to compel the disclosure of the identities of posters of allegedly defamatory statements.

K. New Zealand

One step forward, one step back: [New Zealand’s Supreme Court held](#) that alleged copyright infringer Kim Dotcom could be extradited to the United States, but also held that Dotcom should have been allowed an appeal of the original 2015 district court ruling that found that Dotcom extraditable in the first place. At this rate, Dotcom will shamble off a plane in Los Angeles in 2035 and U.S. law enforcement will say, “Kim who?”

L. Pakistan

With the Pakistan Telecommunication Authority now wielding vast authority to remove and block digital content that poses “harms, intimidates or excites disaffection” toward the government or in other ways hurts the “integrity, security, and defence of Pakistan,” a coalition of tech giants has [threatened to bail out](#) of the country. In particular, the companies have objected to “draconian data localization requirements.”

M. Russia

[Draft legislation](#) would allow the Russian government to block tech platforms that “discriminate” against Russian media outlets. One wonders whether that will be followed with a mandatory compensation system like we’ve seen in France and is under consideration in Australia, to create

a must-carry/must-pay regime. In the interim, we've got a report of a [new case](#) brought by Roskomnadzor against Google for failing to remove prohibited material.

N. Singapore

The defamation case brought by Singapore's Prime Minister against a blogger arising out of an article shared on Facebook [shambled to a conclusion](#), with the PM announcing in closing arguments that he's looking for about \$150,000 in damages. We're watching for the verdict.

O. Sri Lanka

Hey, you know what's always fun? Giving government regulators vague but menacing authority to regulate content on social media. Sri Lanka's [looking to get in on that action](#), apparently.

P. Sweden

The Administrative Court of Stockholm [rejected Google's appeal](#) of a finding of liability for GDPR "right to be forgotten" violations, but reduced a 75 million kronor penalty to 52 million.

Q. Thailand

[K-pop](#) has emerged as a surprising unifying force in Thailand's pro-democracy youth protests, serving as a [point of connection on social media](#).

R. Turkey

Facebook, Instagram, Twitter, Periscope, YouTube and TikTok were each [fined 10 million lira](#) for failing to register a local representative under Turkey's new social media law. Meanwhile, Google has been [fined 196.7 million lira](#) for alleged anticompetitive activity in the search market.

Well, there's no one to root for in this next one: Turkish President Erdogan is [suing a Dutch politician](#) who built his career fearmongering about Islam over a series of tweets in which Erdogan was called a "terrorist." Moving on.

S. United Kingdom

The UK's Competition and Markets Authority is gaining a new Digital Markets Unit to draft and to enforce a pro-competition code of practice regarding technology companies.

The Observer's Carole Cadwalladr has [dropped her defense of truth](#) in a libel action brought by Brexit supporter Arron Banks over a tweet alleging that Banks had a "covert relationship with the Russian government." Cadwalladr continues to assert a public interest defense.

A High Court judge [ruled](#) in a dispute between footballer wives that the defendant's social media posts accusing the plaintiff of leaking false stories about her personal life to the press were capable of being understood to convey a serious allegation of breach of trust.

T. Vietnam

Facebook is [facing the possibility of being shut down](#) in Vietnam if it refuses to censor a greater swath of local political content.

U. Zimbabwe

Journalist Hopewell Chin'ono was [arrested](#) and then [freed on bail two weeks later](#) on charges that he "abused" social media to obstruct justice. Press freedom groups are [decrying the move](#) and voicing their concerns about even worse censorship if a new cybercrime bill passes.

VIII. Miscellaneous

The Second Circuit [held](#) that a student at Charter Oak State College had failed to state a First Amendment claim against one of his teachers for removing a blog post that he made to a college message board as part of a class assignment. The post, said the court, was removed not for its viewpoint but because it was not responsive to the assignment.

A judge in D. Ariz. [held](#) that providers of proprietary computer dealer management systems adequately alleged that Arizona's Dealer Data Security Law, which mandated that they provide code allowing auto dealers to communicate with their systems, compelled their speech in violation of the First Amendment.

A [new lawsuit](#) against Google in N.D. Cal. asserts that Android phones exchange 260MB of data with the company without user authorization even when not in use, constituting conversion of users' data allowances.

A personal injury lawsuit against Snap arising out of a car accident allegedly caused by a distracting use of the Snapchat speed filter (which adds the speed at which one is traveling to an image) was dismissed by the Georgia Superior Court on the basis that Snap did not have a duty to prevent the injury. This month, the Court of Appeals of Georgia [affirmed](#).

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That's the last issue in 2020, though of course we'll be reviewing December in the new year. "New year," doesn't that have a nice ring to it? I, for one, can't wait. Have a fantastic holiday season, and I'll see you in 2021!