The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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It's that time of year again, when we watch the Supreme Court for landmark activity on issues affecting digital media.

This month, we had *Google v. Oracle America* on fair use of software code, *AMG Capital Management v. FTC* on limitations on the power of the FTC to seek equitable monetary relief, and *Facebook v. Duguid* on the reach of the Telephone Consumer Privacy Act's robotext provisions. We also had oral argument in *Manahoy Area School District v. B. L.* on schools' ability to police off-campus student speech on social media, *Minerva Surgical v. Hologic* on patent assignor estoppel, and *City of San Antonio v. Hotels.com* on an award of costs to a hotel booking website that prevailed in a tax dispute. And finally, we had a disappointing GVR in *Biden v. Knight First Amendment Institute*, vacating as moot the Second Circuit's ruling that former President Trump violated the First Amendment rights of people he blocked on Twitter. That last one came complete with a concurrence from Justice Thomas laying out a road map for how Congress could obligate social media platforms to moderate according to First Amendment standards.

We'll talk about all of that, and much more, below. At the same time, we're preparing for the MLRC's *Legal Frontiers in Digital Media* conference, and crossing our fingers that we get a ruling in *Van Buren v. United States* so that we can talk about it there. As always, we've got a great lineup, and you can't beat the price for three days of informative online sessions on cutting-edge issues – so register now!

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I. Privacy

A. Anonymity

Credit Suisse has filed suit in N.D. Cal. against a group of Doe defendants, seeking discovery to reveal the person or persons behind an email to government officials and members of the press containing the personal data of former employees. The email was sent over the name of Credit Suisse's CEO.

B. Personal Information

A Chinese dissident who claims that his pro-democracy actions were outed by Yahoo! to the Chinese government as part of a deal for the company to gain access to the country had his suit in N.D. Cal. dismissed for failure to plead the dates on which the alleged acts occurred; however, the court found that he had standing and allowed him to amend.

A judge in D.D.C., noticing a potential issue with diversity jurisdiction, ordered Marc Rotenberg, former head of the Electronic Privacy Information Center, to amend his complaint against Politico and Protocol Media for disclosure of personal information to identify where the various corporate and individual defendants are located.

A former track coach at Northeastern University is facing a criminal complaint in D. Mass. for allegedly tricking student athletes into sending him private photos.

A Los Angeles Superior Court judge dealt former U.S. Representative Katie Hill a series of defeats with holdings that the publication of nude photos of the politician by online outlets and reporters were protected by the First Amendment. In contrast, a woman won a $500K judgment in Michigan state court in a revenge porn case against an ex-boyfriend who published her photos to PornHub. Congress is set to consider the issue of nonconsensual pornography with a proposed amendment to the Violence Against Women Act that would criminalize the knowing or reckless distribution of "intimate visual depictions" of individuals without their consent.

A group of U.S. senators has asked major online ad networks for information about the data they share with foreign entities, investigating the potential that the data could be used by foreign intelligence agencies. Sen. Ron Wyden followed that up with a draft bill limiting foreign trade in data by tech companies.

Florida's senate debated a data privacy law that would have made it the third state to adopt a comprehensive consumer privacy law; however, the measure died at the end of the legislative session after the house and senate were unable to resolve conflicts.

C. Children's Privacy

The Ninth Circuit held that the district court properly rejected Amazon's attempt to compel arbitration in a case over the alleged unauthorized recording of minors' communications by Alexa devices.

Reddit has been sued in C.D. Cal. for allegedly failing to take action against the plaintiff's ex-boyfriend for posting underage nude photos of her.

Multiple class action lawsuits in N.D. Cal. over the alleged tracking and targeting of children by app advertisers have been resolved with settlements that include agreements to remove certain ad software.

D. Rights of Publicity

Rapper Ice Cube has sued the developers of stock-trading app Robinhood in N.D. Cal. for allegedly exploiting his likeness and catchphrase lyric "You better check yo self before you wreck yo self" in an article on its "Robinhood Snacks" news website.

E. Biometrics

Nothing to report this month.

F. Manipulated Media

Nothing to report this month.

G. Hacking, Scraping & Data Breach

Facebook is before the First Circuit on appeal of a decision by a judge in D. Mass. that drafts of its settlement with the FTC over the Cambridge Analytica scandal are public records under FOIA.

The Second Circuit issued an interesting opinion that attempts to harmonize what some other courts have characterized as a circuit split on the question of whether a risk of future identity theft establishes Article III standing in a data breach case. According to the court, no circuit has actually rejected the proposition that such a risk might create standing, though some have found that standing was not established on the facts of a particular case.

During oral argument, a panel of the Ninth Circuit appeared doubtful of an Israeli software company's claim that it was entitled to sovereign immunity in a case brought by WhatsApp over the use of the company's software to hack its users' communications.

In N.D. Cal., a California Consumer Privacy Act class action claim against Walmart over a data breach was dismissed with leave to amend, after the court held that the complaint failed to allege (1) that any of the alleged action or inaction by Walmart took place after the law's effective date or (2) any disclosure of personal information. (The order was issued in early March but only came across our radar this month; given that it's one of the first cases to interpret the CCPA, I thought it worth mentioning out of time.)

A judge in S.D. Tex. unsealed a search warrant allowing the FBI to engage in an operation to find and remove hackers' backdoors into Microsoft Exchange servers across the United States. The massive effort, which the Justice Department calls successful, is believed to be the first FBI effort to remedy a cyberattack against private networks. The intervention was limited, and did not cure the vulnerabilities that allowed the hacks or remove any malware on the servers.

H. Other Intrusion

The Supreme Court held this month that Facebook did not violate the robotext provisions of the Telephone Consumer Protection Act when it sent allegedly unwanted text messages, holding that the law applies only to the use of devices that "randomly or sequentially generate" phone numbers as opposed to Facebook's pre-existing database of contact information.

Finally, we have an interesting decision from a judge in D. Del. picking apart the implications of the Supreme Court's recent decision in *Barr v. AAPC* and what it means for liability and damages in the case of a robocaller who was acting under a statutory exemption that the Court retroactively held to be invalid.

II. Intellectual Property

A. Copyright

So, the big news in this section, and for that matter this month's article, is the Supreme Court's decision in *Google v. Oracle America.* The Court held, in a 6-2 ruling with Justice Breyer writing for the majority, that Google's copying of approximately 11,500 lines of code from an Oracle API was a fair use. There has already been, and will continue to be, copious analysis of the case inasmuch as it contains remarkable language regarding the nature of fair use, the nature of copyrights in software (you get the sense that Breyer wanted to revisit the copyrightability of software but couldn't get the votes), the nature of the economic market for software, and more.

The broader question is whether this is a software case involving copyright issues or a copyright case that happens to involve software, the difference being the decision's implications for non-software cases – such as the Second Circuit's recent decision rejecting a fair use defense for Andy Warhol's portraits of Prince.

Speaking of the Second Circuit, a panel of the Court of Appeals heard argument this month on Richard Liebowitz's appeal of sanctions. The Ninth Circuit rejected an argument that an alleged delay by Facebook in responding to third-party infringement equated to volitional conduct for the purposes of a claim against the company.

Turning to the district courts, let's start with a handful of DMCA cases. In D. Ariz., a college student backed up by EFF sued the developer of exam proctoring software for violations of § 512(f) for filing allegedly fraudulent takedown notices to force the removal of the student's critical tweets about the company. In C.D. Cal., the court held that an attempt to make an end run around § 512(f)'s tough standards by filing a tortious interference claim was doomed to failure by federal preemption. And in N.D. Cal., an education website successfully invoked § 512(c) to shut down an infringement claim on summary judgment.

In other cases, a judge in N.D. Cal. held that the alleged holder of copyrights in 3-D scans of everyday objects was not required to wait for a decision from the Registrar on reconsideration of a denial of registration before filing suit against Facebook and Princeton University. But another judge of the same court held in a different case that you still need to at least attempt to register your works to be able to sue, shutting down a claim over alleged infringement on YouTube.

In S.D. Fla, a marketing agency alleged in a new complaint that the so-called "King of Instagram" Dan Bilzerian and his company used their photos without authorization after deciding not to hire the agency. In M.D. Tenn., a judge held that the publisher of Eminem's music adequately pleaded a claim against the Harry Fox Agency for allegedly facilitating Spotify's infringement of "Lose Yourself." And in E.D. Va., a preliminary injunction against companies behind streaming service Popcorn Time has been expanded to freeze the companies' PayPal-based assets, in an infringement case brought by major Hollywood studios.

B. Trademark

The Ninth Circuit held that Dropbox should not have been granted summary judgment in a claim that its "Smart Sync" mark for software infringed the plaintiff's "SmartSync" trademark, also for software; the Court of Appeals found that there was a dispute of fact as to the likelihood of reverse confusion. In another dispute over software trademarks, TikTok is facing a new lawsuit in S.D. Cal. over its use of "Stitch" for an editing feature; the suit was filed by a video editing company using the name.

A judge denied summary judgment for the former operator of a concession stand at Petco Park in a case filed by the Padres in S.D. Cal., ruling that the inadvertent residual appearance of Padres trademarks on the defendant's defunct website was not a fair use and could constitute infringement despite the fact that the parties were in different industries.

In E.D.N.Y., Spotify will recover at least some portion of its attorneys' fees after a judge ruled that a trademark complaint over the use of "Reply All" by Spotify's subsidiary Gimlet Media had, from the outset, presented "a fatally weak claim with no hope for success." Ouch.

C. Patent

The Supreme Court heard argument this month on whether a party who assigns a patent is estopped from challenging the patent's validity; it seems likely that the answer will remain yes, at least to some extent. The Court denied cert in another patent case (*NetScout Systems v. Packet Intelligence*) involving monitoring packets on a network. It also received two new petitions in patent cases, one on a Federal Circuit rule precluding a plaintiff from dropping a patent claim against a direct infringer in order to sue the infringer's customers and one appealing from a ruling that a patent for a social networking system was invalid.

Finally, in W.D. Tex., a jury found that Roku had not infringed two patents for interactive TV technology.

D. Trade Secrets/Misappropriation/Conversion

Nothing to report this month.

III. Platform Management

A. Section 230

A judge in C.D. Cal. held that Section 230 precluded a variety of claims in a case brought by a model against Twitter over a third party's unauthorized distribution of her photos, including a non-IP false advertising claim under the Lanham Act and "a breach of contract claim premised solely on Twitter's failure to suspend … accounts."

The Massachusetts Supreme Judicial Court drew a line between first-party content and editorial choices regarding third-party content in a case involving peer-to-peer car rental service Turo, holding that § 230 protected the latter but not the former; however, it also held that § 230 would not protect Turo if it had "more concentrated involvement" in a particular transaction on the site. Exactly what "more concentrated involvement" means isn't precisely clear.

In North Carolina, state senators introduced yet another bill purporting to restrict platforms' freedom to moderate content, which I'm including in this section rather than down below because the bill expressly includes in its "whereas" clauses a total misreading of the state law exemption in § 230(e)(3). You can just imagine these folks thinking they're so smart to have found a loophole that every other state legislature seems to have missed, when in fact they're the only ones foolish enough to have completely misunderstood it. Oops.

B. Elections & Political Advertising

Nothing to report this month. At least, nothing that we can't deal with elsewhere equally as logically.

C. Content Moderation

So, as I foreshadowed last month, we have to talk about another lengthy discursion from Justice Thomas into content moderation issues. This time, it comes in his concurrence to the Court's ruling that *Biden* [nee *Trump*] *v. Knight First Amendment Institute*, the case over the former president's blocking of people on Twitter, is moot. Thomas laments that but for the mootness, the Court might have found that it was inconsistent for the Second Circuit to hold that President Trump violated the First Amendment rights of Twitter users when Twitter itself is a privately moderated forum. If that strikes you as odd (because Trump was a public official in control of his subset of the digital domain regardless of whether Twitter is a private company), you'll love this next bit.

Thomas goes on to explore a variety of theories and cases that might allow Congress to compel social media platforms to moderate according to First Amendment standards, which if adopted could lead to public officials on a platform being bound by the First Amendment as well. It's like he's proposing some Faustian bargain that he thinks liberals in Congress might accept, offering the ability to sue Republican politicians in exchange for unfettering conservatives from social media content policies. Thomas acknowledges that right now social media operators can moderate however they please, but pulls out the usual cases and analogies like Congressional control over common carriers, public accommodation law, and the Court's decisions in *Turner Broad. Sys., Inc. v. FCC* and *PruneYard Shopping Center v. Robins* to say that Congress can override that freedom if it chooses. In a footnote, he also surfaces a truly bizarre argument that Section 230 might violate the First Amendment because it prevents states from passing laws to prevent censorship by private parties (think about that one for a minute).

Plenty of folks have already dissected Thomas's arguments, and I'll let you read those analyses for yourselves. For my part, I think there is actually a challenging question as to whether Supreme Court decisions regarding traditional media are based on a presumption that doesn't so clearly apply to social media, requiring a more nuanced approach than the application of precedent and imperfect analogies that Justice Thomas attempts here. If that strikes you as interesting, check out my article in the most recent issue of the Media Law Letter.

In any event, what Clarence Thomas thinks the Court should do is of course only one vote out of nine, and the rest of the Court seems uninterested in taking up this issue – at least as signaled by the Court's denial of cert this month in *Freedom Watch, Inc. v. Google*, in which the D.C. Circuit rejected conservative speakers' lawsuit against tech platforms for alleged violations of the First Amendment and antidiscrimination law. And in the meantime, courts continue to reject attempts

to hold platforms to constitutional standards, such as in this decision from the Ninth Circuit, and these two from the Northern District of California.

In other news, House Republicans released their "Big Tech Accountability Platform," which nominally rejects the concept of a new "fairness doctrine" for the internet but nevertheless proposes a list of "legislative concepts" that would severely restrict platforms' editorial discretion as to political speech and limit protections against intermediary liability, including a number of riffs on Section 230 reform as well as applications of the FTC Act to moderation practices.

At another big tech hearing, U.S. senators heard testimony from policy leads for Twitter, Facebook and Google as well as two experts on the operation of content algorithms, and questioned them about the interaction between algorithmic promotion of content, extremist speech, and the companies' business models. Unlike the high-profile hearings featuring the companies' CEOs, reports suggest that this discussion managed to avoid being a four-hour rant-fest, which makes for a nice change.

PEN America, EFF, CDT, Free Press, and a number of other free speech and voting rights groups sent President Biden a letter calling for him to form a group to study ways to curb online disinformation campaigns without sacrificing freedom of speech.

In state legislatures, a California bill introduced in February but only announced in April would mandate transparency reports and other reporting requirements by large platforms, much of which they already produce. More troubling is a bill passed by the Florida legislature [UPDATE: and signed by Gov. DeSantis after an exemption for theme park operators was added] prohibiting social media companies from de-platforming political candidates. The First Amendment problems are obvious, and a lawsuit is expected. Louisiana's senate has moved forward a bill prohibiting the deletion of political or religious posts. A Wyoming bill that would have prohibited political, racial, religious, or other discrimination in content moderation died in committee.

We'll get to the Facebook Oversight Board's ruling on Donald Trump in next month's issue, but for now I'll just note that as anticipated in our last issue the FOB is now hearing appeals of decisions *not* to remove content. Meanwhile, Parler will return to Apple's App Store after convincing Apple that it has improved its content and moderation policies.

D. Terms of Service & Other Contracts

The Northern District of California upheld an arbitration clause in the terms of service for Fortnite in a case involving claims arising out of the plaintiff's minor son spending more than $1,000 on in-game purchases. The Southern District of Florida upheld a similar clause in the

terms of service for car rental company Sixt, which was presented to consumers by means of a hyperlink during the online booking process.

IV. Other Content Liability

A. Defamation

The Supreme Court denied cert in two defamation cases, one involving sanctions levied against Alex Jones of Infowars for an online outburst against an attorney for the plaintiffs in the Sandy Hook shooting defamation case, and one involving a dismissed claim that a YouTube user was defamed by an error in the site's automatic closed captioning service that inserted a mild obscenity into her words.

The Fourth Circuit affirmed a ruling that a hyperlink to an article within a later article published by the same party does not restart the statute of limitations for the first article; similarly, third-party tweets of an article do not constitute republication for the purpose of extending the limitations period. The Eleventh Circuit affirmed the dismissal of a former Trump adviser's lawsuit against a former Gizmodo website, holding that New York's fair report privilege extends to reports of information filed under seal in court.

In C.D. Cal., a new lawsuit asserts that an online review calling a jazz club owner "tragically pathetic" and a "pompous jerk" is defamatory. (Ah, no, and you're kind of proving the point by filing suit.) Also in C.D. Cal.: Washington Football Team owner Daniel Snyder is seeking discovery to connect a former adviser to alleged defamation by an India-based website; in a different football-related lawsuit, an ex-employee of the L.A. Rams settled a claim with a former Patriots player over an allegedly defamatory text message posted online; and a courier for food delivery service Postmates dropped a claim against singer Lizzo alleging that she was defamed by the singer's claim on Twitter that the plaintiff stole her food delivery. (That last one actually happened a few months ago, but took a while to be noticed.)

A pharmaceutical company is suing the publisher of medical journal *Anesthesiology* in D.N.J. over allegedly false statements about one of its drugs, and sought a preliminary injunction requiring removal of the statements from the internet and other prior restraints. On a related note, I received general anesthesia for the first time in my life recently, and I have to say the experience was fascinating; the visual impression was like a camera shutter snapping closed behind my eyelids, and while I did dream there was a sense of timelessness that was oddly liberating. Not that I'm eager to do it again any time soon, mind you, but I find myself thinking about it quite a bit. Weird.

Okay, where was I…okay, in E.D.N.Y., we have attorney Lin Wood dropping out of a high-profile defamation case that his client brought against MSNBC host Joy Reid over social media posts, in an attempt to moot a pending motion to disqualify him as "unfit to practice."

Turning to state courts, the Supreme Court of Iowa held that although statements on social media are not automatically opinions, a Facebook comment that a defamation plaintiff was a "slum lord" was rhetorical hyperbole in context. Maryland's Court of Special Appeals held that a blog post published by PETA about the defendants in a separate proceeding involving violations of the Endangered Species Act was not absolutely privileged as a statement connected to a judicial proceeding. New York's Appellate Division held that music producer Lukasz Gottwald, p/k/a Dr. Luke, was not a public figure for the purposes of a defamation claim over singer Kesha's allegations that he sexually assaulted her.

We have three cases in New York's trial courts to report. An MLB umpire scored a $500K default judgment against a former N.Y. Met over statements made in a podcast alleging that the umpire had taken a bribe, and singer Cardi B won a default judgment against a blogger who accused her of being a prostitute (damages to be determined later, apparently). And James O'Keefe, founder of Project Veritas, sued Twitter over the company's explanation for why it suspended O'Keefe from the platform.

Just a few more. A new bill in the Tennessee legislature would restrict how media outlets report on civil litigation and criminal prosecutions and compel them to update their reporting under threat of statutory and actual damages. The Texas Supreme Court denied rehearing on its January decision to let four cases against Alex Jones and Infowars proceed. And in Wisconsin state court, a priest obtained summary judgment on his defamation claim against a Green Bay resident over social media posts, with the defendant enjoined to remove the posts in question and not republish them; the court stayed an award of $100K in punitive damages, to be entered as a judgment if the defendant fails to comply with the injunctive relief.

B. Commercial Speech

The Supreme Court unanimously held this month that Section 13(b) of the FTC Act allows the agency to go directly to court only to seek injunctions against unfair or deceptive conduct, and does not allow the FTC to seek monetary penalties under the guise of equitable relief. The upshot is that if the FTC wants to obtain disgorgement, restitution, or other monetary relief, it must undertake administrative proceedings under other provisions of the FTC Act before going to court.

Expedia settled a false advertising lawsuit in N.D. Cal. with hotels claiming that the booking website had falsely identified them as "sold out" or "unavailable."

We have a pair of lawsuits to report on involving content purchased through Apple's services, with a judge in E.D. Cal. holding that plaintiffs sufficiently alleged that the company's representations that users could "buy" content were deceptive when access to that content could be revoked, and a new lawsuit in N.D. Cal. alleging that a provision of Apple's terms of service

that allows the company to cut off the plaintiff from more than $24,000 worth of purchased media content is unconscionable.

In bankruptcy court in the Southern District of New York, a judge ordered Charter Communications to pay competitor Windstream $19 million for a "literally false and intentionally misleading advertising campaign" suggesting that Windstream's Chapter 11 bankruptcy would prevent it from servicing its customers.

C. Threats, Harassment, and Incitement

A jury in E.D.N.Y. convicted a man who threatened the lives of Democratic members of Congress in videos and on messaging apps on one count of threatening to assault or murder U.S. officials, rejecting the defendant's claim that he was just "spewing out some rhetoric."

A Tennessee man who was arrested for criminal harassment after he posted a manipulated image to social media of two people urinating on what appeared to be a police officer's tombstone is now suing state and local officials following the dismissal of the charges.

A California state judge granted anti-SLAPP motions filed by two men in a proceeding brought by a Carlsbad councilwoman seeking a restraining order against what she alleged were harassment and threats via social media.

V. Infrastructure

A. Accessibility

The Eleventh Circuit overturned a ruling by a district court judge that Winn-Dixie violated Title III of the Americans with Disabilities Act on its website, which does not facilitate the use of screen-reader tools for the visually impaired. The Court of Appeals held that Title III extends only to "tangible, physical places" and not "intangible places or spaces, such as websites."

As to the matter of economic accessibility, New York passed a law that caps the price of broadband for low-income households.

B. Antitrust

The FTC has opposed Facebook's motion to dismiss the Commission's antitrust lawsuit in D.D.C., arguing that Facebook's motion is premised on factual disputes rather than the insufficiency of the complaint.

An antitrust lawsuit brought against Google in N.D. Cal. by a group of advertisers ran into a stumbling block during a hearing on a motion to dismiss, with the judge commenting that the complaint appears to omit relevant companies in its description of "the relevant market to make

it more narrow." Meanwhile, the owner of the Daily Mail has sued Google in S.D.N.Y., alleging that the Daily Mail was punished in Google's search results for working around the company's real-time ad bidding process. And in E.D. Wis., a chain of Wisconsin newspapers sued both Google and Facebook, claiming that the companies have exploited their dominance of online advertising to the detriment of small media outlets.

There's a new lawsuit over app store fees in W.D. Wash., with a game developer alleging that Valve Corporation's popular Steam platform illegally extracts a 30% commission on game sales.

Stepping back from specific litigation, the FTC has created a new "rulemaking group" focused on developing new rules governing anticompetitive activity, while FTC nominee and antitrust hawk Lina Khan had an easy day at her Senate Commerce Committee confirmation hearing.

Sen. Josh Hawley introduced not one but two antitrust bills this month targeting large tech companies, one that would block M&A by companies with market caps over $100 billion without any actual sign of anticompetitive impact, and one that, as Mike Masnick puts it, "seems to pick seemingly random activities and insist that no company can do two of them." So, pretty typical Hawleyisms.

Apple and Google appeared at a U.S. Senate hearing and were questioned about whether they shared data from their app stores with their internal product development teams to develop competitive products. An Arizona bill that would have allowed developers to circumvent the companies' respective app stores, and the percentage commission charged therein, was pulled from the state senate's voting agenda at the last minute and now appears to be dead.

C. Net Neutrality

Turning to the FCC, a petition signed by more than 100,000 people asks the White House to appoint a third Democratic commissioner to break the current 2-2 deadlock left behind by the Trump administration.

D. Domain Name System

Nothing to report this month.

E. Taxation

The Supreme Court heard argument this month in *City of San Antonio v. Hotels.com*, involving a dispute as to whether the district judge had discretion to deny an award of costs to the prevailing party in a taxation dispute. Meanwhile, the Seventh Circuit heard argument from streaming services on why a lawsuit over municipal franchise fee taxes on streaming media should not have been remanded to state court.

The Maryland legislature amended its new digital advertising tax law to exclude broadcast and news media entities, to prohibit passing taxes along to consumers via new line-item charges, and to delay its effective date to 2022. The bill is expected to pass without being signed or vetoed by Gov. Hogan.

F. Wire & Wireless Deployment

President Biden revealed his plan to roll out high-speed broadband to the whole country this month, focusing on competition, municipal and nonprofit networks, and "future-proofing," with a price tag of $100 billion.

Speaking of municipal broadband, Washington state's legislature has voted to end prohibitions on the rollout of public networks.

G. Artificial Intelligence & Machine Learning

Nothing to report this month.

H. Blockchain & Cryptocurrency

A brief note about non-fungible tokens: Be sure you understand what rights you're actually getting when you buy one, because this is just a simulation of owning a physical object rather than actual ownership. For a great example of how thorny this can get from the copyright angle alone, see this story.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

Sens. Ron Wyden and Rand Paul have teamed up to introduce a new bill that would prohibit intelligence and law enforcement from paying data brokers for information without a court order, aligning privacy protections with those applicable to data held by mobile service providers and other digital services.

We learned this month that the U.S. Postal Service has been running something called the "Internet Covert Operations Program." Apparently, this involves scouring Americans' social media activity for "inflammatory" materials and then passing that data along to other agencies. Which (1) what the hell, and (2) the USPS?

B. Encryption

Ghmabgz mh kxihkm mabl fhgma.

C. Biometric Tracking

A Detroit man has sued the city in E.D. Mich. with the help of the ACLU, claiming to be the first person wrongfully arrested through the use of unreliable facial recognition technology.

A new Maryland bill would put limits on law enforcement use of consumer genealogy databases, restricting demands for data to certain serious crimes and requiring notice and consent from consumers that their information could be used in that fashion.

D. Domain Seizure

Nothing to report this month.

E. Content Blocking & Prior Restraints

So, we talked up above about Justice Thomas' concurrence in *Biden v. Knight First Amendment Institute*, but we shouldn't lose sight of the actual holding in which the Court vacated as moot the Second Circuit's decision holding that Donald Trump had violated the First Amendment rights of people he blocked on Twitter. I'm honestly still a bit puzzled how the case could be considered moot. I get that the U.S. government can no longer tell Donald Trump what to do with his Twitter account (should he ever be allowed to use it again), but the individuals represented by the Knight First Amendment Institute suffered actual harm for a period of time before Trump left office, obtained actual relief when Trump unblocked at least some people in response to the suit, and would be entitled to their attorneys' fees for winning the case below. It also sounds a bit like *Uzuegbunam v. Preczewski* to me…would it be different if the plaintiffs had asked for $1 in nominal damages on top of an injunction so that there was still monetary relief at stake?

In any event, the Second Circuit's decision is already in the DNA of decisions by other courts on similar issues, so its effects will continue to be felt even if it is no longer good law. Speaking of other courts, we have a new case in W.D. Tex. against state AG Ken Paxton for blocking citizens of the Lone Star State on Twitter.

Turning to other issues, the Ninth Circuit has vacated a court order blocking two State Department decisions that facilitated the distribution of plans for 3-D printed guns, holding that the Department's decisions were not subject to judicial review.

A new lawsuit in D.N.J. asserts that the state's judiciary violated the rights of an online poster when it asked a website operator to take down a post critical of two state judges.

F. Online Access to Government Information

A Missouri appellate court will soon hear argument in a case against former governor Eric Greitens over his alleged destruction of public records through use of an app that automatically deleted his messages. The lower court ruled that any violation was of the state's record retention law, which offers no private right of action, rather than the state's freedom of information law.

VII. Global

A. Europe

The European Court of Human Rights held that the freedom of expression of an investigative journalist was violated when Ukraine's courts authorized the country's law enforcement apparatus to obtain 16 months' worth of her smartphone data after she reported on senior government officials.

The European Parliament approved a new regulation requiring online platforms to remove, within one hour of notification, the following categories of material: material that incites, solicits or contributes to terrorist offenses; provides instructions for such offenses; or solicits people to participate in a terrorist group. The regulation will come into effect upon official publication, but will be enforced a year later; it also has exemptions for educational, artistic, and journalistic material.

The EU Parliament is also now considering a number of significant restrictions on use of facial recognition in public spaces, keyed to need in specific situations and whether the use involves real-time tracking of individuals.

The European Commission lodged a statement of objections against Apple, asserting that the company's App Store ruled interfere with competition in the market for music streaming apps.

B. Australia

A new discussion paper released by the attorneys-general of New South Wales contemplates reforms to defamation law to account for the role of online intermediaries, including how to categorize such intermediaries and whether they require protection against liability. Speaking of defamation in NSW, the territory's supreme court has ruled that a woman should be barred from publicly reporting her claims of sexual assault and invasions of privacy, after finding that she had not in fact been assaulted.

A proposal in a parliamentary committee report that users should be required to present extensive proof of identity in order to obtain a social media account has predictably come under fire.

The Australian Competition and Consumer Commission found that Google misled Android users into believing that turning off the "location history" setting would prevent collection of their personal data. The ACCC has also authorized a coalition of regional newspapers to bargain collectively with Google and Facebook under the country's new news media bargaining code.

C. Belgium

A man alleged to have posted hateful and misogynistic comments to Facebook has been referred to a jury trial on charges of threats, incitement to hatred, and publication of defamatory language. It is, apparently, exceedingly rare for a speech-related case in Belgium to be tried to a jury.

D. Brazil

Brazil's Chamber of Deputies is working on the repeal of the country's National Security Law, a measure that has frequently been abused to quell political dissent. However, free speech groups warn that a proposed replacement law threatens free speech and journalism in different ways.

E. Cambodia

The Cambodian government has complained about Vice's publication of photos of the victims of the Khmer Rouge that it alleges were manipulated to depict the victims smiling. Vice pulled the article in question, while the artist who restored the photos has not acknowledged modifying the images beyond colorization.

F. Canada

Canada's Federal Court of Appeal rejected an appeal by Google Canada on a subsidiary issue in a patent case over online ad technology, stating that the case would be more efficiently addressed by going to trial.

A new parliamentary petition would add law enforcement to the list of groups protected under the country's hate speech laws, a measure critics have panned as an effort to insulate police from public comment. Meanwhile, an amendment to a pending bill that would sweep online videos within the regulatory authority of the Canadian Radio-Television and Telecommunications Commission has triggered a widespread outcry.

G. China

China has fined Alibaba to the tune of approximately $2.75 billion for antitrust violations, part of a crackdown on the market power of the nation's internet companies.

The New York Times has a disturbing article on a double standard for moderation applied to men and women on Chinese social media.

H. France

Max Schrems is at it again, filing a new complaint with France's CNIL alleging that the Android Advertising ID violates the 2002 ePrivacy Directive by tracking users without their knowledge or consent.

Meanwhile, France is getting a jump on the proposed EU Digital Services Act by implementing new intermediary liability measures while the DSA is still just a proposal at the European Commission. Problem is, France's "pretranscription" of the DSA is inconsistent with the eCommerce Directive, which is still the governing law on intermediary liability. The country is also moving forward with a widely-criticized ban on the malicious sharing of photographs that identify police officers.

I. Germany

Germany's data protection authority brought proceedings to block the implementation of new terms of service for WhatsApp that, the DPA alleges, would require users consent to new terms for data sharing between WhatsApp and Facebook in order to continue using the app. WhatsApp disputes the characterization of the new terms, stating that they do not expand any sharing of data with Facebook.

J. India

Facebook announced increased efforts to block hate speech in India as the country began an extended election process in multiple states.

India has ordered Twitter and Facebook to remove posts critical of the government's handling of the coronavirus pandemic in the midst of a catastrophic surge in cases. Facebook also briefly removed all posts with the hashtag #ResignModi, which the company called a mistake and not triggered by any government demand.

K. Ireland

The Irish Data Protection Commission opened an investigation into whether Facebook violated the GDPR in connection with a recently-announced data breach affecting over 533 million accounts. A lawsuit on behalf of affected users is apparently also in the works.

We have an instance of libel tourism, with Buzzfeed and self-help icon Tony Robbins fighting before the Irish High Court about whether Robbins' defamation case against Buzzfeed UK more properly belongs in the United States.

Facebook and Twitter faced criticism from an Oireachtas committee over their content moderation practices, and in particular the proliferation of misinformation originating from

anonymous accounts. New legislation has also been proposed that would ban political parties from having their social media accounts managed outside of Ireland.

L. Jordan

The government of Jordan has banned publication of any statement related to a recent scandal in which a former crown prince claims to have been placed under house arrest after being accused of participating in a conspiracy to destabilize the country.

M. Malaysia

A satirist in Malaysia was arrested for sedition after publishing a Spotify playlist featuring variations on the word "jealous," a response to a public controversy over the royal family allegedly receiving priority for COVID-19 vaccines and the Queen's response on social media asking "Are you jealous?"

N. Myanmar

As the Myanmar junta continues in control of the country, at least 100 celebrities with large social media followings, including actors and journalists, have been targeted with arrest for incitement to protest.

O. Pakistan

Pakistan blocked Twitter, Facebook, WhatsApp, YouTube, and Telegram for several hours in an effort to disrupt retaliatory activity by a terrorist group after the arrest of its leader and ensuing protests.

The Islamabad High Court ordered a government committee formed to review objections to the country's new social media regulations to submit its report by May 10, after the committee was accused of dragging its collective feet.

P. Russia

Twitter was hit with fines totaling about $117,000 for failing to remove content that allegedly encouraged minors to participate in unsanctioned protests. Russia has also engaged in throttling traffic to and from Twitter, backed up by deep packet inspection to avoid circumvention via VPNs and similar techniques; free speech groups are exploring countermeasures.

A new law banning profanities on social media has predictably resulted in an uptick in profanities on social media.

Q. Singapore

A blogger slapped with a $98,800 judgment for linking to allegedly defamatory statements regarding Singapore's prime minister has crowdsourced $100,000 from more than 2,000 people to cover the judgment.

R. Tanzania

Tanzania's government flip-flopped on a decision to lift a media ban in the country, revising the decision to lift the ban only for online television but leaving it intact as to newspapers and other outlets.

S. Thailand

Thailand's prime minister dropped a defamation lawsuit against a Facebook poster after she apologized for referring to him as a reptile.

T. United Kingdom

The UK's new Digital Markets Unit within the Competition and Markets Authority launched this month, with one of its first tasks being to investigate the economic relationship between tech platforms and news outlets. The new head of the unit has since commented on the approach that it is likely to take. Meanwhile, the CMA is investigating Facebook's acquisition of Giphy for antitrust issues related to digital advertising, and prompted Facebook to remove 16,000 groups allegedly engaged in the trading of fake reviews for products and services.

A two-day hearing took place before the UK Supreme Court in a class action against Google for allegedly secretly tracking iPhone users. Google argued that the claimants should be required to demonstrate actual damage, an argument that echoes the Article III standing cases in U.S. data privacy actions.

The "Who is Satoshi?" mystery rears its convoluted head once again, as an Australian computer scientist who claims to be the inventor of bitcoin has been allowed to serve a copyright lawsuit via Twitter or email against the operator of a website hosting a copy of the pseudonymous white paper outlining the technology.

A trial concluded in a defamation lawsuit brought by a Syrian teenager against a far-right activist who posted anti-Muslim statements about him in Facebook videos; a judgment is expected at a later date.

VIII. Miscellaneous

The Supreme Court heard argument this month in a closely watched case about a high school's authority to discipline a cheerleader for off-campus speech on social media referring to school activities. A variety of amicus groups submitted briefs on deep questions about the porous nature of the boundary between school and the rest of a student's life in the digital age, with tension between the troubling extent of a school's authority over a student's speech if social media activity is included and the legitimate need to respond to bullying, threats, and other activity that can disrupt school activities. However, the justices hinted that there might be a narrow resolution to this case because the specific speech in this case, including a few choice expletives about cheerleading and the school in general, wasn't really all that disruptive.

The Sixth Circuit held that the application of Kentucky's anti-price-gouging law to Kentucky businesses selling into the state via Amazon does not violate the dormant commerce clause, pointing out that any extraterritorial effects result from independent choices that Amazon makes about the structure of its marketplace and are thus not "direct or inevitable." Meanwhile, Professor Goldman compares two rulings in product liability cases involving Amazon, one from Cal. App. holding that Amazon is subject to strict liability under California law even if it does not fulfill orders itself, and one from N.D. Ill. reaching the opposite result under Illinois law.

In the "idiots gonna idiot" file, twin brothers who faked a bank robbery for a YouTube prank pleaded guilty to misdemeanor charges in Calfornia state court after the prank ended with an innocent Uber driver having guns pointed at him by the police.

And finally, California's Supreme Court Committee on Judicial Ethics Opinions issued an advisory opinion warning state judges about the potential pitfalls of using social media to discuss the justice system.

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That's all for April. Now, go and register for the *Legal Frontiers* conference – see you there!