

The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone! I'd like to start this month by talking about an issue that's been on my mind for a while now, and that came up several times in discussions that I had with folks in Virginia.

A number of people, including our guest speaker at our Friday breakfast session, were interested in the possibility of using antitrust law as a manner of responding to the perceived problem of a limited number of social media sites acting as gatekeepers to the "digital public square." The idea would be that by "breaking up Big Tech" – or at least reducing perceived barriers to entry into the market – you give rise to a wider variety of gatekeepers who might be amenable to carrying particular speech. The concept has always bothered me; after some further pondering, I wanted to offer some thoughts.

First and foremost, while we all love speech, the mere fact that a particular message or viewpoint is denied access to existing platforms is not by itself evidence of a problem (let alone illegal activity). It might normatively be preferable for there to be a multiplicity of channels to encourage to a diversity of viewpoints, but not all messages are worthy of amplification to a mass audience and the system is not broken simply because some messages are filtered out.

It is of course possible that one consequence of illegal market manipulation in the media realm might be an undesirable limitation on available channels for speech, but even if you analogize information to a "product" that social media sells – and we should be careful of metaphors that suggest speakers must be treated like businesses in a supply chain – there's no antitrust problem just because you can't find a store that wants to put your product on a shelf. That is why, even if motivated by concerns over speech, antitrust actions against tech companies have addressed the legality of merger practices and control over digital advertising markets rather than broader content moderation patterns.

I suspect that part of the instinct to use law (whether it be antitrust, common carrier theory, or some other doctrine) to force access to social media derives from the concept of the social media space as a resource held in common -- the "modern public square," as the Supreme Court rhetorically called it in [Packingham](#). Which brings us back to the problem of metaphors. Analogizing social media to a public square and analogizing the "marketplace of ideas" to an economic market might both be superficially appealing as a rhetorical device, and useful for some limited discussions, but is dangerous if treated as a complete model for policy decisions.

For example, while both social media and public parks offer anyone the opportunity to show up and talk, there are critical aspects of a traditional public square that do not appear in most social media platforms. Most importantly, the traditional public square is based in a particular geographic area. When people turn to the public square to convey their messages, they are attempting to persuade a community defined not by shared viewpoints but by the commonalities arising from the location in which they all live. That is to say, the function of the traditional public square is to give individuals an opportunity to earn an audience in a community of which they are already a part. Moreover, geography imposes a limitation on the size of the community, making it less likely that fringe ideas will be held by a significant number of people and thus more challenging for radical ideas to find acceptance.

In contrast, social media is often less about earning an audience in a pre-existing community than about building community. The lack of geographic limitations allows the formation of communities of interest based on the viewpoints and interests that users express rather than commonalities forced upon them by physical location. Meanwhile, the massive user base of the large platforms enables even purveyors of fringe ideas to find a significant number of like-minded individuals (at least in terms of absolute numbers, if not in terms of overall percentage of the user base). The dynamic can thus be less one of persuasion than of echolocation – sending your viewpoint off into cyberspace and listening to hear it reflected back to you.

The function of social media sites to build communities of interest is both their greatest benefit to the world and their greatest threat, depending on whether the “interest” in question is constructive or destructive. Distinguishing between the two is the fundamental problem of socially responsible content moderation, and it is one that simply does not arise in the same way in the traditional public square because the burden of persuasion in the traditional forum serves as a filter for ideas with low information quality. The lone firebrand in the park might indeed spark the flames of revolution – and we want them to have the opportunity to try – but chances are that they’ll find damp tinder unless there are already serious problems in the community.

None of this is to say that it is wrong to believe that too many people are silenced on social media. However, leaning on either the metaphor of the economic market to invoke antitrust concepts or on the metaphor of the public square for a free speech rationale is deeply flawed. Measures to reform the social media landscape must be based on the specific nature of the medium in question, and not on facile (albeit appealing) comparisons.

There endeth the rant. Moving on.

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I. Privacy

A. Anonymity

Let's start with a [ruling](#) from S.D.N.Y., in which a doctor was denied in his attempt to unmask the anonymous author of a negative review after Yelp objected to the demand.

In W.D. Va., the Mountain Valley Pipeline has [subpoenaed](#) Facebook to identify the operators of a page called "Appalachians Against Pipelines" in connection with a pending case involving the owners of property through which the pipeline is supposed to cross.

In California state court, a podcaster successfully invoked the state's shield law to [quash](#) a subpoena seeking the identities of anonymous sources who made accusations of sexual harassment against a man being prosecuted for the 1996 murder of a college student. A blogger in Connecticut was not so lucky, with a state judge [ordering](#) him to turn over his laptop and cellphone so that a police lieutenant might search for the identities of commenters who allegedly defamed him.

B. Personal Information

A judge in D.D.C. [ruled](#) that records of Facebook accounts allegedly connected to anti-Rohingya violence in Myanmar and shut down by the company were not protected against disclosure in connection with a genocide prosecution against Myanmar at the Hague.

A Colorado appellate panel [ruled](#) that the state's revenge porn law is not limited to images containing full nudity.

President Biden [nominated](#) Alvaro Bedoya, a privacy advocate with a background in facial recognition and algorithmic bias, to the empty seat on the FTC. This comes as the FTC is [turning its attention](#) to online privacy issues and the protection of consumer data, and Democrats are [seeking](#) to funnel \$1 billion to the Commission to create a new digital privacy division.

The conflict over abortion rights in Texas has revealed a data privacy angle, as domain registrars [GoDaddy](#) and [Epik](#) denied service to a website that encouraged whistleblowers to report violations of the state's anti-abortion law. Both companies have terms of service prohibiting hosted sites from collecting or harvesting personally identifiable information.

C. Children's Privacy

After a widespread outcry over potential privacy issues, Apple has [postponed](#) its plan to incorporate detection of CSAM into iOS 15.

D. Rights of Publicity

These days we usually see photographers suing celebrities over the unauthorized use of their work. Leave it to Jay-Z to flip the script, successfully [defeating](#) a motion to dismiss in a right-of-publicity case brought against a photographer who allegedly used his pic of the superstar to sell merch.

Clint Eastwood has obtained a [default](#) in C.D. Cal. against one defendant that he sued for falsely claiming that he endorsed CBD products, and a [\\$6.1 million default judgment](#) in a separate case in the same court raising similar allegations.

We have an interesting [decision](#) from N.D. Cal. holding that a data broker is not immune to a publicity claim over the sale of third-party personal information just because there is no suggestion that the third parties endorsed the data broker's services; quoth the court, "their names, likeness, and personal information [are] what attracts the attention of ... customers to the dossiers." However, the claim was dismissed because the plaintiffs' identities were themselves the product rather than being used in connection with an unrelated service. An unfair trade practices claim survived despite a Section 230 argument, much to Prof. Goldman's [consternation](#).

After a recent decision holding that sec. 230 does not preclude claims based on the use of third-party photos in advertising for the Classmates.com website, a new [putative class action](#) filed by an Indiana resident in W.D. Wash accuses PeopleConnect of publicity and misappropriation violations in its use of minors' photos in such ads. (There's more on § 230 and ROP below.)

A California state judge [dismissed](#) a publicity claim filed by a Starbucks customer who was refused service because she refused to wear a mask; the defendant was the creator of a

GoFundMe campaign who raised over \$100,000 in tips for the barista who refused service. The court found that the fundraiser's speech related to a matter of strong public interest.

E. Biometrics

A judge in multidistrict litigation (based in N.D. Ill.) over the alleged collection and exploitation of biometric information by TikTok [granted](#) preliminary approval of a \$92 million settlement in the case. Meanwhile, Shutterfly reached a [final settlement](#) of biometric privacy claims in Illinois state court under which it will pay \$6.75 million.

F. Manipulated Media

Nothing to report this month.

G. Hacking, Scraping & Data Breach

Privacy claims against Robinhood over unauthorized access to user accounts [survived a motion to dismiss](#) in N.D. Cal.; the court found that the plaintiffs had adequately alleged claims under the California Consumer Privacy Act, the Consumer Records Act, and the California constitutional privacy right, as well as stating claims for unfair/unlawful trade practices.

Did we mention that the FTC is getting the ball rolling on digital privacy issues? I think we did. In a first for the Commission, the FTC has [banned](#) a spyware developer from doing business in the surveillance industry after it left the mobile data of thousands of unwitting individuals unprotected on the open web and then lied about investigating the breach. The FTC also [announced a new policy](#) on health apps, informing developers that they must tell customers about any data breaches or face fines that can run over \$43,000 per day.

H. Other Intrusion

Nothing to report this month.

II. Intellectual Property

A. Copyright

In a case alleging that the Texas A&M Athletic Dept. violated the plaintiff's copyright by republishing a chapter of his book online without permission, the Fifth Circuit [held](#) that the Department was an "arm of the state" not independent of the government and enjoyed sovereign immunity. Moreover, it was not necessary to exclude the copyright claim from that immunity in order to protect the plaintiffs' due process rights, because the plaintiffs might have a valid claim (albeit only in state court) under the Texas Constitution's takings clause. (For what it's worth, the U.S. Copyright Office has [recommended](#) that Congress take another stab at creating a remedy for

copyright holders subjected to infringement by state actors, after the Supreme Court in 2019 struck down a prior attempt to abrogate sovereign immunity.)

The Ninth Circuit [rejected](#) a storage company's claim that the unauthorized use on its website of an attorney's photo of the Indianapolis skyline was de minimis, reviving the attorney's copyright claim.

Instagram [succeeded](#) on a "server test" defense in a case in N.D. Cal. alleging that the service induced copyright infringement by offering its embedding tool, with the court finding that the Ninth Circuit's decision in *Perfect 10 v. Amazon* establishing the test was not limited to the search engine context.

In C.D. Cal., the National Music Publishers' Association [settled](#) a copyright dispute with Roblox, opening up negotiations for the licensed use of music on the gaming platform. In E.D.N.Y., another dispute over music (a class action involving claims of background vocalists and session musicians under the Digital Millennium Copyright Act, the Digital Performance Right in Sound Recordings Act, and the Audio Home Recording Act) led to the attorneys for the class being [awarded](#) around \$2.8 million in fees.

Streaming service Locast, which offered digital streams of local television broadcasts without the permission of the broadcasters, [suspended](#) operation this month shortly before a judge in S.D.N.Y. [issued](#) a permanent injunction against its operation. The injunction was a given, because that the parties had agreed that it should enter if the court [ruled](#) that Locast was not exempt under [17 U.S.C. § 111\(a\)\(5\)](#) from the plaintiff's infringement claim as a nonprofit retransmission service.

Elsewhere in S.D.N.Y., we have: comedian Michael Che [facing](#) a new lawsuit alleging that he ripped off a TikTok creator's "HomeGirl Hotline" bit for his HBO Max show; a judge [rejecting](#) the argument that Emily Ratajkowski's adding a caption when she posted a paparazzo's photo of herself to Instagram was transformative; another judge [holding](#) that BuzzFeed's embedding of journalists' photographs from Instagram was not transformative; and a [ruling](#) that a German citizen who alleges that he holds the international copyright and distribution rights to the original Austin Powers film adequately stated claims against Apple for the direct infringement of those rights (but not for contributory or foreign infringement).

Federal prosecutors in E.D. Pa. have [charged](#) a rather flashy YouTuber with criminal copyright infringement for his unauthorized sale of TV shows and movies to subscribers to his online service.

The Copyright Office has started to issue proposed rules governing its new small-claims procedures, including proposals related to [preemptive opt-outs by libraries and archives](#), [the](#)

[relationship to class actions with overlapping claims](#), the [initiation of Copyright Claims Board proceedings](#), and the [directory of designated service agents](#).

Finally, in a brief follow-up to an item mentioned last month, whoever was sending bogus § 1201 takedown notices to Google claiming to be the “United States Copyright Office” is now doing so as the “Video Industry Association of America.” As TorrentFreak [notes](#), “The ‘American’ organization starts one request off in Russian and finds it hard to construct proper English sentences.”

B. Trademark

A judge in C.D. Cal. [denied](#) a motion to dismiss in a case over the allegedly infringing use of a competitor’s trademark as a keyword metatag.

The SHOP SAFE Act, a [bill](#) pending in the House, would condition intermediary protection for the sale of counterfeit items on digital platforms on compliance with numerous burdensome requirements including disclosures, investigative steps, and technical measures.

C. Patent

Fans of the Wayback Machine (who include yours truly) will be interested to hear that the Federal Circuit [took judicial notice](#) of information from our favorite internet history time machine as evidence of prior art in a patent dispute.

The last glow of the brief candle that was Quibi is now fading, as the shell of the company has reached a [settlement](#) in C.D. Cal. in a patent spat over technology for automatically adjusting the aspect ratio of video on a smartphone when its orientation changes.

In N.D. Cal., a district judge [ruled](#) that Voip-Pal's covenant not to sue Twitter over a call routing patent meant that there was no live case or controversy sufficient for Twitter to pursue a declaratory judgment of non-infringement; however, the court reserved power over motions for attorneys' fees. In a lawsuit filed by Broadcom in the same court, Netflix [secured](#) a dismissal without prejudice of claims based on three patents that the district court held were directed to abstract ideas and thus ineligible for patent protection under the Supreme Court's Alice decision (though a fourth patent survived).

A judge in D. Del. [awarded](#) Ubisoft its fees for fighting off a VR patent lawsuit, holding that patent claims that were not objectively unreasonable at the start of the case nevertheless became so after claim construction, when the court applied a disclaimer by the plaintiff.

And as always, when one thinks of patent law, one thinks of the federal courts of Texas. Netflix looks like it might be stuck in E.D. Tex. in another Broadcom-related patent suit, after a

magistrate [found](#) that having servers in the district qualified as having a regular place of business there. Judge Rodney Gilstrap of E.D. Tex., of whom we've written before, won a dubious distinction in a [recent Wall Street Journal article](#) that identified him as the federal judge who has taken the largest number of cases posing personal financial conflicts.

Meanwhile, over in W.D. Tex., Judge Alan Albright didn't take a pretty clear hint from the Federal Circuit on a venue transfer issue. After the Federal Circuit admonished Albright to reconsider his refusal to transfer a patent case against DISH Network to the District of Colorado, and stated it was confident that he would do the right thing, Albright [decided](#) that the right thing was what he wanted to do the first time. Albright also [refused to dismiss](#) patent claims against Google over video-sharing technology, analyzing a tricky issue involving a terminal disclaimer.

And finally, a judge in E.D. Va. [found](#) that the USPTO properly rejected patent applications filed in the name of an artificial neural network called DABUS, agreeing that only "natural persons" can be inventors. Incidentally, the fellow who built DABUS is the same fellow who [recently won a case in Australia](#) that did recognize an AI as a patent inventor.

D. Trade Secrets/Misappropriation/Conversion

Nothing to report this month.

III. Platform Management

A. Section 230

We have yet another twist in the saga of Vimeo at the Second Circuit, with the panel [withdrawing](#) its amended opinion in the case and issuing a [summary order](#) in its place. You'll recall that the Second Circuit had already taken two tries at explaining why Section 230(c)(2)(A) protected Vimeo's decision to remove content advocating for gay conversion therapy. The panel's third stab at resolving the case drops all discussion of Section 230 and affirms the dismissal of claims against Vimeo on the basis that the plaintiff failed to state his underlying claim for discrimination.

The Third Circuit has split from the Ninth Circuit on state law IP claims, [holding](#) that Section 230's IP exception applies to both federal and state claims – including the plaintiff's right of publicity claim against Facebook over the use of her image in third-party advertisements. (If you're thinking that an ROP claim is a privacy claim, not an IP claim, the Third Circuit [also rejected](#) that argument, because dictionaries.)

My apologies to anyone who listened to me attempt to parse 18 U.S.C. §§ 1591 and 1595 (the U.S. laws creating federal criminal and civil sex trafficking liability, respectively) on the fly during the recent digital law boutique in Virginia. It's a legislative thicket made worse by the

overlay of § 230(e)(5)(A), a/k/a the FOSTA-created exception to § 230 for federal civil sex trafficking claims. Boiled down to its essence, the question is whether FOSTA requires a civil sex trafficking claim, which ordinarily requires only constructive knowledge, to meet the heightened scienter standards of a parallel criminal charge in order to evade § 230. Two recent cases, [one in C.D. Cal.](#) and [one in N.D. Cal.](#), have held that constructive knowledge is sufficient, while [another case in N.D. Cal.](#) holds that the plaintiff must prove a platform has actual knowledge of trafficking activity.

I think the actual knowledge standard is correct, based on the legislative fight over this issue when FOSTA was being debated in Congress; the language of the exception was modified during negotiations precisely because of concerns over platforms being held liable for conduct of which they were not actually aware. However, the whole thing was a muddle, so it's not surprising that the final language turned out to have ambiguities.

Also in N.D. Cal., Malwarebytes [fought off](#) false advertising and tortious interference claims from Enigma Software Group. (This was after remand from the Ninth Circuit following a ruling that Malwarebytes could not rely on § 230(c)(2)(B), which protects technical measures to block “otherwise objectionable” content.) The district court held that, even without § 230 protection, the plaintiff had failed to state its underlying claims.

A judge in N.D. Ill. [leaned on](#) the Seventh Circuit's language in *Huon* about “passive conduits” to deny § 230 protection to the operators of a website selling paid access to a database of emails and direct dial numbers. The plaintiff class alleged violations of state rights of publicity from the use of their information to advertise the database as a whole, and you might think the court would have discussed the applicability of the IP exception as in the Third Circuit case mentioned above – but no.

The District of Nevada reached a similar result in a right-of-publicity case against Ancestry.com over the site's use of yearbook photos sourced from third parties, with the court [denying](#) a § 230 motion to dismiss on the bases that (1) while the material might have originated with others, Ancestry itself posted it online and (2) it was not clear that the yearbook providers intended the contents to be posted online.

I'll end this section with [an interesting piece](#) from Christian Dawson, the executive director of new MLRC member the Internet Infrastructure Coalition (a/k/a i2Coalition). Christian writes about the importance of intermediary liability protections at the infrastructure layers of the internet. Welcome aboard!

B. Elections & Political Advertising

The Federal Election Commission has [rejected](#) a complaint from the Republican National Committee alleging that Twitter's decision to block a New York Post article regarding Hunter

Biden was an undeclared in-kind contribution to Joseph Biden’s political campaign; similar allegations against Snapchat over its decision to block Donald Trump also failed.

Governor Ron DeSantis of Florida directed state election officials to [investigate](#) whether Facebook’s XCheck (that’s pronounced “cross-check”) program, which insulated certain politicians and other high-profile figures from normal content moderation procedures, redounded to the benefit of incumbent politicians at the expense of competing candidates. More on that below.

C. Content Moderation

Speaking of Florida’s attempts to interfere in platform content moderation, the state [filed its brief](#) with the Ninth Circuit on appeal from a preliminary injunction against the enforcement of Florida’s law prohibiting platforms from moderating the speech of politicians and journalism organizations. Texas, which just [passed its own law](#) purporting to ban (1) platforms from engaging in viewpoint discrimination (including against Holocaust denialism and vaccine misinformation) and (2) email providers from filtering of spam, [filed an amicus brief](#) in support of Florida’s law just as the parties who obtained the injunction in Florida [filed a lawsuit](#) in W.D. Tex. to block the Texas law.

Prof. Goldman eviscerates the Texas bill [here](#). Mike Masnick points out a particularly tacky move by Texas Governor Abbott [here](#), and separately [notes](#) that Texas has created a potential paradox between the requirements of this law and those of the state’s controversial anti-abortion law.

Also at the 11th Circuit, we have a [ruling](#) that social media sites that allegedly played a part in radicalizing the Pulse nightclub shooter were not liable under the federal Anti-Terrorism Act because there was no evidence that the shooting amounted to “international terrorism.”

There’s yet another [complaint](#) against social media sites for blocking vaccine disinformation, this one in S.D. Cal. and roping in President Biden as a defendant in a transparent attempt to bodge together a state action argument. Speaking of which, Facebook [moved](#) to transfer Donald Trump’s lawsuit against the company to the Northern District of California. [Late-Breaking Update: YouTube [succeeded](#) in getting the judge to order a transfer to N.D. Cal. in its parallel case on the basis of the forum-selection clause in YouTube’s terms of service.]

So, it’s been a rough month for Facebook. Even before that 60 Minutes episode – which we’ll get to next month – Facebook was under fire in a pair of Senate subcommittee hearings ([Commerce/Consumer Protection](#) and [Judiciary/Antitrust](#)) over whistleblower claims [published by the Wall Street Journal](#). The concerns center around Facebook’s alleged knowledge of the harmful effects of its services, particularly on teenagers, but also included revelations about the “XCheck” program mentioned above. (Facebook’s Oversight Board is also [inquiring](#) about the

latter.) Facebook naturally [disputes](#) the serried allegations against it. There's plenty of commentary to be found about all of this, but [this piece](#) from Kate Klonick was interesting.

Meanwhile, we have: Sen. Warren [pressuring](#) Amazon over its algorithms apparently recommending books and other publications including alleged COVID-19 misinformation, making some [questionable allegations](#) that the content is illegal; Sen. Hawley [pressuring](#) Google over its decision to block anti-abortion ads promoting a dangerous medical procedure; and Sen. Rick Scott [pressuring](#) LinkedIn over their blocking of U.S. journalists on its China-based service.

D. Terms of Service & Other Contracts

Nothing to report this month.

IV. Other Content Liability

A. Defamation

The Eighth Circuit [reversed](#) the dismissal of Rep. Devin Nunes' libel lawsuit against journalist Ryan Lizza over the latter's tweet of a link to a news article by Lizza that Nunes had sued over; the court found that the link was a republication of the earlier article to a new audience, and that such republication after a defamation claim had been filed was prima facie evidence of actual malice. [Which is insane](#), because no denial by the subject of an article – even in the form of a defamation lawsuit – can possibly prove subjective doubt on the part of a journalist, nor does a mere pointer to a resource that is continuously available online constitute “republication.” (If you really want to dig into the merits of the underlying case in N.D. Iowa, a swath of the district court record [has now been unredacted](#) thanks to Prof. Volokh.)

In N.D. Cal., ex-TV journalist John Stossel has [sued](#) Facebook, claiming that he was defamed by fact-checking labels the company placed on two of his videos about climate change. Random fun fact, I once bought a house from Stossel's nephew. It was a very strange house, which says things about me, I suppose.

A judge in D.D.C. [dismissed](#) a libel claim over Michael Isikoff's “Conspiracyland” podcast, finding that allegations of actual malice were lacking. In S.D. Fla., the laptop repairman who allegedly was the source of Hunter Biden's laptop had his lawsuit over Twitter's blocking of a New York Post story dismissed, with the court [ruling](#) that Twitter's notice that the Post story was blocked for containing hacked information did not identify the plaintiff. In the same court, a judge [dismissed](#) an Amazon seller's tortious interference and unfair trade practices claims as an invalid attempt to plead around the statute of limitations on defamation claims.

Accusations of sexual assault that played out online among members of the [Society for Creative Anachronism](#) led to a libel suit in N.D. W. Va., which in turn led to a [default judgment](#) of

\$80,000 and a prior restraint against “publishing the same or similar statements about Plaintiff that are the subject of this matter.” Prof. Volokh [has thoughts](#) about the latter relief. Down in S.D. W. Va., a judge [held](#) that coal company CEO Don Blankenship adequately alleged that Donald Trump, Jr., knew that it was false to label Blankenship a “felon” in a tweet, when Blankenship had never been convicted of more than a misdemeanor.

Does an online rant over a custom-ordered birthday cake gone wrong relate to an issue of public interest? No, says a California appellate panel, [holding](#) that the defendant’s anti-SLAPP motion was properly denied.

In California superior court, a music producer [sued](#) singer Phoebe Bridgers over accusations of abuse on Instagram. In Colorado district court, a judge [granted](#) an anti-SLAPP motion filed by a doctor who was sued after she accused an anti-abortion activist of publishing a deceptively edited video of her actions. In Ohio’s court of common pleas, a judge [ruled](#) that an online satirist was not liable to an Ohio restaurateur, because satire.

At a recent [oral argument](#), number of the justices of Pennsylvania’s Supreme Court seemed to suggest that jurisdiction over online defamation could be found anywhere that the statements were received. Texas’ Supreme Court [declined](#) a [petition](#) for review of the denial of an anti-SLAPP motion in a defamation case over a law firm’s advertisements seeking clients to bring malpractice claims against the physician plaintiff.

Finally, a Texas district judge issued [default judgments](#) against Alex Jones and InfoWars in two Sandy Hook-related cases as a sanction for discovery misconduct.

B. Commercial & Professional Speech

One of the lawsuits filed by models over the unauthorized use of their likenesses to promote strip clubs online has made its way to the Supreme Court, [asking](#) the Court to resolve a circuit split as to whether a plaintiff must be “recognizable, publicly prominent, or a celebrity, to bring and sustain a claim under 15 U.S.C. § 1125(a).”

In a pending case before the Supreme Court, the UCLA First Amendment Amicus Brief Clinic has filed an [amicus brief](#) arguing that an Austin city ban on digital signage that relates to activities or people not on the site where such a sign is located is unconstitutionally content-based.

A magistrate judge in N.D. Cal. [found](#) that Ice Cube failed to amend his complaint to state a false endorsement claim against online financial services company Robinhood, and granted the latter’s motion to dismiss.

Some of you might have noticed that Prof. Rebecca Tushnet seemed to have taken a bit of a break from blogging recently, but we are pleased to find that she's back and making up for lost time. This month, she brings us the following cases (some of which were decided in August, but we won't quibble):

- A [decision](#) from the Ninth Circuit suggests a plaintiff is not required to establish damages in order to obtain disgorgement of profits in a false advertising case.
- LinkedIn obtained [dismissal](#) of UCL claims in N.D. Cal. based on its alleged misrepresentation to advertisers of the actual level of user engagement with ads on the platform, on the basis that the complaint failed either to exclude sophisticated or large corporations or to allege harm to consumers; leave to amend was granted.
- A professional skateboarder's false endorsement claims in S.D. Cal. over the use of his likeness in a video game developer [ran aground](#) on the *Rogers* test.
- A judge in N.D. Ind. [held](#) that posts on LinkedIn that included information about other court cases between the parties were not commercial speech or made to influence customers for the purposes of a Lanham Act claim.
- In S.D. Ohio, a landscape designer's alleged emotional distress at a competitor's copying of photos from the plaintiff's website [was not enough](#) to sustain Lanham Act false advertising claims.
- And in a [doubleheader](#), Zillow [fought off](#) consumer protection and Lanham Act claims in D. Vt., but antitrust and false advertising claims in W.D. Wash [survived](#) a motion to dismiss

Finally, the SEC has reached a \$10 million settlement in a securities fraud claim against analytics company App Annie, which allegedly engaged in false representations regarding the data it gathered on the performance of mobile apps.

C. Threats, Harassment, and Incitement

The Ninth Circuit [held](#) that the First Amendment applies to speech directed at California from outside the United States, and that a criminal prosecution for "true threats" requires the government to prove that the defendants subjectively intended to threaten the victim.

Twitch has [sued](#) two of its anonymous users for TOS violations and other claims arising out of their "targeting black and LGBTQIA+ streamers with racist, homophobic, sexist and other harassing content"; the lawsuits followed repeated futile efforts to block the users.

A patent case in W.D. Mo. involving voice command technology took a weird turn into online harassment issues, with a judge [finding](#) the defendant to be in contempt of an earlier order to remove invitations to harass the plaintiff by publishing links to third party sources quoting that content.

A judge in W.D. Va. [enjoined enforcement](#) of a prohibition against “unwarranted annoyance” in Virginia Tech’s computer policy as vague, overbroad, and in violation of the First Amendment.

V. Infrastructure

A. Accessibility

A judge in E.D.N.Y. broke from other district judges in the Second Circuit to [hold](#) that the Americans with Disabilities Act does not apply to a newspaper website unattached to a brick-and-mortar place of business, finding that other rulings had read Second Circuit precedent incorrectly.

B. Antitrust

After a three-week bench trial, the judge in the high-profile antitrust lawsuit filed by Epic Games against Apple in N.D. Cal [held](#) that Apple must allow app developers to provide customers with links to payment options other than its own payment processing service. However, she also ruled that Epic had failed to establish that Apple violated federal or state prohibitions on monopolistic behavior, which would have allowed Epic to argue that it was necessary to crack open the iOS payment system further. Epic has [appealed](#) the latter part of the ruling.

Also in N.D. Cal., Google is facing a [new lawsuit](#) alleging that its control over digital advertising on Android devices forced the plaintiff competitor out of business. Over in N.D. Ga., Google obtained [dismissal](#) of amended claims that it had attempted to leverage the transition from Flash to HTML5 to force rivals from the online advertising market. The Department of Justice is reportedly [preparing another lawsuit](#) against Google over its advertising business, while Democrats in Congress are [demanding a probe](#) into an alleged 2018 advertising agreement between Google and Facebook.

A coalition of thirty-four organizations has [urged](#) the FTC to block Amazon’s proposed \$8.45 billion purchase of MGM Studios in the Commission’s pending antitrust review of the deal. Meanwhile, the FTC [filed](#) a largely unredacted version of its amended complaint against Facebook in D.D.C., in case you were interested the specifics.

C. Net Neutrality

[Still no pick](#) from the White House for the empty seat on the FCC, and given that Acting Chair Jessica Rosenworcel's term has technically expired, there could actually be a [2-1 Republican majority](#) if something isn't done before the end of the year. Democratic Senators have [recommended](#) that Biden make Rosenworcel the actual Chair, which would still leave one seat to fill.

The Ninth Circuit [heard argument](#) this month on appeal from denial of a preliminary injunction against California's net neutrality law.

D. Domain Name System

Nothing to report this month.

E. Taxation

Netflix and Hulu scored wins in [E.D. Tex.](#) and [Cal. Super.](#), fighting off attempts to compel them to pay municipal franchise fees to the cities of New Boston, Texas, and Lancaster, California, respectively.

F. Wire & Wireless Deployment

G. Artificial Intelligence & Machine Learning

Nothing to report in these sections this month.

H. Blockchain, Cryptocurrency, & NFTs

You might recall that earlier this year Jay-Z got in a fight with Roc-A-Fella Records co-founder Damon Dash over the latter's frustrated attempt to sell an NFT embodying the copyright to Jay-Z's debut album "Reasonable Doubt." Now Roc-A-Fella has [sued](#) Dash in S.D.N.Y. in an attempt to prevent him from trying again.

The SEC is moving into cryptocurrency, [putting the brakes on](#) a cryptocurrency lending scheme to be offered by Coinbase and otherwise [making it clear](#) that compliance with securities regulations is essential. Meanwhile, the Treasury Department has launched [new sanctions](#) targeting the key role played by cryptocurrencies in ransomware schemes, in an attempt to choke hackers' revenue stream.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

The Fourth Circuit found that the Wikimedia Foundation had credibly established through publicly available evidence that its communications with Wikipedia users had been surveilled by the NSA, but nevertheless [held](#) that the company's challenge to the mass interception of Americans' communications could not proceed because it would violate the "state secrets privilege." The court rejected the argument that the privilege was preempted by the Foreign Intelligence Surveillance Act. A disturbing decision, to be sure.

The ACLU [obtained an order](#) in N.D. Cal. directing Customs & Border Protection to disclose information about its rules and policies allowing agents to use fake identities and nongovernment accounts to surveil social media users. The Massachusetts Supreme Judicial Court [considered](#) similar issues in a criminal case, questioning prosecutors during oral argument on the extent to which police can use deception to surveil social media activity without probable cause or even an articulable basis for suspicion of illegal activity.

You might recall that last month the House Select Committee investigating the January 6 attack asked telcos and social media companies to preserve the account information of lawmakers and others who could be involved in the investigation. House Minority Leader Kevin McCarthy [responded](#) by threatening any company that turned over such information with "losing their ability to operate in the United States," which, to use the technical term, is some straight-up bullshit. The companies' responses have, not surprisingly, [varied](#).

Incidentally, we've [recently learned](#) that the Postal Service's bizarre undercover internet surveillance team was involved in the scouring of less well-known social media sites after January 6. So, unless there were postal workers defending the battlements at the Capitol, I think we have to suspect that maybe that program hasn't been entirely constrained by the purported scope of its remit to protect USPS employees. Quelle surprise.

A [new bill](#) is in the works from Sen. Wyden that would require government agencies to notify those targeted by surveillance demands to tech companies about what data they have obtained, and require federal courts to publish statistical information about orders related to tech surveillance.

Newly revealed documents [show](#) that Los Angeles police officers were instructed to obtain information about the social media accounts of individuals that they questioned, whether or not they were arrested or even suspected of a crime. I can't even remember my own Twitter handle off the top of my head, and my passwords are random jumbles of characters stored in a locker secured by multifactor authentication, so sorry guys! Meanwhile, [a new lawsuit](#) in California

state court claims that Oakland police are routinely violating a municipal ban on use of surveillance tech.

B. Encryption

Rwkv lfen vvkf uvny xflw ysns. ([Enigma M4](#), UKW B Thin, Beta I II III, no plugboard. I leave the wheel settings for you to figure out.)

C. Biometric Tracking

So, according to a [new GAO report](#), federal agencies are quite willing to evade any limitations they might have on the use of facial recognition by getting state and local authorities to do their dirty work.

D. Domain Seizure

Nothing to report this month.

E. Content Blocking & Prior Restraints

PETA has [filed suit](#) in D.D.C. challenging a blocklist that the National Institutes of Health placed on its Facebook and Instagram accounts against mentions of PETA and other terms.

We've got [a truly gross case](#) in E.D. Wis. involving a police sergeant who threatened to jail a teenager if she did not remove Instagram posts asserting that she had contracted COVID-19. At the time (March 2020), the teen's county was still reporting as COVID-free, and her post apparently send the county government into a tizzy that led to a call to the sheriff that led to Sergeant Klump (not making this up) showing up at her doorstep. A judge has now stated the obvious and held that this violated the teen's First Amendment rights, saying, "Defendants may have preferred to keep Marquette County residents ignorant to the possibility of COVID-19 in their community for a while longer, so they could avoid having to field calls from concerned citizens, but that preference did not give them authority to hunt down and eradicate inconvenient Instagram posts."

An Illinois appellate panel [struck](#) as unconstitutional language in an anti-stalking order that would have prohibited the recipient from posting about the petitioner on social media. A North Carolina appellate panel [did likewise](#) in a similar case.

And in Colorado, transportation officials Government officials [leaned on](#) mapping app providers to show an open road as closed due to a non-existent mudslide, in order to reduce traffic diverting to the road as a result of an actual closure.

F. Online Access to Government Information

The Supreme Court [will host](#) an audio livestream of oral arguments for its October Term on its official website. You might recall that last term you needed to go to a third-party site to access the stream.

VII. Global

Items of note in this month's link roundup include a major intermediary liability decision in Australia regarding user comments on Facebook, an abortive attempt in Brazil to limit social media moderation, new efforts by China's government to control online speech and culture, a crackdown by Russia on western tech companies before a major election, and the ongoing wave of antitrust activity around the world.

A. Africa

- [Social Media Regulation In African Countries Will Require More Than International Human Rights Law](#), *Greenhouse*

B. Europe

- [Europe's top court slaps down 'zero rating' again](#), *TechCrunch*
 - [Judgment: Vodafone v. Bundesrepublik Deutschland](#)
- [Google's voice assistant in new EU antitrust investigation](#), *Reuters*
- [Google offers to settle EU antitrust probe into adtech](#), *Reuters*
- [Google tells court 'staggering' \\$5 bln EU antitrust fine flawed](#), *Reuters*
- [US and EU look to work more closely in regulating Big Tech at summit](#), *Korea Times*
- [Clubhouse, Vimeo, DoubleVerify and others set to sign up to beefed-up disinformation](#), *TechCrunch*

C. Australia

- [Australian High Court Says Facebook Account Holders "Publish" Third-Party Defamatory Comments](#), *Technology & Marketing Law Blog*
 - [Opinion: Fairfax Media Publications v. Voller](#)
 - [A judgment rooted in 1928, when the world couldn't have dreamed of Facebook](#), *Sydney Morning Herald*

- [An Australian court ruling makes publishers legally responsible for every idiot Facebook user who leaves a comment](#), *Nieman Journalism Lab*
- [High court ruling in Voller defamation case puts media companies firmly in firing line](#), *The Guardian*
- [Facebook defamation ruling by High Court exposes all page owners to lawsuits, not just the media](#), *ABC News*
- [That Comment Someone Left on Facebook? It Can Get You Sued.](#), *New York Times*
- [More public figures expected to turn off Facebook comments after Australian defamation ruling](#), *The Guardian*
- [CNN disables Facebook page in Australia after high court defamation decision](#), *The Guardian*
- [Facebook pages fall quiet as administrators fear legal action over defamatory comments](#), *ABC News*
- [Facebook or Twitter posts can now be quietly modified by the government under new surveillance laws](#), *The Conversation*
- [Commercial Radio Australia Set To Begin Collectively Bargaining With Google And Facebook Over News Payments](#), *B&T*
- [Australia challenges Google's ad dominance, calls for data-use rules](#), *Reuters*
- [Australia latest to eye laws to curb Google's adtech dominance](#), *TechCrunch*
- [MP Ali Cupper's defamation case against Simon Clemence ended before trial](#), *ABC News*

D. Brazil

- [Bolsonaro issues decree limiting social media moderation](#), *France 24*
 - [Brazilian president changes legislation to limit moderation power of social networks](#), *ZDNet*
 - [Brazil's Restrictive New Social Media Rules Could Be an Omen For the Future of the Internet](#), *Time*
 - [Bolsonaro's Ban on Removing Social Media Posts Is Overturned in Brazil](#), *New York Times*
- [São Paulo police arrest Brazilian sports blogger Paulo Cezar de Andrade Prado in defamation case](#), *Committee to Protect Journalists*

E. Canada

- [People's Party Leader Maxime Bernier Has Twitter Frozen After Targeting Journalists](#), *Vice*

F. China

- [China to Ban “Sissy” Boy Bands, Reality Talent Shows As Cultural Crackdown Continues](#), *Hollywood Reporter*
- [BTS fan group banned on social media after raising 2.3 million yuan to celebrate idol's birthday](#), *The Standard*
- [Chinese social media firms and streaming platforms promise to back crackdown on celebrity culture by removing content that fuels fan fights](#), *South China Morning Post*
- [Directors of Hong Kong’s Apple Daily Publisher Quit, Citing National-Security Crackdown](#), *Wall Street Journal*
- [China and Big Tech: Xi’s blueprint for a digital dictatorship](#), *Financial Times*
- [China Rules Against Sexual-Harassment Accuser in Closely Watched Case](#), *Wall Street Journal*
- [China's New Youth Online Gaming Restrictions Birth Underground Workaround Industry To Defeat It](#), *Techdirt*
- [China's Game Controllers Ignore Emergent Order](#), *Techdirt*
- [Financial blogger crackdown leaves China investors scrabbling for data](#), *Financial Times*
- [Hongkongers Battle Supporters Of Beijing For The Soul Of The Chinese-Language Wikipedia](#), *Techdirt*
- [China says all cryptocurrency-related transactions are illegal and must be banned](#), *TechCrunch*
- [Online Tiananmen museum is blocked in Hong Kong as Internet curbs widen](#), *Washington Post*
- [Hong Kong Government Arrests Four Members Of Pro-Democracy Hong Kong Alliance, Shuts Down Its Online Presence](#), *Techdirt*
- [China Announces Plans To Regulate Algorithms Tech Companies Use](#), *Übergizmo*
- [Man says Tesla is suing him for US\\$650,000 for online posts after he won a separate suit against the car company](#), *South China Morning Post*

G. Egypt

- [Egypt Frees Reporter, Activist, YouTube Star](#), *Associated Press*
- [Egypt to tax social media stars](#), *AFP*

H. France

- [Google appeals ‘disproportionate’ French copyright, talks fine](#), *TechCrunch*
- [France goes after Amazon’s books business](#), *Politico*
- [ProtonMail logged IP address of French activist after order by Swiss authorities](#), *TechCrunch*

I. Germany

- [A Twitter user insulted a German politician. Police then raided his house.](#), *Washington Post*
- [A Roundup of German Caselaw Regarding Emojis and Emoticons](#), *Technology & Marketing Law Blog*
- [An Experiment to Stop Online Abuse Falls Short in Germany](#), *New York Times*
- [Sony Music Says DNS Service Is Implicated In Copyright Infringement At The Domains It Resolves](#), *Techdirt*

J. India

- [Supreme Court expresses grave concern over fake news on social media and YouTube](#), *Times of India*
- [PIL against Google for showing Kannada as ‘ugliest language’ withdrawn after its apology](#), *Indian Express*
- [India may be next in line to mandate changes to Apple’s in-app payment rules](#), *TechCrunch*
- [Google abused dominant position of Android in India, antitrust probe finds](#), *TechCrunch*
 - [Google files writ against Indian antitrust watchdog following report leak](#), *TechCrunch*

K. Iran

- [A new app helps Iranians hide messages in plain sight](#), *Ars Technica*

L. Ireland

- [WhatsApp has been fined \\$267 million for breaching EU privacy rules](#), *CNBC*

- [Ireland fails to enforce EU law against Big Tech](#), *Ars Technica*
- [Ireland probes TikTok's handling of kids' data and transfers to China](#), *TechCrunch*
- [Facebook warned over 'very small' indicator LED on smart glasses, as EU DPAs flag privacy concerns](#), *TechCrunch*

M. Japan

- [Apple announces new settlement with Japan allowing developers to link to external websites](#), *TechCrunch*
- [Japan Eyes Heavier Penalties for Online Libel](#), *Jiji Press*
- [Japan's new digital chief in copyright gaffe](#), *Yahoo! News*

N. Kenya

- [In Kenya, Influencers Are Hired to Spread Disinformation](#), *Wired*

O. Myanmar

- [Myanmar court extends pre-trial detention of Michigan journalist](#), *Associated Press*
 - [An American journalist's detention in Myanmar poses a test for Biden](#), *Washington Post*
 - [An American Journalist Sits in Prison as Myanmar Suppresses Dissent](#), *New York Times*

P. New Zealand

- [Attorney-General asked to investigate National Library-Internet Archive deal](#), *Stuff.co.nz*

Q. Nigeria

- [Twitter ban in Nigeria to be lifted if platform sets up a local office and pays taxes, president says](#), *TechCrunch*
- ['Yahoo Yahoo' not sustainable way of life, Bawa warns corps members](#), *Punch*

R. Pakistan

- [Pakistani journalists rally against proposed new media law](#), *Associated Press*
- [TikTok Now Has 'Vulgarity' Moderators in Pakistan](#), *Vice*

S. Russia

- [Russia's Drive to Replace Foreign Technology Is Slowly Working](#), *Moscow Times*
- [This is what life is like when the Kremlin lists you as a 'foreign agent'](#), *Washington Post*
- [Russia Threatens Apple and Google Over Alexei Navalny App](#), *Wall Street Journal*
 - [Court marshals visit Google's Moscow office in connection with injunction against 'Smart Vote' search results](#), *Meduza*
 - [Apple and Google bow to pressure in Russia to remove Kremlin critic's tactical voting app](#), *TechCrunch*
 - [Russian telecoms operators start blocking Google Docs after Navalny's team uses it to publish 'Smart Vote' endorsements](#), *Meduza*
- [Antitrust regulator repeatedly fines Google for inappropriate advertising](#), *TASS*
- [Russia publishes plan to tax foreign tech, promote home-grown rivals](#), *Reuters*
- [Russian disinformation campaigns change tack to get around western defences](#), *Financial Times*

T. Singapore

- [Singapore PM wins \\$275,000 in latest defamation suits](#), *Reuters*

U. South Korea

- [South Korea Shelves 'Fake News' Bill Amid International Outcry](#), *New York Times*
- [Epic Games asks Apple to reinstate Fortnite after new law](#), *TechCrunch*
- [South Korean antitrust regulator fines Google \\$177M for abusing market dominance](#), *TechCrunch*

V. Turkey

- [Turkish government increases pressure on social media](#), *Deutsche Welle*
- [Google Is Getting Caught in the Global Antitrust Net](#), *Wired*

W. United Kingdom

- [UK now expects compliance with children's privacy design code](#), *TechCrunch*
- [After years of inaction against adtech, UK's ICO calls for browser-level controls to fix 'cookie fatigue'](#), *TechCrunch*

- [Government to consult on new rules for ‘harmful’ content on streaming platforms](#), *Evening Standard*
- [UK dials up the spin on data reform, claiming ‘simplified’ rules will drive ‘responsible’ data sharing](#), *TechCrunch*
- [Conor Murphy warns against ‘copy and paste’ libel law reform](#), *Press Association*
- [Facebook slams UK antitrust watchdog over call to sell Giphy](#), *Tech Xplore*
- [UK offers cash for CSAM detection tech targeted at E2E encryption](#), *TechCrunch*

X. Zimbabwe

- [Journalist Chinóno Sued U.S.\\$100,000 for Defamation](#), *All Africa*

VIII. Miscellaneous

A couple of lingering petitions to the Supreme Court to note, [one from a private investigator](#) who claims that the state of Maine violated his First Amendment rights by denying him a license because of his social media posts, and [one from a website designer](#) who claims that Colorado’s law compelling her to create websites for same-sex weddings violates the First Amendment.

The prosecution of the founders of Backpage.com for facilitating prostitution and money laundering [ended in a mistrial](#), after the judge found that the prosecution had prejudiced the jury by continuously referring to child sex trafficking.

We’ve got a couple of cases from the Northern District of California, both from Judge Davila. In one case, he [held](#) that a putative class action for trespass to chattels could proceed against Google; the claim was based upon a “related links” banner that it allegedly superimposed on websites accessed on Android devices through Google Search. In the other case, he [held](#) that standing in a case over allegedly addictive video game “loot boxes” could not be established by the amount of in-game currency spent on the boxes; he also rejected the premise of the complaint that the boxes were illegal gambling mechanisms.

And finally, a New Jersey lawyer escaped sanctions on charges that he told his paralegal to friend an opposing party on Facebook. The state’s Supreme Court [found](#) to be credible his claim that, in 2008, he did not understand how Facebook worked. However, the court made clear that it wouldn’t reach the same conclusion in 2021.

* * *

And there we go. Now I’m off to grab a cider donut – I love the autumn. Till next time!