

The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings from Hoboken, where it went quickly from the edge of summer to the edge of winter, a [transition not eased](#) by the sudden turnover from Halloween festivities to Christmas-themed advertising on every available channel.

We at the MLRC are heavily focused on our Annual Dinner in just a few days, so I’m going to skip the usual extended introduction here, though as usual I’ve embedded random commentary throughout what follows. In any event, if you’re coming to the Dinner, please find me and say hello!

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I. Privacy

A. Anonymity

You might recall that last month we mentioned a doctor who was denied the opportunity to obtain the identity of anonymous authors of negative online reviews. The doc had more success

this month in a separate case in S.D.N.Y., with the court [granting](#) his motion to subpoena Yelp for the identities of users whose negative reviews contained allegations that the judge determined to be more factual in nature.

Meanwhile, in W.D. Va., the company behind the Mountain Valley Pipeline is [struggling to enforce](#) a subpoena to Facebook for the identities of the users who set up the “Appalachians Against Pipelines” page.

B. Personal Information

In N.D. Cal., the parties to a lawsuit against Google over the alleged leaking of user data by Google Search have [notified](#) the court that they have reached a settlement.

The AG for the District of Columbia intends to [seek to amend](#) the District’s complaint in D.C. Superior Court over the Cambridge Analytica data breach to include Mark Zuckerberg personally as a defendant.

A [new staff report](#) from the FTC claims that Verizon, T-Mobile, Comcast Xfinity, Charter Spectrum, AT&T and Google Fiber have all gathered vast amounts of personal information about their customers without meaningful opportunities to control that collection. And while we’ll talk more about the activities of the Facebook whistleblower down under Content Moderation, one consequence of those events was the FTC [investigating](#) whether Facebook might be in violation of a 2019 \$5 billion privacy settlement.

Meanwhile, the Consumer Financial Protection Bureau has [directed](#) major online payment platforms to turn over information about their practices in an effort to study their use and protection of users’ financial information.

California Gov. Newsom [signed a bill into law](#) that extends the statute of limitations on invasion of privacy claims related to the unauthorized dissemination of intimate images (I’m trying to wean myself off of the phrase “revenge porn,” which is too narrow for how this concept has evolved). Claimants now have one year from their discovery of the material online rather than one year from publication. California also has [named](#) former FTC technologist Ashkan Soltani as the new executive director of the California Privacy Protection Agency established last year. Meanwhile, Alphabet’s Sundar Pichai [continues](#) to call for a nationwide digital privacy law.

C. Children’s Privacy

The Supreme Court [denied cert](#) on *Diez v. Google*, a pro bono claim out of the Fifth Circuit in which the plaintiff alleged that Google should be held liable for failing to warn him that images he obtained could be considered to be child pornography.

Representatives of Snapchat, TikTok, and YouTube were [questioned](#) for four hours by members of the Subcommittee on Consumer Protection, Product Safety, and Data Security of the House Commerce Committee about their efforts to protect the privacy and safety of children. The intensity of the questioning was spurred by Frances Haugen’s earlier testimony about Facebook (which we’ll discuss in detail further below), and the companies struggled [to distinguish themselves](#).

D. Rights of Publicity

Facebook has [petitioned for rehearing en banc](#) of last month’s Third Circuit decision holding that Section 230 does not preclude state law right of publicity claims. And once again I feel awkward, as this could also have gone under Section 230 or Intellectual Property, given the nature of the issues in the case – but of course, I’m just sensing the underlying ambiguity about what a right-of-publicity claim is actually supposed to protect in the first place.

E. Biometrics

A judge in multidistrict litigation [granted](#) preliminary approval of a \$92 million settlement of claims that TikTok unlawfully gathered, used, and shared biometric and other personal information about its users.

F. Manipulated Media

Nothing to report this month.

G. Hacking, Scraping & Data Breach

At [oral argument](#) on the rehearing of *hiQ Labs v. LinkedIn*, at least one judge expressed skepticism that the Supreme Court’s decision in *Van Buren* would compel a different result despite the high court’s invocation of *Van Buren* in vacating the Ninth Circuit’s earlier decision in *LinkedIn*.

Facebook [filed suit](#) in N.D. Cal. against a Ukrainian man who allegedly violated the website’s terms of service by scraping and selling public-facing information from over 170 million user accounts. In the same court, a judge [granted](#) preliminary approval of a \$85 million settlement of a class action against Zoom over “zoombombing” disruptions and other privacy issues.

A Minnesota man is facing [federal charges](#) in S.D.N.Y. after he allegedly attempted to extort \$150K from Major League Baseball by threatening exposure of security vulnerabilities in its computer systems.

A judge in N.D. Tex. [enjoined](#) website Kiwi.com from scraping flight information from Southwest Airlines' website in air of a scheme to purchase and resell flights to Kiwi users, finding that the scraping was prohibited by Southwest's terms of service.

The U.S. government continues to seek ways to combat the scourge of ransomware attacks, including a [new bill](#) in Congress that would require companies to disclose any payments they make to the Department of Homeland Security, and working with an international coalition to [hack the servers](#) of the ransomware gang behind the Colonial Pipeline attack.

I'll end this section with a pair of articles discussing the [recent resurgence in hacktivism](#) and a [spike in the number of zero-day attacks](#) in 2021.

H. Other Intrusion

Nothing to report this month.

II. Intellectual Property

A. Copyright

The Supreme Court is back at work, and this month we have [denials of cert](#) in *Marano v. Metropolitan Museum of Art* from the Second Circuit, a copyright case over the allegedly unauthorized use of a photograph in an online advertisement for an art exhibit, and *AMA Multimedia v. Wanat* from the Ninth Circuit, which involved questions of jurisdiction over a foreign defendant in a copyright case.

The Second Circuit [heard argument](#) this month on appeal of the dismissal of a complaint against Google over its alleged copying of user-supplied content from Genius' song lyrics website.

A judge in N.D. Cal. [ruled](#) that Cloudflare's offering of caching, content delivery, and security services could not be considered material contributions to copyright infringement by websites using its services.

We have more photographer lawsuits in C.D. Cal. over social media posts; this month, the defendants include [Lisa Rinna](#) (over a photo of herself posted to Instagram) and the [producers of a true-crime podcast](#) (over a photo of Leona Helmsley posted to Twitter). Meanwhile, also in C.D. Cal., Snoop Dogg was [sued](#) for allegedly publishing a video on Instagram without the permission of the rightsholder, and in E.D.N.C. a photographer [sued](#) an online website advertising "tiny homes" for sale for allegedly copying his photos for use in its listings.

A judge in N.D. Ill. [ordered](#) that the CEO of serial copyright plaintiff Malibu Media be arrested if the company does not pay costs and attorneys' fees to an anonymous defendant who successfully fought off one of Malibu's infringement cases.

Last month we reported that Locast, a service which relayed broadcast TV signals over the internet, shut down its services after an adverse court ruling in S.D.N.Y.; the company has since reached a [\\$32 million settlement](#) with the plaintiff broadcasters to end the case. In S.D. Tex., streaming service Universe IPTV was [hit with a \\$7 million judgment](#) representing maximum statutory damages for willful infringement of DISH Network's exclusive distribution rights in 47 copyrighted works; the court also ordered the shutdown of the service.

The Copyright Office [expanded](#) the DMCA exemption for the “diagnosis, maintenance, and repair of certain categories of devices to cover any software-enabled device that is primarily designed for use by consumers”; as far as video game consoles are concerned, the exemption extends solely to the repair of optical drives. Meanwhile, the battle over music streaming royalty rates is [becoming intense](#) as publishers and streaming services took radically different positions on their respective proposed rates before the Copyright Royalty Board.

Gawker reported this month on the unannounced deletion of photographs and other images from older stories posted by [BuzzFeed](#) and on [G/O Media's family of websites](#).

Finally, Donald Trump [announced](#) that he was launching a new social media platform, Truth Social, that wouldn't ban him (though even before launching the site has [started banning other users](#)). What makes this a copyright issue is that the site appears to be a thin reskin of the Mastodon open-source social media platform, and Trump's service [does not comply](#) with the terms of the applicable open-source license. The Trump Media and Technology Group [has been given](#) 30 days to bring the service into compliance or have its license revoked.

Incidentally, compliance would mean opening up Truth Social's source code and modifications thereto to the public. I can only imagine what hackers would do with that information.

B. Trademark

Models who filed Section 1152 claims against strip clubs over the use of their names and likenesses to promote the clubs have [petitioned](#) the Supreme Court for cert, following a decision of the Second Circuit that such claims required a showing of either “recognizability” or “public prominence.” The petition highlights a circuit split on that question, with the Second and Ninth Circuits on one side and the Sixth, Seventh, and Eleventh on the other.

This is not, of course, the only such models vs. strip clubs trademark suit out there. In fact, we had [two more filed](#) in E.D.N.C. this month.

A judge in E.D. Cal. [held](#) that a customer of online print shop Redbubble failed to show entitlement to an injunction against the site's sale of “counterfeits,” due to a lack of evidence that allegedly infringing goods were in fact counterfeits.

A federal magistrate in S.D. Fla. [found](#) that a Florida security firm had engaged in cybersquatting by creating an Instagram page under a competitor's name and registering confusing domain names.

Finally, Prof. Tushnet offers us a [high-speed information-dense romp](#) through the year's trademark and right of publicity developments.

C. Patent

The Supreme Court [invited briefing](#) by the Solicitor General in *PersonalWeb Technologies v. Patreon*, a case from the Federal Circuit involving application of the doctrine of patent preclusion to claims against media entities. The Court also [denied cert](#) in two patent cases from the Federal Circuit, *iLife Technologies v. Nintendo of America* (involving motion detection technology) and *VoIP-Pal.Com v. Apple* (involving VoIP technology).

The Federal Circuit, meanwhile, seems to be getting fed up with Judge Albright hoarding media and tech patent cases in W.D. Tex., yanking [three patent cases](#) out of his court after the judge refused to transfer them to another venue. The last of these was pulled after the Federal Circuit had previously denied a writ of mandamus in the case on the basis that they expected Albright to do the right thing on reconsideration; Albright [did not take the hint](#).

The Federal Circuit also [affirmed](#) a ruling in favor of Take-Two Interactive that cleared two of the video game company's subsidiaries of allegations that it infringed the plaintiff's patents in computer networks.

A company holding patents for technology to improve video streaming filed separate infringement suits against [Walt Disney Co.](#) and [Hulu](#) in the Central District of California, and another suit against [Netflix](#) in the Western District of Texas.

A judge in D. Del. [found](#) that Amazon's Alexa did not infringe two patents for speech-based software. And in E.D. Tex., a jury [ruled](#) that Sony did not infringe two patents for light and shadow in computer graphics with its PlayStation console.

Finally, President Biden [nominated](#) former Winston & Strawn partner Kathi Vidal to lead the U.S. Patent Office.

D. Trade Secrets/Misappropriation/Conversion

Nothing to report this month.

III. Platform Management

A. Section 230

We have an interesting [decision](#) from S.D.N.Y. holding that Section 230 protected a securities exchange against claims for, inter alia, breach of fiduciary duty that arose from allegations that the exchange was used by a third party to disseminate fraudulent information.

We also have belated but good news from state court in Florida, where the Wikimedia Foundation [won](#) a defamation case in September on the basis of § 230.

Senior Democrats in the House [proposed](#) a bill in reaction to the testimony of Facebook whistleblower Frances Haugen that would, let's see here, create a new § 230 exception for the personalized algorithmic recommendation of information that materially contributes to physical or severe emotional injury. Hoo boy. Prof. Goldman, [take it away](#).

We also have another [Josh Hawley bill](#), which while not strictly speaking a Section 230 reform bill would achieve much the same thing. This one would allow individuals under 16 years of age to sue social media sites for bodily harm or mental health injury “attributable, in whole or in part, to the individual’s use of a covered interactive computer service provided by a social media company.” Huh.

Incidentally, here’s an [interesting piece](#) exploring why so many people seem to have difficulty understanding – or choose to deliberately ignore – what § 230 does when debating potential reform of the law.

B. Elections & Political Advertising

Nothing to report this month.

C. Content Moderation

The Supreme Court [denied cert](#) in another content moderation claim, this time in *Bledsoe v. Facebook* from the Ninth Circuit.

A judge in N.D. Cal. [dismissed](#) claims that YouTube was either coerced into or voluntarily participating in state action, in a case over the suspension of QAnon accounts, finding that the allegations of communications with government officials were unrelated to their content and were insufficient to show state action in any event. Indeed, the court expressed concern that the plaintiffs’ theory would chill Google’s right to communicate with their elected representatives.

That’s another holding Donald Trump will need to contend with now that his lawsuits seeking to regain access to social media sites are being transferred one by one to the Northern District of

California. His suits against [Twitter](#) and [YouTube](#) have already been transferred (along with a [pending motion](#) for an injunction in the Twitter case to compel the restoration of his account). He has a [similar motion](#) for a preliminary injunction pending against Facebook in S.D. Fla., and I'm expecting a similar transfer order. The transfer is significant not only because courts in the Ninth Circuit have taken a dim view of state action claims in these cases, but also because the Ninth Circuit itself has a [remarkable precedent](#) holding that even where a plaintiff has established that it was kicked off a private communications channel as a result of government threats, the remedy is not for the court to engage in its own government compulsion by ordering a private entity to restore access.

An anti-Zionist's claims against six social media sites for Title II discrimination and violation of Massachusetts' common carrier law [failed](#) in D. Mass. both on their merits and under Section 230. A lawsuit in D. Minn. over the termination of a Facebook page was [dismissed](#) because three of the claims asserted lacked a private right of action and the fourth, a § 1983 claim, failed to allege facts to support a claim that Facebook was a state actor.

An animal rights non-profit [sued](#) YouTube in California state court, alleging that it breached its contract with users by failing to remove animal abuse content. Also in Cal. Super., Netflix has [filed](#) an anti-SLAPP motion in response to a lawsuit alleging that its algorithmic recommendation of the show "13 Reasons Why" led to a teenager's suicide.

Ohhhhkay, let's get into it. Former Facebook product manager Frances Haugen [went public](#) with a bombshell interview on 60 Minutes in which she revealed herself as the source of the leak of internal Facebook documents to the Wall Street Journal and lobbed a [series of shocking allegations](#) against Facebook regarding its content moderation practices and its alleged knowledge of harm that it was causing to teens and others. 60 Minutes also released [whistleblower complaints](#) filed by Haugen with the SEC.

Haugen [subsequently testified](#) before the Subcommittee on Consumer Protection, Product Safety, and Data Security of the House Commerce Committee. Among other statements, she [argued](#) that § 230 should not protect algorithmic decision-making (a suggestion that various Congressfolk leapt upon, see Section 230 above). Haugen's lawyers are also looking for action [from state attorneys general](#), who are already demanding information from Facebook in response to the document leak, and Haugen [will meet with Facebook's Oversight Board](#), which has [already accepted](#) a request from Facebook to review the operation of the "XCheck" VIP content review protocols revealed in the documents. And in E.D.N.Y., we have shareholders [filing suit](#) against Facebook alleging damage to their investments from the alleged misrepresentations and withholding of information.

The rollout of Facebook documents to media outlets has been [carefully coordinated](#) by Haugen's team with [limitations placed on journalists](#) as to discussion of their negotiations for access. The

release has led to [coordinated reporting by a number of](#) media outlets, with [more outlets](#) allowed to access the documents as time went on.

Facebook [strongly disputes](#) Haugen's characterization of its practices, both in her appearances on [60 Minutes](#) and [before Congress](#), and [criticized](#) the press's handling of the leaked materials. Facebook is [not alone](#) in the latter criticisms. Others worry that the focus on Facebook will lead to us [losing sight of bigger issues](#), or to [government censorship](#). Glenn Greenwald, curiously, [pointed](#) to Pierre Omidyar's financing of Haugen's team as evidence of another billionaire attempting to pull levers to cause Congress to lock down the open internet.

A few words of my own on this topic: I think it is important for us to read these allegations with a lawyer's analytical eye rather than under the influence of confirmation bias. I've litigated too many cases in which employees within large corporations made unfortunate statements in writing that looked like devastating admissions. Most of us have had the experience of needing to turn over such documents in discovery, knowing we'll likely have to explain to someone later that these are either meaningless when read out of context or written by people who had a limited perspective on what was happening within the company. Sometimes, yes, documents such as these reveal serious problems, but they might leave out efforts to fix things afterwards.

Regardless, the one thing we know as attorneys is that neither a single person's testimony nor a tranche of hand-picked materials ever conveys the whole picture. Thus, I give little credit to gotcha pieces declaring that we have "[unassailable proof](#)" of wrongdoing. We know better.

Meanwhile...TikTok is also getting attention for its content moderation practices, with Connecticut's AG [wanting to talk with the company](#) about this whole "Slap a Teacher" thing, and Senate Homeland Security Chairman Gary Peters [wanting more information](#) about how the company handled extremist content related to January 6.

D. Terms of Service & Other Contracts

We have more rulings on arbitration clauses this month. The Eighth Circuit [found](#) that such a clause from Walmart might be enforceable with respect to the theft of funds on physical gift cards, despite (1) various hurdles that a card purchaser would need to overcome to see the arbitration clause on Walmart.com and (2) a lack of any requirement of affirmative acceptance by the buyer if they did manage to find the clause.

In a case alleging injuries sustained by a 3-year-old on a Peloton machine, a judge in S.D. Cal. [held](#) that the child's father accepted an arbitration clause when signing up for an online Peloton account, but that the acceptance wasn't binding on either the child or the child's mother. And in S.D.N.Y., a judge [held](#) that Amazon's deletion of its mandatory arbitration clause did not affect the enforceability of that clause against a plaintiff who agreed to the clause before it was deleted.

IV. Other Content Liability

A. Defamation

The First Circuit [heard argument](#) this month on whether New Hampshire’s criminal defamation law is unconstitutional as applied to a man who was tossed in jail for calling a local police chief a “coward” on Facebook. (The charges against the man were later dropped, but he’s pursuing an affirmative claim with the help of the ACLU.)

In the Eighth Circuit, a coalition of media organizations (including the MLRC) [filed an amicus brief](#) in support of rehearing on a recent decision holding that Devin Nunes could pursue a defamation claim based on a hyperlink to an earlier publication.

In D. Colo., a judge [found](#) that an individual’s online comments that a competitor’s home inspector certification service was affiliated with NAMBLA and killed more people than Jeffrey Dahmer could only be understood as rhetorical hyperbole; however, other statements were more factual in nature.

A complaint in D.D.C. against Michael Isikoff over statements in the “Conspiracyland” podcast calling the plaintiff a “troll” and a “crankster” was [dismissed](#) for failure to plead actual malice. In E.D. Mo., a judge [refused to overturn](#) a jury’s \$80,000 verdict against a Facebook poster who falsely stated that plaintiff Steak N Shake’s mean was infested with worms. A case in S.D.N.Y. arising out of online accusations of sexual assault has [settled](#) with a payment of \$175,000 to the plaintiff. And in E.D. Va., an MP in Ghana’s Parliament [sued](#) the owner, operator and host of various online video programs over accusations of criminal behavior.

We’ve got some anti-SLAPP motions playing out in state courts. Colorado’s new-ish anti-SLAPP law is [being tested out](#) by supporters of Donald Trump sued for accusing a former employee of Dominion Voting of rigging the 2020 presidential election. In a libel case filed by the public defender for indigent misdemeanor defendants in Glynn County against the ACLU over a blog post, the Georgia Supreme Court [held](#) that (1) the lower courts erred in finding the plaintiff to be a private figure and (2) actual malice was not shown on the face of the record. (Rather than reverse the denial of the ACLU’s anti-SLAPP motion, the court remanded for discovery on the actual malice issue.) And in N.Y. App., Public Citizen [filed an appellate brief](#) on behalf of pet owners whose anti-SLAPP motion was denied in a case over their online reviews of a grooming service they believe was responsible for their pet’s death.

Finally, Alex Jones has again been [defaulted](#) in a Sandy Hook case in Texas state court for discovery abuses.

B. Commercial & Professional Speech

Detailed allegations of online complaints and bad reviews can support an inference of actual knowledge of product defects in a false advertising case, a judge in C.D. Cal. [found](#), denying a motion to dismiss.

If you're going to file a putative class action in federal court against Amazon claiming that it's deceiving consumers with a "buy" button when they're only obtaining a revocable license to online content, make sure that the name plaintiff alleges that her access to such content was actually revoked. That's the lesson from a recent E.D. Cal. ruling [dismissing](#) such a case for lack of standing.

Okay, false advertising nerds, this one is for you. A judge in S.D.N.Y. [dismissed](#) false advertising counterclaims in a dispute over online statements regarding the catalogue raisonné of Amedeo Modigliani's works, finding that the statements at issue related to the authorship/source of the ideas in the catalogue – not the product containing them – and were thus immaterial under *Dastar*. Uh, sure. In the same court, in a case between competitors in the "copper-infused compression garment" market, the court [allowed](#) the plaintiff to add a false advertising claim over certain online statements to its trademark complaint, despite arguments that it was dilatory in discovering the alleged falsity.

The FTC issued a [Notice of Penalty Offenses](#) to more than 700 companies, warning them of the Commission's seriousness in enforcing its rules against fake reviews and deceptive endorsements online – to the tune of a somewhat puzzling \$43,792 per violation.

Finally, the father of a murdered journalist has [filed](#) an FTC complaint against Facebook alleging that it misrepresents the safety of its services to the public. The claim arises out of video of the reporter's death, which allegedly continues to surface on Facebook and Instagram.

C. Threats, Harassment, and Incitement

A San Antonio man was [sentenced](#) in W.D. Tex. to 15 months in prison for spreading a hoax about his friends deliberately spreading COVID-19, following a [ruling earlier this year](#) than his speech was not protected by the First Amendment.

V. Infrastructure

A. Accessibility

Nothing to report this month.

B. Antitrust

In N.D. Cal., Apple is [seeking a stay pending appeal](#) of Judge Rogers' ruling in the *Epic Games v. Apple* case that it must allow developers on the iOS app platform to direct customers to payment options besides Apple's in-app system. In the same court and against the same plaintiff but in another case, Google has [filed](#) an answer and counterclaims alleging that Epic breached the Google Play developer agreement.

In D.D.C., Facebook has [moved](#) to dismiss the FTC's second shot at an antitrust complaint against the company, arguing that the amended allegations still don't get over the hurdle. In S.D.N.Y., a judge [unsealed](#) portions of an antitrust complaint brought by twelve states over Google's digital advertising practices; the less-redacted document is [available here](#) and Insider has an [analysis](#).

A new [bipartisan Senate bill](#) aimed at online platforms would protect against interference with interoperability of platforms, tying preferred placement on services to purchasing decisions, using data from rivals to compete against them, and self-preferencing in search results.

Amazon is [facing questions](#) from members of Congress as to whether the company's prior testimony was truthful with respect to its use of data from third-party sellers to develop competing products.

Finally, President Biden's nominee to lead the DOJ's antitrust division, Jonathan Kanter (formerly of Paul Weiss), was [approved](#) by the Senate Judiciary Committee.

C. Net Neutrality

Speaking of presidential nominees, Biden finally got around to [nominating](#) a new FCC Chair and a third Democratic commissioner. The picks are not surprising – Jessica Rosenworcel to be elevated to the Chair in which she now sits on an acting basis, and Gigi Sohn to the empty seat – and [received](#) the expected adulation from Democrats in Congress.

Rosenworcel and Sohn, together with Alan Davidson, who is newly [nominated](#) to head the National Telecommunications and Information Administration, are [expected to be a powerful team](#) in favor of net neutrality principles.

D. Domain Name System

The U.S.-based former holder of the domain registration for “France.com” has [petitioned](#) the Supreme Court for a writ of certiorari on a Fourth Circuit ruling that the Foreign Sovereign Immunities Act forecloses relief in U.S. courts from a French decision transferring the domain name to the French government.

E. Taxation

Nothing to report this month.

F. Wire & Wireless Deployment

A provision in the Senate-passed version of the \$42 billion Infrastructure bill would [exempt](#) the broadband expansion plan from FOIA.

G. Artificial Intelligence & Machine Learning

Nothing to report this month.

H. Blockchain, Cryptocurrency, & NFTs

We talked about government efforts to halt the menace of ransomware up under Privacy, but it’s also worth mentioning that a [joint statement](#) following a 30-nation summit on the issue focused on disrupting the payment systems used by ransomware gangs. Though the statement did not specifically discuss crypto transfers, that’s what it’s talking about. Meanwhile, the DOJ has [launched](#) a new “National Cryptocurrency Enforcement Team” to investigate and prosecute “criminal misuses of cryptocurrency, particularly crimes committed by virtual currency exchanges, mixing and tumbling services and money laundering infrastructure actors.”

Senate Democrats [demanded](#) that Facebook cease its ventures into cryptocurrency products, following the company’s launch of the Novi digital wallet.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

The Seventh Circuit [held](#) this month that the Supreme Court’s decision in *Riley*, which extended Fourth Amendment protections to searches of the contents of cell phones, does not extend to the phones of parolees. If you’re interested in gritty detail about the kinds of data that the FBI can gather from cell phone companies, [records](#) recently obtained through FOIA lay that out. Meanwhile, a new Inspector General [report](#) criticizes U.S. Customs and Border Protection for systemic failure to properly document searches of digital devices.

A judge in D.D.C. also [ordered](#) CBP to release documents related to its attempt to discover the identity of an anonymous critic of Donald Trump on Twitter; thanks to the Reporters Committee for its efforts in the case.

The Ninth Circuit [denied rehearing](#) by the panel or en banc in *Jewel v. NSA*, leaving in place a panel decision that the case was properly dismissed for failure to establish that the plaintiffs in fact had their communications surveilled by the National Security Agency as part of its massive sweep of phone and internet communications. Speaking of sweeps, Forbes has a [disturbing report](#) on the use of “keyword warrants” – sweeping demands to digital platforms for data on anyone who searches for a particular term.

Meanwhile, the Ninth Circuit [held](#) that state police could not rely on the private search exception to the Fourth Amendment to avoid needing a search warrant to review email attachments, when the private parties had forwarded the attachments to the police but not actually opened them. Pretty obvious: No search by private parties, no private search exception.

Finally, a judge in the Middle District of Pennsylvania [found](#) that Google Translate isn’t accurate enough for police to rely upon translations as a basis for deciding that people have consented to a search.

- B. [Encryption](#)
- C. [Biometric Tracking](#)
- D. [Domain Seizure](#)

Nothing to report in these sections this month.

E. [Content Blocking & Prior Restraints](#)

A new [decision](#) from E.D. Ark. poses a dilemma for government agencies operating comment spaces on social media, as it suggests that the First Amendment is implicated not only by specific content blocking decisions made by government officials but also by a choice by the government to use automatic content filtering systems offered by the platform.

The Fairfax County School Board [filed suit](#) in Virginia state court seeking to force parents of special education students to return documents that the Board alleges were incorrectly released in response to a FOIA request and to remove them from a website. Sounds like a non-starter to me, but apparently some blinkered judge did issue a TRO. The parents are, naturally, [fighting the case](#) and seeking to dissolve the TRO.

F. Online Access to Government Information

A Kansas judge [held](#) that it did not violate state FOIA for the Kansas secretary of state to disable a tool on the state's election database that allowed the creation of a report showing provisional ballots that were not counted.

Missouri Gov. Mike Parson is apparently [losing his marbles](#) over a reporter who discovered that the Social Security numbers of school teachers and administrators were embedded in the HTML code of a public-facing state website, and were thus effectively exposed to the world. Parson is calling the journalist a "hacker" and threatening prosecution, but there was [no intrusion of any sort](#) and the journalist [followed widely-acknowledged good faith protocols](#) in reporting on the security flaws.

VII. Global

Notable stories this month include journalists Maria Ressa (Philippines) and Dmitry Muratov (Russia) winning the Nobel Peace Prize, more fallout from the *Voller* decision in Australia, continued crackdowns in China, a draft GDPR ruling against Facebook in Ireland, a new "foreign interference law" in Singapore, and a ton(ne) of regulatory activity in the UK.

A. International

- [Police in US, Europe arrest 150 suspects in global dark web sting, AFP](#)

B. Europe

- [Facebook whistle-blower's testimony strengthens calls for regulation in Europe, New York Times](#)
- [Tech giants' slowing progress on hate speech removals underscores need for law, says EC, TechCrunch](#)
- [Big Tech to be forced to hand over data on political ads, Politico](#)
- [Inside a European push to outlaw creepy ads, TechCrunch](#)
- [European Parliament backs ban on remote biometric surveillance, TechCrunch](#)
- [DuckDuckGo, Other Search Engines Ask EU to Loosen Google's Stranglehold, PC Magazine](#)

C. Australia

- [Australia looks to revise laws after court rules publishers can be liable for defamatory comments, CNBC](#)
 - [Lawyers use Voller defamation case to demand Facebook group admins remove posts, The Guardian](#)
 - [Australia is preparing for another showdown with Big Tech — this time over defamatory posts, CNBC](#)
 - ['A coward's palace': Australian PM slams social media amid defamation law controversy, Dawn](#)
- [What is the government doing to crack down on big tech, and why?, The Guardian](#)
- [Morrison government to beef up social media rules to protect teens, News.com.au](#)
- [Missing apostrophe in Facebook post lands NSW real estate agent in legal hot water, The Guardian](#)
- [Peter Dutton tells defamation trial 'rape apologist' tweet by activist was 'deeply offensive', The Guardian](#)
- [Afghan journalists beaten by the Taliban in viral photos plead for asylum in Australia, SBS](#)

D. Austria

- [After social media sites banned Vienna museums for nude artwork, they turned to OnlyFans, USA Today](#)

E. Belgium

- [Belgian Government Wants To Add Encryption Backdoors To Its Already-Terrible Data Retention Law, Techdirt](#)

F. Brazil

- [Bolsonaro asks Supreme Court to intervene to avoid social media suspension, Reuters](#)

G. Canada

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VIII. Miscellaneous

FIRE filed an [amicus brief](#) urging the Supreme Court to grant cert in the case of a private investigator in Maine who was denied a license on the basis of social media posts criticizing a State Police officer.

A jury in N.D. Cal. [cleared](#) Palmer Luckey and Facebook Technologies of breach of contract claims in connection with respect to the development of the Rift VR headset.

A jury in N.D. Ill. [found a man guilty](#) of providing material support to the Islamic State by creating a script to facilitate the dissemination of propaganda on Telegram.

And in Georgia, the state's supreme court [heard argument](#) on an Atlanta couple's appeal of the dismissal of their claims that Snapchat's speed filter encouraged risky behavior by another motorist leading to an accident in which the husband sustained serious injuries.

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And that's it for October. I'll see some of you at Dinner, and wish all of you a happy Thanksgiving!