

# The MLRC Digital Review

## *Reporting on developments in digital media law and policy*

by Jeff Hermes

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Greetings, everyone! As we roll toward the conclusion of 2021, I'd like to start this article by picking up on some thoughts that I've been discussing in recent issues. This is going to get a little theoretical, so feel free to skip to the main article if you're not into this sort of thing.

So, back in my [opening musings in the September issue](#), I talked about the problem of using a "public square" metaphor for social media because the lack of geographic limitations means that the dynamics of communication are significantly different between the two settings. Specifically, I suggested that speech in the public square is about persuasion, while speech on social media is often more about what I called "echolocation" – i.e., finding like-minded people by sending your thoughts out into the world and having them reflected back by people who already think the way you do.

Looking back on it, I think I drew the distinction a little too sharply, because of course both persuasion and echolocation occur in both settings. I still believe, however, that echolocation is a much more significant component of speech on social media, enhanced by the much greater reach of digital platforms. As I suggested before, if your ideas are outside of the mainstream, you might hear only crickets if you attempt to echolocate in a limited geographic area, whereas your chance of finding fellow travelers is far greater on a platform with hundreds of millions of users.

With that as preface, I've been thinking lately about echolocation as it relates to the idea of information quality. So much of First Amendment jurisprudence rests on an implied concern with information quality (whether we're talking about truth, or the broader concepts of "literary, artistic, political, or scientific value" that found their way into our peculiarly definition by exclusion for obscenity) that I started to ponder how speech for the purposes of echolocation relates to that concept. This is not a trivial inquiry: If there turns out to be a problem with information quality in how echolocation functions on social media, that could have significant implications for the strength of free speech arguments with respect to that aspect of these sites.

So, what is the information value of echolocation? Remember, we're talking about communicating to people who already believe what you're saying, so you're probably not introducing your intended recipients to anything new in terms of your underlying message. Put another way, if your message is "I believe in X," then the new information to your recipients is "I believe," not "X." Similarly, if they write back and say "me too!," then the information you're

interested in is the fact of their agreement.

Maybe, then, what we're really talking about is validation. If you have an idea and you find out that others agree with you, then you tend to take that as an indication that your idea is correct. More accurately, however, it suggests that the idea is one which does not present immediate conflicts for those who hold it. Every person who believes an idea is one more person who has tested that idea against their own experience and identified no problems. That might be understood to suggest that conclusions agreed to by larger groups are more reliable.

This, however, could be a flawed conclusion, for at least three reasons that I can think of. First, people can have erroneous ideas that are independent of their own experience. One can spend one's whole life believing that the sun orbits Earth rather than the other way around with no immediate disastrous consequences, as a majority of people did for centuries because that issue had no impact on their day-to-day experiences. Second, people can be irrational and choose to disregard such negative consequences as they might experience from adhering to particular beliefs. If someone believes anti-vaccine misinformation and gets sick, that person might still believe that a vaccine would have made no difference or would have had worse effects. And third, negative consequences can be difficult to identify. If one believes anti-vaccine misinformation and *doesn't* get sick, their heightened vulnerability is not immediately apparent.

If the error rate caused by such factors is significant, then validation obtained by echolocation has the potential to be a weak or even misleading indicator of the information quality of your ideas. Thus, it is possible that echolocation could undermine information quality by perpetuating error. It is also possible that certain kinds of beliefs are more prone to error; as suggested by the examples above, some beliefs are detached from practical experience or can have non-obvious negative effects.

But is there any reason to believe that validation on social media is more likely to be misleading than validation in other settings? There is no reason I can think of to believe that the error rate is higher simply because of the medium. At most, you're more likely to obtain validation of ideas at the fringes, because as the size of the audience grows, you're more likely to find people who agree with less common beliefs. But that says nothing about whether those ideas are correct – at least, unless we adopt the broad proposition that ideas held by a smaller percentage of the community are by definition more likely to be false, which I don't think we can do. Even if we accept that widespread acceptance of an idea correlates (albeit imperfectly) with truth, that does not logically imply that lesser acceptance of an idea correlates with falsity. Every idea starts small.

Okay, I'm going to stop there for now. On with the regular show.

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## I. Privacy

## A. Anonymity

Public Citizen [filed an amicus brief](#) in a case pending before the Second Circuit, in which the plaintiffs are seeking the identities of anonymous online speakers who published instructions for 3-D printing of firearms bearing the name of anti-gun groups. As Paul Alan Levy explains, “The danger is that the trial judge’s dismissive treatment of the right to speak anonymously could be addressed in a way that has serious implications for more legitimate speakers.”

A magistrate judge in N.D. Cal. [gave](#) an anonymous Twitter user whose identity was targeted with an DMCA subpoena the opportunity to appear anonymously to contest allegations of copyright infringement, including by advancing a fair use argument. Kudos to Twitter for stepping in to defend the user’s interests. A different magistrate of the same court [ordered](#) Google to reveal the identity of the operator of a website carrying pirated manga.

And though I’m uncertain of whether these cases belong in this section, or in this article at all, I’ll default to providing more information rather than less (because when have I ever been inclined to brevity in my writing). In W.D.N.C., the court [rejected](#) a politician’s attempt to proceed anonymously as the plaintiff in a libel case over, among other things, online speech. Ohio’s Supreme Court, meanwhile, [heard argument](#) on the question of whether a police officer could remain anonymous in his libel lawsuit over social media comments.

A New Mexico district attorney [sued](#) Facebook in California Superior Court, attempting to compel the company to disclose information about the creators and operators of a page for a right-wing militia group; the page was removed for violation of Facebook's rules on extremist content. Facebook claims that it does not have the information and that it is in any event protected by the Stored Communications Act.

#### B. Personal Information

Ugh. So, the mayor of Cambridge, Maryland (NOT Cambridge, Massachusetts, my home before moving to the NYC area) is [being prosecuted](#) in Maryland state court for posting nude photos of his ex-girlfriend to Reddit. Oh, and apparently he [captioned the photos](#) with racial slurs. I repeat, ugh.

#### C. Children's Privacy

A new [lawsuit](#) in E.D. Cal. asserts that comedy video website Smosh violated the TCPA with respect to calls and texts to minor's cellular devices, on the theory that minors are incapable of consenting to such messaging.

Hey, what a shocker, state attorneys general are upset with big online services again. This time, a coalition is [exploring](#) whether they can go after Instagram for harming children and mining their data in the wake of, you guessed it, the recent Facebook leaks and whistleblower testimony. Meanwhile, Adam Mosseri, the head of Instagram, [agreed to testify](#) before Congress in December about the site's alleged effects on children.

You might recall that Apple announced earlier this year that iOS would start detecting when sexually explicit photos are sent or received on the Messages app on iPhones and iPads. Well, after some controversy and a brief delay, the company has [announced](#) that the feature will be enabled in iOS 15.2, and can send an alert from a child's device to a parent.

#### D. Rights of Publicity

A judge in N.D. Cal. [allowed](#) an ROP claim to proceed over PeopleConnect's use of old yearbook photos to promote the services of its website Classmates.com. The court rejected § 230 and copyright preemption defenses; Professor Tushnet also has a typically thorough [analysis](#) of the decision.

#### E. Biometrics

In the face of mounting government pressure and following a series of lawsuits, Facebook has [sworn off](#) the use of facial recognition technology for its photo upload feature and deleted

biometric data for more than a billion people. This [does not mean](#), of course, that other Meta properties and services will not continue to utilize the technology.

Clearview AI [participated](#) in the National Institute of Standards and Technology's Face Recognition Vendor Tests for the first time, and [did well](#) in both rounds of the testing with respect to its accuracy.

#### F. Manipulated Media

Nothing to report this month.

#### G. Hacking, Scraping & Data Breach

The First Circuit [held](#) that a defendant accused of participating in a cyberattack on a Boston-area hospital had not established a justification defense on the basis that he was attempting to protect a child whose medical treatment was the subject of a national controversy.

The Ninth Circuit [held](#) that Israeli spyware company NSO Group was not protected by the sovereign immunity doctrine because it's, y'know, not a sovereign. Meanwhile, Apple has [sued](#) NSO Group for CFAA violations arising out of the use of its Pegasus spyware to access iOS devices without authorization, and the U.S. government has [blacklisted](#) the company.

In N.D. Tex., federal governments have [secured indictments](#) against, and seized \$6 million from, participants in ransomware gang REvil. Another ransomware gang, BlackMatter, [shut down](#) in the face of the gathering legal storm.

#### H. Other Intrusion

Nothing to report this month.

## II. Intellectual Property

### A. Copyright

The Supreme Court [heard argument](#) this month about whether a court that, in the midst of an infringement case, finds a misstatement in an application for copyright registration of the work at issue is required to refer the matter to the Register of Copyrights under § 411(b). It's not a digital media case and it's a pretty wonkish issue, but still it's the Supreme Court on copyright so I felt awkward about leaving it out.

In other Supreme Court news, the justices [denied cert](#) in *Fischer v. Forrest*, a case out of the Second Circuit involving what qualifies as copyright management information under the DMCA,

and are [considering](#) whether to take a case out of the Fifth Circuit about whether a state's infringement of a copyright can form the basis for a takings claim.

A group producing modded content for the "Grand Theft Auto" video game series has [asserted](#) a fair use defense in a lawsuit brought against it in N.D. Cal. by Take-Two Interactive.

The paparazzi lawsuits keep rolling in, with a [new one](#) this month in C.D. Cal. against Kim Kardashian's fashion company over a snap of model Bella Hadid that Kardashian posted to Instagram.

The New York Appellate Division [suspended](#) Richard Liebowitz from practice in New York until further notice, in reciprocity with his federal suspensions from practice.

We're a little light on court decisions this month, but Eric Goldman brings us the interesting tale of the Copyright Review Board [struggling](#) with the concept of copyright in animated emoji images. It's an interesting and fairly nuanced analysis. Prof. Goldman also [offers his thoughts](#) on the Copyright Office's rulemaking with respect to the Copyright Claims Board.

Finally, Sen. Ron Wyden and Rep. Anna Eshoo have [written](#) to library distributors seeking information about the standard licenses that publishers grant to libraries for the distribution of ebooks. The inquiry is based on concerns that libraries are being forced to pay more for ebooks than for comparable print volumes, and are subject to more restrictive rules on distribution.

## B. Trademark

I'm kind of bummed about this one. The Supreme Court [denied cert](#) in one of the strip club cases out of the Second Circuit, in which the petitioners called on the Court to resolve a circuit split as to whether a Lanham Act claim based on misappropriation of identity is limited to celebrities or other plaintiffs who are publicly prominent. I dislike the concept of special claims only celebrities can bring -- though I'm fine with them having a higher burden of proof in defamation claims. Is that inconsistent? I'm not sure, but I can live with it.

A jury in N.D. Cal. [cleared](#) Redbubble of claims that it infringed and counterfeited Atari trademarks and other intellectual property in connection with the online print shop's sale of merchandise carrying video game imagery. In S.D. Fla., the holder of trademark rights in Diego Maradona's last name [sued](#) to force Facebook to remove a tribute page on Instagram to the late great soccer player.

A [remarkable surge](#) in trademark applications at the USPTO looks to have crested, and the Office staff expects that it can now begin making headway with the backlog. Still, you might want to bring a book or something because the wait times are going to be extended for a while.

### C. Patent

The Supreme Court [denied cert](#) on a Federal Circuit decision involving eligibility for a patent for automated text captions.

Judge Koh in N.D. Cal. [held](#) that her court had personal jurisdiction over a party threatening Twitter with infringement claims over VoIP patents and that venue was proper, allowing Twitter's declaratory judgment action to go forward.

Peloton filed [two lawsuits](#) in D. Del. against rival companies that it alleges are infringing patents for on-demand classes.

Judge Rodney Gilstrap of E.D. Tex. has [recused himself](#) from 138 cases involving companies in which he or his wife had a financial interest, following a Wall Street Journal investigation into his refusal to recuse in patent cases. Meanwhile, Senators Tillis and Leahy have [written](#) to Chief Justice Roberts suggesting that he look into forum shopping in patent cases, a concern raised by W.D. Tex. judge Alan Albright's shilling of his courtroom to patent plaintiffs. Tillis also [wrote](#) separately to the Commissioner of Patents about Albright's pattern of stifling the PTAB's inter partes review process by manipulating the schedules of his cases, a procedural maneuver calculated to attract patent plaintiffs who detest the IPR process.

In the meantime, a jury in Albright's court [awarded](#) \$26 million to VideoShare in a case against Google and YouTube over – you guessed it – a video sharing patent.

### D. Trade Secrets/Misappropriation/Conversion

Nothing to report this month.

## III. Platform Management

### A. Section 230

The Third Circuit [denied rehearing](#) on Facebook's petition for rehearing of a panel decision holding that § 230's intellectual property exception extends to state law right of publicity claims. So, any chance of avoiding a circuit split with the Ninth Circuit is gone, but the idea of this one going up to this Supreme Court is unappealing to me to say the least.

Twitter has [appealed](#) to the Ninth Circuit from a recent decision denying it the protection of Section 230 in a case involving allegations of sex trafficking across the site. The main question involves the scienter standard necessary to trigger the FOSTA exception to 230, about which district courts have reached varying conclusions.

The Department of Justice has [accepted](#) the invitation to defend the constitutionality of § 230 in Donald Trump’s deplatforming lawsuit against Twitter, now pending in the Northern District of California after transfer. With the [transfer](#) this month of Trump’s lawsuit against Facebook to N.D. Cal., that means that all three of the cases (Twitter, YouTube, Facebook) originally filed in S.D. Fla. are now [on the tech companies’ home turf](#) and subject to favorable Ninth Circuit precedent on state action questions.

A brief aside on the constitutionality of § 230. One of the linked articles above cites to a prominent academic who argues that there’s a potential First Amendment challenge to § 230 based on the fact that it amounts to government encouragement of censorship. This is actually quite similar to the “jawboning” arguments that we’ve seen asserting that politicians violate the First Amendment rights of users (and potentially platforms) by cajoling platforms into removing content that for one reason or another they deplore, and that platforms violate the First Amendment of their users by acceding to such suggestions.

I am unpersuaded by any of these iterations of the argument. Unless the government crosses the line into *compelling* platforms to remove content, the choice remains the platforms’ own under the First Amendment. Even if § 230 embodies a government preference for removing certain kinds of content (and to be clear, we’re talking about § 230(c)(2) here, not (c)(1)), nothing about the statute is coercive. Sure, some of the political jawboning has been closer to the line. But even if such pressure does take on a coercive aspect, the proper remedy is for a court to declare the pressure unconstitutional and thereby to give platforms the space to make up their own minds. What courts should *not* do is impose their own government-backed coercion on platforms to make the opposite decision – that’s just substituting one First Amendment violation for another.

Moving on, we’ve got a [§ 230 win](#) for Facebook and TikTok in E.D. Mo., in a case asserting a negligence claim in connection with a pattern of harassment of the plaintiff. Section 230 did not carry the day in a [case](#) in E.D. Wis. over online marketplace Armslist’s alleged enabling of illegal firearm sales, but the plaintiff’s claims nevertheless failed under state law.

California’s Senate Judiciary Committee held a hearing this month on state regulation of social media; Prof. Goldman [testified](#) about the limitations that § 230 places on state efforts.

## B. Elections & Political Advertising

Nothing to report this month.

## C. Content Moderation

The Supreme Court [denied cert](#) in *Lewis v. Google* out of the Ninth Circuit, another complaint over content moderation. The Ninth Circuit also breezily affirmed the dismissal of [two more](#) complaints asserting that social media sites should be treated as state actors. Meanwhile, judges

in [N.D. Cal.](#) and [E.D. Pa.](#) continued the trend of dismissing cases about content moderation practices.

In the Eleventh Circuit, [amicus briefs rolled in](#) supporting NetChoice's challenge to Florida's social media compelled carriage law, although not all of them were as full-throated in their support of the First Amendment rights of platforms as I might have wished. My special thanks to the Reporters Committee for Freedom of the Press, which took the lead on drafting the brief that the MLRC joined in the case.

Meanwhile, we've got a [great decision](#) out of W.D. Tex. enjoining Texas' separate attempt to stifle the editorial discretion of social media sites – but technically that happened in December, so more on that next month. In the interim, Prof. Goldman offers a [roundup](#) of the case so far.

So, speaking of jawboning, a [new lawsuit](#) in W.D. Wash. asserts that Sen. Elizabeth Warren violated the rights of a Vermont publishing company by criticizing Amazon for carrying “The Truth About COVID-19” and claiming that the book peddled misinformation and conspiracy theories about the virus. Amazon stopped selling ads for the book but continues to carry it.

We've got some new federal legislation in the works. First, there's the [Filter Bubble Transparency Act](#), which would require platforms to offer users the opportunity to opt out of receiving algorithmically moderated content. Commentary [here](#), and [here](#), and from Luke Skywalker [here](#). And second, we have the [INFORM Consumers Act](#) (Senate)/[INFORM Act](#) (House), which attempts to make it easier to locate sellers of potentially defective products on online marketplaces by requiring the marketplaces to gather and to publish seller information and to delist those who don't cooperate. The sponsors of the bill are attempting to [slip it into](#) this year's National Defense Authorization Act, which [as we saw last year at about this time](#) is just a fantastic way to attempt to make internet law.

Finally, Meta is [hoping](#) to rework its relationship with the Oversight Board in order to more effectively process the Board's recommendations for improving its content moderation practices, indicating that the current process produces recommendations in a form that is hard to keep up with.

#### D. Terms of Service & Other Contracts

A judge in N.D. Cal. [enforced](#) an arbitration clause with respect to claims that Google unlawfully gathered third-party app data from Android devices.

In S.D.N.Y., a judge [held](#) that an Australian subscriber to the NFL's Game Pass Pro streaming service stated a viable breach of contract class action claim against the league, after service crashes during the 2020 Super Bowl allegedly ruined viewers' enjoyment of the game.

Finally, the FTC has [stated](#) that it considers it to be an unfair trade practice to require users to call to cancel subscription services that they could sign up for online – a practice engaged in by many news organizations.

#### IV. Other Content Liability

##### A. Defamation

The Supreme Court [denied cert](#) this month in two separate cases, *Pace v. Baker-White* from the 3<sup>rd</sup> Circuit and *Tah v. Global Witness Publishing* from the D.C. Circuit, raising various challenges and questions regarding the actual malice rule in defamation cases.

The Eighth Circuit [denied](#) rehearing of its disturbing panel decision in *Nunes v. Lizza*, in which it held that a journalist's hyperlinking to his own article after a complaint had been filed regarding that article was a republication and evidence of actual malice. Due to an alleged conflict, the Court of Appeals rejected a media coalition amicus brief explaining why its original decision made no sense (a complaint over an article is somehow evidence that the reporter now subjectively doubts its veracity? what?), and further denied the opportunity to avoid the conflict by dropping the problematic amicus.

So, Cardi B sued a vlogger in N.D. Ga. for defamation over the claim that the rapper has herpes; not surprising then that a judge has [ordered](#) a hospital to turn over the star's medical records on that issue.

A judge in D.N.J. [ruled](#) that it is not tortious interference to coordinate a campaign on social media in order to get a suspected fascist or white supremacist fired from their job, but gave the plaintiff the opportunity to plead more specifics regarding alleged threats and other potentially tortious conduct.

One of Jeffrey Epstein's accusers has [sued](#) another of his accusers in S.D.N.Y. for defamation, based on a series of tweets in which the second claimed that the first helped to recruit Epstein's victims and had attacked her physically.

A judge in W.D. Tex. [dismissed](#) a lawsuit filed by a woman who claimed she was defamed by statements in podcast "Son of a Hitman" that she was a "star" or "unusual" witness; the judge found that the statements were opinion and could not reasonably understood to imply anything about her veracity.

In W.D. Va., a judge [ordered](#) a range of social media and messaging services to turn over communications from the accounts of James Hoft, owner of the Gateway Pundit website, so that Hoft could then provide documents responsive to discovery requests from the plaintiff in a

defamation case against him for calling the plaintiff a left-wing government plant at the Charlottesville rally.

The Better Business Bureau spent the better part of a decade fighting off a defamation lawsuit in Connecticut state court over its business ranking algorithm, but [finally succeeded](#) this month. As a bonus, claims over comments from consumers about the plaintiff were broomed under § 230. In the same court, another judge [held](#) Alex Jones liable to Sandy Hook parents as a sanction for discovery abuses.

The Pennsylvania Supreme Court [held](#) that questions of venue selection for online libel should be decided the same way as venue questions for defamation in traditional media, ruling that venue is appropriate anywhere in the state that a publication is read by a third party and understood as defamatory.

A Texas appellate panel [tossed](#) a \$3 million summary judgment award in favor of Deion Sanders against his ex-wife over accusations on social media of spousal abuse, finding that Sanders had failed to establish economic losses and an actual impact on his reputation.

## B. Commercial & Professional Speech

Meta is in the crosshairs of investors who claim that the company misled the public about the harm that its services caused users, with [two lawsuits](#) filed in the Northern District of California. Another lawsuit against the company in the same court, which alleged that its disclosures about how it detects click fraud are deceptive, was [kicked out](#) on summary judgment.

## C. Threats, Harassment, and Incitement

In N.D. Cal., gaming platform Roblox has taken the unusual step of [suing](#) a banned user who, it alleges, hacked back into the platform to harass other users and to post terrorist threats that caused a temporary shutdown of the Roblox Developers Conference.

We have a challenging [ruling](#) from the Court of Appeals of Wisconsin this month reversing a threats conviction of a man who allegedly threatened a shooting at a movie theater through a series of images posted to social media. The court found that the posts didn't meet the elements of a true threat because with the defendant's limited social media presence it wasn't foreseeable that anyone inside the theater would have seen the posts. Moreover, not all of the photos were posted to a single service; the defendant had posted to Instagram photos of (1) a future movie ticket for a specified show, (2) ammunition, and (3) the inside of a theater, but a photo of an actual firearm was posted separately to Snapchat. Thus, the court noted, people would have to connect the dots between the defendant's social media accounts to construct the threatening narrative. I'm not entirely sanguine about this result – for one thing, I think the photo of the ammo gets you there without the photo of the gun – but I think I come down agreeing that this

should be enough to trigger preventative measures by the police but not necessarily prosecution for a threat.

## V. Infrastructure

### A. Accessibility

Nothing to report this month.

### B. Antitrust

Apple's attempt to stay injunctive relief pending appeal in its antitrust fight with Epic Games in N.D. Cal. was [denied](#) by the judge. Meanwhile, the same judge [gave preliminary approval](#) to a \$100 million settlement of monopolization claims by developers relating to software on iOS devices.

We have more lawsuits by local newspapers against tech giants, with [two lawsuits](#) in N.D. Ga. against both Google and Facebook over their control of advertising markets. In E.D.N.Y., Meta was hit with a new [lawsuit](#) by the developer of a dead photo app, alleging that the developer was suckered into thinking that Facebook wanted to make a deal when it actually wanted to kill the competition. In S.D.N.Y., state AGs filed a [third amended complaint](#) in their antitrust case against Google over display advertising.

And in W.D. Wash., Valve, the operator of the Steam video gaming platform, secured [dismissal](#) of antitrust claims over (1) the alleged tying of the Steam game platform and its game marketplace and (2) Steam's 30% commission on game sales. The former claim failed because the court found the two pieces to be part of an integrated product, and the latter failed because the 30% commission had proved to be sustainable in the marketplace.

The Senate [confirmed](#) Jonathan Kanter to lead the Department of Justice's antitrust division. As we have seen before from tech companies with respect to other Biden appointments, Google has [raised concerns](#) about Kanter's impartiality based on his past work focused on tech companies.

Senators Klobuchar and Cotton have introduced a [new bill](#), the Platform Competition and Opportunity Act, which would require tech companies to prove that proposed mergers and acquisitions are beneficial to competition before they are allowed to proceed. Meanwhile, a [separate proposal](#) from Sen. Klobuchar, the American Innovation and Choice Online Act, would make it illegal to restrict access to a user's data or interfere with portability – which some commentators fear could have unintended adverse effects on data privacy.

### C. Net Neutrality

President Biden's FCC nominations were scheduled for [separate confirmation hearings](#), with nominee for FCC Chair Jessica Rosenworcel [appearing](#) this month and nominee Gigi Sohn [scheduled](#) for December 1st. Rosenworcel voiced her continuing support for net neutrality; we'll come back to Sohn's hearing next month, for now just noting the [controversy over](#) Sohn's nomination and somewhat [surprising support](#) that she has received from far-right media outlets.

### D. Domain Name System

Nothing to report this month.

### E. Taxation

The FCC has [asked for public comment](#) on a proposal by the National Association of Broadcasters to impose regulatory fees on users of unlicensed spectrum, including those who use Wi-Fi, Bluetooth, and other device connectivity tools.

### F. Wire & Wireless Deployment

Boeing [received](#) the go-ahead from the FCC to launch a constellation of broadband satellites, rejecting claims by SpaceX that the new satellites would interfere with existing satellites.

Closer to the ground, President Biden's signature Infrastructure Investment and Jobs Act [became law](#) this month, with more than \$42 billion earmarked for broadband deployment to unserved areas, among other initiatives.

Why did the FAA [compel a delay](#) in the launch of 5G service on C-band spectrum on the basis of potential interference with airplane altimeters, when there's no evidence of any such interference in the dozens of countries that have rolled out 5G service? Good question.

### G. Artificial Intelligence & Machine Learning

The FTC has [brought onboard](#) a former Google employee and current NYU faculty member as a senior advisor on artificial intelligence issues.

### H. Blockchain, Cryptocurrency, & NFTs

A British citizen is [facing prosecution](#) in S.D.N.Y. in connection with an elaborate scheme to steal more than \$780,000 in cryptocurrency.

A [new report](#) from the Treasury Department calls on Congress to provide regulators with greater authority to regulate stablecoins, cryptocurrencies that have a theoretical link to the value of

stable assets but are not always as secure as described. Meanwhile, questions are [arising](#) regarding how the Biden infrastructure bill will affect cryptocurrencies, and in particular how transactions will be taxed.

NFTs are the hot new thing in the entertainment world, with everyone from [indie filmmakers](#) to [major studios](#) jumping on the bandwagon. Among these is Quentin Tarantino, who [planned](#) to sell 7 deleted scenes from “Pulp Fiction” as NFTs, only to face a [lawsuit](#) in C.D. Cal. from Miramax over who actually has the rights to issue such things. And in the same court, Playboy Enterprises obtained an [injunction](#) against a company allegedly selling NFTs under counterfeit trademarks.

Speaking of trademark issues, WIPO’s arbitration service [ruled](#) in favor of J.R.R. Tolkien’s estate and blocked the sale of the “JRR Token.”

And then there’s [this](#), a particularly biting method of illustrating the limitations of NFTs as a way of preserving and controlling the distribution of nominally unique digital artifacts.

## VI. Government Activity

### A. Data Surveillance, Collection, Demands, and Seizures

The Seventh Circuit [ruled](#) this month that parolees do not enjoy Fourth Amendment rights against the warrantless search of their cell phones, holding that this was one of the “case-specific exceptions may still justify a warrantless search of a particular phone” to which the Supreme Court referred in its decision in *Riley*.

The U.S. Attorney General’s Office in C.D. Cal. [issued](#) a grand jury subpoena to end-to-end encrypted messaging app Signal for information in connection with a criminal investigation; alas, Signal means it when they say “end-to-end,” and they don’t collect any information on your contacts, profile name, and so forth.

Meanwhile, the U.S. Treasury simply [buys](#) its app data about private individuals from data brokers, while the FBI has created an interesting [guide](#) as to the kinds of data that law enforcement can obtain from various messaging apps.

Meta [wrote](#) to the LAPD this month to demand that the Department cease its use of fake accounts and other surveillance on the platform in violation of site policies.

### B. Encryption

A Michigan [bill](#) that would block the use by state officials of encrypted messaging apps that frustrate public records requests has taken another step towards passage, with the state Senate voting the bill through.

### C. Biometric Tracking

### D. Domain Seizure

Nothing to report in these sections this month.

### E. Content Blocking & Prior Restraints

A judge in W.D. Wash. [enjoined](#) enforcement of a rule against “off-topic” comments that was imposed on the City of Sammamish’s official Facebook page, finding that the rule violated commenters’ First Amendment rights in a designated public forum.

A New York state judge [denied](#) a preliminary injunction against a financial journalist sued for defamation over an article on her website.

A [new bill](#) introduced by Marco Rubio would direct a group of federal agencies to arrange for continued internet service to be provided in foreign countries in the event of domestic unrest or suspension of local internet service as a tool of repression. Certainly, government-mandated internet outages are a favorite tactic to suppress dissent around the world, so there’s a problem to be solved here...

### F. Online Access to Government Information

There’s a [tentative settlement](#) in the lawsuit in D.D.C. against the United States over exorbitant PACER fees! Next question, to whom does the MLRC submit a claim? All of those PACER documents we give you haven’t been free, you know – we’re often the folks who upload them to Court Listener/RECAP in the first place.

A judge in S.D. Fla. is furious at news outlets who shared Zoom footage of a criminal defendant from a recent virtual hearing in defiance of court order, and has [directed](#) an investigation into whether they should face contempt proceedings.

Meanwhile, if you’re looking for information on California law enforcement’s use of geofence warrants, you’re likely to see a conspicuous hole in the records available in the state’s transparency database. The Markup found that the number of records [doesn’t tally](#) with the much greater number of warrant requests disclosed in a separate transparency report.

A FOIA requester was hit with a prior restraint in New Jersey state court prohibiting him from disclosing the content of government records that were provided with faulty redaction; the requester has [moved](#) to dissolve the injunction. In a similar case in Virginia state court, a judge [denied](#) a broad injunction against the dissemination of records erroneously produced in response to a FOIA request, but did prohibit dissemination of certain bank account, tax, and federal ID information.

## VII. Global

This month, notable developments include the European General Court affirming a sizeable antitrust judgment against Google in the EU, “anti-troll” legislation in Australia, more companies shutting operations down in China, increasing friction over Thailand’s lese majeste laws, Clearview AI running into serious trouble in Australia and the United Kingdom, and a chilling explanation of why hackers apologized to royal families in the UAE.

### A. International

- [Facebook Whistleblower Testifies Before ‘Grand Committee On Disinformation’; Which Includes Countries That Lock People Up For Criticizing The Gov’t](#), *Techdirt*

### B. Asia

- [Central Asian leaders want to tighten grip on social media. Russia’s playbook blazes the trail](#), *Washington Post*

### C. Europe

- [Google loses antitrust battle with EU as court upholds 2017 order to pay \\$2.8 billion fine](#), *CNBC*
  - [Judgment: Google v. European Commission](#)
- [CJEU: Advisor to EU’s top court suggests German bulk data retention law isn’t legal](#), *TechCrunch*
  - [Advisory Opinion: Bundesrepublik Deutschland v. SpaceNet AG](#)
- [EU Lawmakers Pass Strict New Rules Affecting Big U.S. Tech](#), *Bloomberg*
- [Europe’s digital rules reboot could tame Facebook, whistleblower Frances Haugen tells EU Parliament](#), *TechCrunch*
- [EU’s Latest Internet Regulatory Madness: Destroying Internet Security With Its Digital Identity Framework](#), *Techdirt*
- [EU Pushes to Limit How Tech Companies Target Political Ads](#), *Wall Street Journal*
  - [Europe offers tepid set of political ads transparency rules](#), *TechCrunch*
- [EU’s data protection adviser latest to call for ban on tracking ads](#), *TechCrunch*

- [European Parliament’s IMCO backs limits on tech giants’ ability to run tracking ads](#), *TechCrunch*
- [Who will enforce Europe’s crackdown on Big Tech?](#), Politico
- [The European Commission Deletes Mass Amounts of Emails and Doesn’t Archive Chats](#), *Spiegel International*
- [Digital rights nonprofit alleges Grindr violated user privacy laws](#), *Jurist*
  - [Complaint](#)
- D. Australia
  - [Government’s ‘anti-troll’ legislation would allow social media users to sue bullies](#), *The Guardian*
    - [Social media companies could be forced to give out names and contact details, under new anti-troll laws](#), *ABC*
  - [Clearview AI told it broke Australia’s privacy law, ordered to delete data](#), *TechCrunch*
  - [Twitter says any move to ban anonymous accounts would not reduce abuse](#), *The Guardian*
  - [Google: US technology giant to invest \\$740m in Australia](#), *BBC News*
  - [LGBTIQ publishers unite to seek deals with Google and Facebook](#), *Q News*
  - [Australia defence minister awarded \\$25,000 over defamatory six-word tweet](#), *Reuters*
    - [Should politicians like Peter Dutton suck up Twitter’s hot-gives and -takes or pursue vindication?](#), *The Guardian*
- E. Austria
  - [Facebook’s lead EU privacy supervisor hit with corruption complaint](#), *TechCrunch*
- F. Belarus
  - [Belarus classifies social media channels as ‘extremist’ in new crackdown](#), *KFGO*
  - [Google permanently blocks Belarusian Investigative Committee’s YouTube channel due to sanctions](#), *Meduza*

## G. Belgium

- [IAB Europe says it's expecting to be found in breach of GDPR](#), *TechCrunch*

## H. Brazil

- [Brazil's Fake News Legislation Moves Forward, Gets Slightly Better And Way Worse](#), *Techdirt*
- [Brazil's Far-Right Disinformation Pushers Find a Safe Space on Telegram](#), *New York Times*

## I. Cambodia

- [U.S., rights groups condemn jailing of teenager over social media posts](#), *Reuters*

## J. China

- [China's great Big Tech experiment matters everywhere](#), *CNET*
- [Hong Kong's Carrie Lam vows to 'plug loopholes' in internet regulation, and 'supervise and manage the media'](#), *Hong Kong Free Press*
- [Hong Kong journalists urge government to drop plans for fake news law](#), *SCMP*
- [Chinese province targets journalists and students in planned surveillance system](#), *Reuters*
- [Chinese tech companies appear to censor Uyghur and Tibetan Tech](#), *Protocol*
- [The U.S. urges Beijing to release a Chinese citizen journalist who highlighted Covid.](#), *New York Times*
- [Epic pulls plug on Fortnite in China](#), *TechCrunch*
- [Yahoo Ceases Operations in China](#), *PC Magazine*
- [Missing 'Simpsons' Episode In Hong Kong Raises Censorship Fears](#), *Wall Street Journal*

## K. Egypt

- [Leading Egyptian rights activist fined for social media post](#), *Associated Press*

## L. Ethiopia

- [Ethiopia's Tigray conflict: What are Facebook and Twitter doing about hate speech?](#), *BBC News*
- [Facebook deletes Ethiopia PM's post that urged citizens to 'bury' rebels](#), *BBC News*

## M. France

- [France asks search engines and app stores to remove Wish](#), *TechCrunch*
- [Google Will Pay AFP for Its News in First Deal After French Fine](#), *Bloomberg*

## N. Germany

- [Google Reaches Content Deals With German Publishers](#), *U.S News & World Report*

## O. India

- [Use of trademark as keyword: Delhi High Court directs Google to probe into web traffic diversion](#), *Bar and Bench*
- [India eyes prohibiting irresponsible crypto ads](#), *TechCrunch*
- [Kashmir's vanishing newspaper archives](#), *Coda*

## P. Ireland

- [Irish News among media organisations to have articles pulled by Google 'at request of Sean Quinn family'](#), *Irish News*
- [Twitter opposes order sought by journalists in defamation case](#), *Irish Times*
- [Google Ireland agrees €345m tax settlement with Revenue](#), *Irish Times*

## Q. Italy

- [Italy fines Amazon and Apple \\$230M over alleged reseller collusion](#), *TechCrunch*
- [Italy fines Apple and Google for 'aggressive' data practices](#), *TechCrunch*

## R. Japan

- [Japanese Police Use Targeted YouTube Ads To Warn Would-Be Voyeurs](#), *Ubergizmo*

- [Osaka court rules reposting subtitles from YouTube video violates copyright](#), *The Mainichi*
  - S. Kazakhstan
- [Meta denies Kazakh claim of exclusive access to Facebook's content reporting system](#), *CNN*
  - T. Kenya
- [On Twitter, political disinformation clouds Kenya's trending topics](#), *TechCrunch*
- [Researchers say a coordinated misinformation campaign on Twitter backed Kenya's president.](#), *New York Times*
- [Facebook on the spot in Kenya as exploitation of minors rife on its platform](#), *TechCrunch*
  - U. Mexico
- [Mexico arrests businessman in Pegasus spyware case](#), *Associated Press*
  - V. Nicaragua
- [Nicaragua accused of running internet troll farm](#), *BBC News*
  - W. Pakistan
- [Islamabad High Court decides to review new social media laws](#), *Express Tribune*
  - X. Philippines
- [Journalist Maria Ressa reflects on Nobel Peace Prize win](#), *Associated Press*
  - Y. Poland
- [Poland-Belarus: How social media posts fuelled the migrant crisis](#), *BBC News*
  - Z. Russia
- [Moscow Warns Google, Apple, TikTok, and More to Set Up Offices in Russia](#), *Gizmodo*
  - AA. Singapore
- [Shuttered news site's editor guilty of defamation](#), *AFP*

## BB. Spain

- [Google News to relaunch in Spain after mandatory payments to newspapers scrapped](#), *The Verge*

## CC. Thailand

- [Thai ruling party leaves lese majeste law intact to protect royal institution](#), *Pattaya Mail*
- [Thai court says calls for royal reform may be seditious](#), *Associated Press*
- [“No absolute monarchy:” Thousands of Thais march for royal reforms](#), *Reuters*
- [Apple warns Thai activists “state-sponsored attackers” may have targeted iPhones](#), *Reuters*

## DD. Turkey

- [Turkey’s famed commuter dog fights defamation online](#), *Daily Sabah*

## EE. United Arab Emirates

- [Hackers Apologize to Arab Royal Families for Leaking Their Data](#), *Vice*

## FF. United Kingdom

- [UK Supreme Court rules in favor of Google in iPhone tracking case](#), *Engadget*
  - [Judgment: Lloyd v. Google](#)
- [Clearview AI told to stop processing UK data as ICO warns of possible fine](#), *TechCrunch*
  - [Clearview AI fined £17 million for breaching UK data protection laws](#), *Engadget*
- [UK’s antitrust watchdog orders Facebook to sell Giphy](#), *TechCrunch*
- [Google makes pledges on browser cookies to appease UK regulator](#), *Reuters*
- [UK warns Facebook to focus on safety as minister eyes faster criminal sanctions for tech CEOs](#), *TechCrunch*
- [Apple, Google questioned by ICO over app age ratings after UK child safety charity raises concerns](#), *TechCrunch*

- [ICO's new draft journalism code expands scope of journalistic exemption but questions remain over implementation](#), *Press Gazette*
- [UK.gov emits draft IoT and smartphone security law for Parliamentary scrutiny](#), *The Register*
- [Official judgment portal set to go live](#), *The Law Society*
- [UK privacy watchdog warns adtech the end of tracking is nigh](#), *TechCrunch*
- [Damian Collins MP on why Online Safety Bill can rebalance relationship between big tech and journalism](#), *Press Gazette*
- [Online Safety Bill: Culture Secretary Nadine Dorries vows to get tough on tech firms - as executives could face jail for breaches](#), *Sky News*
- [Culture Secretary Nadine Dorries says the left has hijacked social media](#), *The Times*
- [Govt pays compensation to website editor falsely labelled 'extremist hate preacher' in press release](#), *PA Media*
- [Jeremy Corbyn gets damages over fake photo tweet](#), *BBC News*
- [N. Ireland Health Minister suing Van Morrison for defamation](#), *RTE*

#### VIII. Miscellaneous

At [oral argument](#), a panel of the Third Circuit appeared skeptical of an NLRB ruling that a tweet by the publisher of the *Federalist* that he would send employees “back to the salt mine” in response to unionization efforts was unlawful.

A new [lawsuit](#) in N.D. Cal. involves the suicide of a man after he was allegedly trapped on a Zoom call by his employer for an extended period. His widow asserts that his employer's repeated directives that he not leave the call constituted unlawful imprisonment. Which is...creative, I'll give it that.

In E.D.N.Y., a man was [sentenced](#) to 10 years in prison for his role in a massive online advertising fraud scheme in which he solicited advertisements that were never placed on real websites; instead, he placed the ads on dummy pages and used bots to simulate actual ad views.

Sen. Elizabeth Warren [called on](#) the SEC to investigate whether there was anything hinky about the deal between a special purpose acquisition company (which you've probably seen as “SPAC”) and Donald Trump's new media and technology company (which is bringing us “Truth

Social”). See, a SPAC is supposed to disclose when it’s having contacts with potential acquirees, which doesn’t seem to have happened here.

Microsoft and Uber [have dropped out](#) of lobbying group the Internet Association. As deputy director of a membership organization, that hurts me to type, but it’s not surprising to hear that in the current political climate that there might be divisions between tech companies on their legislative agendas.

Finally, there was some [significant confusion](#) during the trial of Kyle Rittenhouse in Wis. Cir. over exactly what happens when you use the “pinch to zoom” feature on an iPad, with the judge ruling that the prosecution had failed to establish that zooming in on a picture introduced into evidence would produce an accurate image. The issue was whether the zoom feature uses an algorithm (or as defense counsel called it, a “logarithm,” which is [something else entirely](#)) to create artificial data not present in the original image. It is now obligatory for me to link to [this video](#), but, in light of technological advancements, also [this one](#).

\* \* \*

And that’s it for 2021! Have a wonderful holiday season, everyone, and I’ll see you next year!