

The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone. I wish we didn't have to start this issue this way, but really there's no getting around the fact that the major story in digital media this month is the role that online communication is playing in the invasion of Ukraine. So, we'll talk about that here rather than relegating these events to the International link round-up.

This obviously [isn't the first time](#) that the internet has been leveraged in a modern conflict, but the sheer scale of the role that digital media and attempts to control information are playing is [unprecedented](#) – both in terms of the use of information as a weapon and in terms of the mind-blowing levels of detail of public awareness. The war has [brought](#) the international power of digital platforms to the center and [forced the tech industry](#) to cope with a fast moving landscape with human lives on the line. (Note: Speaking of things being fast moving, this article only deals with updates as far as March 1st, so there will obviously be recent events that I don't cover here.)

The spread of disinformation was [an immediate concern](#), with Russian-backed messaging spreading quickly. After an early [glitch](#) at Twitter, both [Twitter](#) and [Facebook](#) spun up efforts to block disinformation accounts. [Manipulated videos](#) are a particular concern, leading to [various efforts to spot](#) fakes. But perhaps the biggest issue was what to do with [Kremlin-backed media outlet RT](#) and state-owned outlet Sputnik. The EU [banned](#) both outlets throughout the bloc, and [made clear](#) that social media sites operating in the area were expected to do the same. [Facebook](#), [TikTok](#), [YouTube](#), and [Netflix](#), and [Twitter](#) flagged tweets with links to Russian state media and restricted their reach. (Twitter would later attempt to [geoblock](#) tweets from RT's and Sputnik's accounts from EU users.) Multiple sites also cut off the ability of Russian state media [to earn revenue](#) on the platforms. Russia [demanded](#) without much effect that YouTube restore its state media channels in Ukraine, as RT saw its audience [shrink radically](#).

Meanwhile, Russia is [desperate to control](#) what its own citizens learn about the war, which it insists must not be called a "war" or an "invasion" in the press. Already [facing severe pressure](#) in the country, social media sites became a target for threats and access restrictions as Russians [turned to Facebook, Twitter, and other sites](#) to figure out what the hell was going on in Ukraine – and then to protest when they found out. Russia "[partially restricted](#)" [Facebook](#) in retaliation for Facebook's restrictions on Russian state media, and more restrictions would follow.

China, never shy about censoring speech, [jumped in on its own platforms](#) to shut down online

discussion that did not fit its own pro-Russia stance. But surprisingly, Chinese Twitter-equivalent Weibo has become an [intermediary](#) for foreign governments to reach out to Russia to plead for peace.

Then we have the hackers. [Anonymous decided to intervene](#) in the conflict by hacking Russian websites, briefly knocking out RT.com and the websites of the Kremlin, the Russian government and the Russian defence ministry. Ukraine must have loved that, because within days it reached out online to rally [an international “IT army” of more than 180,000 volunteers](#) to hack the online operations of Russia and its allies. And [hack they did](#). But the attacks are not one-sided, with Ukraine [accusing hackers in Belarus](#) of similar operations against its own forces. Ukrainian websites are [likewise going dark](#) under Russian cyberattacks, and archivists have [mounted an international effort](#) to preserve Ukraine’s information sphere.

Meanwhile, Ukraine reached out to Elon Musk for terminals to access the Starlink satellite broadband service to preserve internet access in the face of Russian efforts to cut off the country. [Encrypted communication services](#) have become critical to Ukraine’s military and its citizens as well, while cryptocurrencies might turn out to be more of a [double-edged sword](#). And Google [shut down its live traffic data on Google Maps in Ukraine](#) for fear that signs of traffic might tip off the Russian military about Ukrainian troop movements and gatherings of civilians. (*Holy New York Times Co. v. U.S.*, 403 U.S. 713, 726 (1971), Batman.)

Keep an eye on the *MediaLawDaily* for updates, and of course I’ll revisit these issues in my next issue (though that will come out in early May, because I’ll be working on producing the MLRC’s [Entertainment & Media Law Conference](#) next month).

Before moving on to the rest of this article, I want to recognize that President Biden has [nominated D.C. Circuit Judge Ketanji Brown Jackson](#) to fill Justice Breyer’s seat on the Supreme Court when he retires later this year. Analysis of Judge Jackson’s [free speech jurisprudence](#) has been light so far, though we expect to see more; in the meantime, more general commentary on her rulings can be found [here](#) and [here](#).

Rolling ever onward...

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I. Privacy

A. Anonymity

The ACLU and the Electronic Frontier Foundation have filed an [amicus brief](#) in N.D. Cal. in support of Twitter's efforts to quash a DMCA subpoena for the identity of the operator of a satirical account targeted with weak claims of copyright infringement. The case raises the issue of whether DMCA subpoenas should face a lower degree of First Amendment scrutiny than other subpoenas for the identity of anonymous online speakers, or whether consideration of fair use provides adequate protection.

B. Personal Information

Meta is [seeking approval](#) in N.D. Cal. for a \$90 million settlement of privacy claims arising out of Facebook's alleged tracking of users' online behavior. Meanwhile, the Oversight Board has [responded](#) to Meta's request for advice on the balancing of privacy interests with the public interest in information with a recommendation that it take additional steps to prevent doxing.

A new [bill](#) in California would extend the current exclusion of data collected from employees and other businesses from the scope of the California Consumer Privacy Act. In D.C. Superior Court, the District's attorney general has [sought](#) the assistance of the court in taking the deposition of Mark Zuckerberg in connection with a lawsuit arising out of the Cambridge Analytica incident. Massachusetts is following in the wake of California, Virginia, and Colorado

with the “Massachusetts Information Privacy and Security Act, a comprehensive [data privacy bill](#), as is Utah, which has [advanced its own bill](#) out of the state senate.

The Interactive Advertising Bureau has [reported](#) that it is lobbying against the FTC taking action to limit the collection and brokering of personal data for ad placement. Meanwhile, the Better Business Bureau’s Digital Advertising Accountability Program [issued](#) a “compliance warning” stating that it would treat disparate data combined to identify a device or user for the purposes of online advertising as if it were a single advertising ID.

C. Children’s Privacy

A new bipartisan [bill](#) in the Senate, the Kids Online Safety Act, would give social media users under 16 more control over their data and disable certain kinds of features, as well as giving new tools to parents, requiring risk audits, and providing researchers with access to company data. Meanwhile, a new California [bill](#) based on recent legislation in the UK would provide another assortment of protections for children in the state.

D. Rights of Publicity

We have a surprising [decision](#) from D. Colo. this month, in which the court held that unjust enrichment to an online home improvement service deriving from a false endorsement in the name of a talk radio host did not constitute injury to the plaintiff sufficient to support either ROP or trademark claims.

There’s a new [lawsuit](#) in N.D. Ind. against Ancestry.com over the use of yearbook photos in promotional materials. The suit tracks other recent lawsuits that have survived motions to dismiss.

A judge in S.D.N.Y. [held](#) that runway models might have an ROP claim for the use of their photos on an e-commerce site, but not for the appearance of their photos in editorial content on the *Vogue* website even when presented near links to an e-commerce site where readers could purchase the fashions depicted.

An Australian billionaire is [scuffling](#) with Meta in Cal. Super. over Facebook ads that allegedly use the plaintiff’s likeness to promote scam cryptocurrency deals. Speaking of ROP and Facebook ads, *Philadelphia* magazine has an [interview](#) with Karen Hepp about her lawsuit against the company and the possibility of a trip to the Supreme Court after the Third Circuit rejected Facebook’s § 230 defense.

E. Biometrics

Hey, look, Ken Paxton is at it again. This time, it's a Texas state court [lawsuit](#) against Meta alleging unlawful collection and use of users' biometric data. Much more of this and we'll have to give him the Jim Hood Award (if he [lasts long enough](#) in office to collect it).

And if you were worried that the IRS was going to force you to verify your identity with biometric face scans to access the agency's online portal, not to worry – they've [given up](#) on that plan.

F. Manipulated Media

Nothing to report this month, other than that there is [reason to be cautious](#) about believing any images out of a war zone that do not originate with trusted sources. But you knew that, right?

G. Hacking, Scraping & Data Breach

The Supreme Court [denied rehearing on a denial of cert](#) in *Bledsoe v. Facebook*, a pro se lawsuit arising out of an alleged hack of the plaintiff's social media account. At least, I think that's what it's about...the allegations are pretty muddled.

Meta [sued](#) two Nigerian individuals this month in N.D. Cal. in connection with a scheme to direct Facebook and Instagram users to phishing sites.

The DOJ has [arrested a very colorful couple](#) accused of laundering the proceeds of a 2016 hack of a crypto exchange, seized \$3.6 billion in bitcoin, and filed a [criminal complaint](#) in D.D.C. against the duo. The judge has [stayed](#) a decision to grant the pair bail pending review.

A judge has [denied](#) a motion to dismiss tortious interference and IIED claims in a lawsuit arising out of an online Twitter spat that devolved into one user allegedly hacking the other's social media accounts to find information to use to undermine the other's personal and business contacts.

We have [cross-complaints](#) in N.D. Tex. and Del. Super. with American Airlines and a scraping service suing one another over the latter's collection and publication of information about airline rewards programs.

A [major hack](#) targeting multiple News Corporation journalists and publications appears to have originated from China. Meanwhile, the U.S. has [established](#) the new "Cyber Safety Review Board" to study significant hacks of the past in order to strengthen the defenses of U.S. government and industry systems.

H. Other Privacy Issues

Nothing to report this month.

II. Intellectual Property

A. Copyright

In [Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.](#), the Supreme Court held, 6-3, that the safe harbor provision in 17 U.S.C. § 411(b) does not distinguish between a mistake of law and a mistake of fact, and that lack of either factual or legal knowledge can excuse an inaccuracy in a copyright registration. Not a tech case, but the opinion written by Justice Breyer is relevant to anyone considering § 411(a)'s requirement of a valid copyright registration as a prerequisite to filing an infringement lawsuit.

Speaking of Justice Breyer, [this article](#) picks up a few more of his relevant copyright decisions that I didn't mention last issue in my introduction, including *MGM v. Grokster*, *ABC v. Aereo*, and *Kirtsaeng v. Wiley*. Names with which you are familiar, I'm sure.

The Second Circuit [affirmed](#) the denial of attorneys' fees to a sports publication that defeated an infringement lawsuit over its use of a tennis player's Instagram photo.

In the Eleventh Circuit, a group of intellectual property professors filed an [amicus brief](#) arguing that fair use protects a software developer that used Apple's iOS to create testing environments for researchers.

A judge in N.D. Cal. [dismissed](#) a lawsuit against Instagram alleging that its embedding feature enabled infringement by its users, holding again that the plaintiffs' claims are foreclosed by Ninth Circuit precedent and denying leave to amend. A different judge of the same court [dismissed](#) a lawsuit against Apple over the design of racially diverse emoji, ruling that Apple might have adopted the idea of diverse emoji but not any of the plaintiff's protectible expression.

We've got another [paparazzo v. celebrity case](#) in C.D. Cal. over an Instagram post. Yawn. This time it's Anna Kendrick in the defendant's seat. Also in C.D. Cal., Pandora Media has been targeted with at least [five lawsuits](#) from well-known comedians (or their estates) alleging that the service streamed their performances without permission.

A judge in D. Md. [granted](#) a preliminary injunction against enforcement of a new Maryland law compelling publishers to license e-books to public libraries on "reasonable terms," finding that the publishers are likely to succeed on their argument that the law is preempted by the Copyright Act.

Amway scored a [summary judgment](#) in its favor against AIG in a coverage dispute in W.D. Mich. relating to a long-running infringement lawsuit involving the allegedly unauthorized use of music in online marketing.

In S.D.N.Y.: A British citizen was [sentenced](#) to 22 months in prison and \$120,000 in restitution in connection with an online video piracy ring; Locast has now [paid in full](#) its monetary obligations under a settlement with broadcasters; and the Jehovah's Witnesses are [attempting to push forward](#) with a lawsuit over parody videos despite a DMCA subpoena in the case being rejected on the basis of fair use.

Following a default judgment, a judge in E.D. Va. [adopted](#) a magistrate's proposed award of \$83 million in damages to the RIAA in a lawsuit against the operators of a pair of stream-ripping websites.

A new [opinion](#) from the U.S. Copyright Office declares that artificial intelligences are not authors entitled to copyright protection for their works under U.S. law. (This decision brought to you by the same fellow who recently tried to get a patent on an invention developed by an AI.) The Office also [kicked off its consultations](#) in connection with the state of available technical measures to prevent copyright infringement online; Prof. Rebecca Tushnet has a [blow-by-blow](#) report on some of the sessions, while the Copia Institute submitted this [comment](#) and Google submitted a [comment](#) that detailed the evolution of its technological anti-infringement measures. And finally, Prof. Goldman has published an [analysis](#) of the Copyright Office's Notice of Proposed Rulemaking on the procedures to be used by the Copyright Claims Board (the [NPM](#) dropped in December).

What else...well, Reddit [reported](#) that it blocked over 2,600 subreddits last year due to "excessive" copyright infringement. So there's that.

B. Trademark

Here's an interesting one...the Federal Circuit held that a domain name registrar could not register a trademark in the term ".SUCKS," upholding a TTAB ruling that consumers would see the term as part of a domain name rather than as a source identifier even when the application was limited to a stylized form of the term. Seems right to me.

No luck for trademark plaintiffs in two cases in C.D. Cal this month, with one judge [ruling](#) that two terms ending in "-Lash" were not confusing in a keyword advertising case and another judge [ruling](#) that a health mobile app developer and a hand sanitizer manufacturer were in separate enough industries that their respective uses of the term "Healthvana" were not confusing.

A messy divorce between a fashion designer and a couture company, which led to a court case in S.D.N.Y. and a decision by the Second Circuit (which we covered last issue), has returned to the

district court where a [modified preliminary injunction](#) issued banning the designer's use of her name as a social media influencer, splitting custody over her Instagram account, and awarding her sole custody of her TikTok account.

Reuters has [reported](#) that Facebook and Instagram, which are expanding their e-commerce offerings, are encountering the kind of counterfeiting problems that other sites such as eBay and Amazon have faced in the past. Meanwhile, Donald Trump's Truth Social service has been [accused](#) of allowing accounts such as "@NFL," "@FoxSports," and "@ESPN" that are unauthorized by those media outlets, but which have pages on the site that appear to be official. (What do you want to bet that, when challenged, Truth Social offers to transfer control to the trademark holders in order to make these pages "official"? What better way to sucker legitimate organizations into having a presence on the site they might never have wanted?)

C. Patent

A new [petition](#) to the Supreme Court in a case against Google, Facebook, and others argues that the Federal Circuit has expanded the Court's ruling in *Alice* far beyond its original bounds to deny patents to inventions that should be eligible.

The Federal Circuit vacated and remanded a PTAB decision in a case over a patent on providing "audio/visual presentations via a computer network," [holding](#) that the PTAB's ruling upholding the patent excluded a preferred embodiment and was inconsistent with the specification's description of the invention.

A judge in W.D. Tex. [denied](#) Facebook's motion on the pleadings in a case involving livestreaming patents, finding that Facebook had failed to establish that the patents were invalid under *Alice*. In the same court, Blizzard Entertainment [settled](#) a lawsuit alleging that certain of the company's games infringed various patents.

D. Trade Secrets/Misappropriation/Conversion

The Georgia Supreme Court unanimously [rejected](#) Edible Arrangements' attempt to make an end-run around trademark law by casting trademarks as property that could be the subject of conversion and theft claims in a lawsuit over Google's ad keyword sales.

III. Platform Management

A. Section 230

A muddled [ruling](#) from N.D. Ala. dodged questions about the scienter requirement for the FOSTA exception to § 230, noting the split of authority on the issue but holding that the issue was irrelevant given that the plaintiff had sufficiently alleged that MG Freesites, operator of

PornHub, was a material contributor to child pornography on its site. Meanwhile, a judge in N.D. Cal. [ruled](#) that § 230 foreclosed a claim against Google for allowing messaging app Telegram on its Google Play Store; the plaintiff had claimed that Telegram violated Google's developer guidelines, and that Google had therefore breached some undefined obligation to anyone who happened to be affected by the allegedly offending app. (Needless to say, the underlying claims didn't hold water either.)

So, yes, [EARN IT is back](#), with the Senate Judiciary Committee marking up the bill that would carve child sexual abuse material (CSAM) out of § 230 – with [some shots at encryption](#) along the way – and [voting it on to the full Senate](#). This, despite the fact that the last attempt to do something like this (FOSTA) has apparently made matters [much, much worse](#) for those it was supposed to help, and there has been [no attempt to gather evidence](#) from the FOSTA experience to support EARN IT's approach.

The sponsors of the bill put out a [problematic “Myths & Facts” sheet](#) about EARN IT in order to respond to critics, alongside the usual suggestions that anyone who opposes the bill is in the pocket of big tech – which [isn’t at all true](#) if you know anything about the many people who have been speaking out. These include: [more than 60 human rights and public interest groups](#) concerned about the bill's effect on encryption, among other issues; [Sen. Ron Wyden](#), who points out that undermining digital security by making it legally risky to offer encrypted communications is a great way to expose children to online predators; [Wikipedia](#), whose highly effective community-based editorial model is inconsistent with the unreliable automated content review contemplated by the bill; [Future Tense](#) (a partnership of Slate, New America, and Arizona State University), which notes that a law that compels or strongly urges platforms to scan private communications without any probable cause is guaranteed to violate the Fourth Amendment and thus make any obtained evidence inadmissible (they're right, too -- see [Skinner v. Railway Labor Executives' Assn.](#), 489 U.S. 602 (1989)) – and if you think that these measures would in any way be voluntary, then ask yourself why it's not happening already); [Prof. Jeff Kosseff](#), who argues that the EARN IT scheme doesn't square with the parameters of distributor liability under the First Amendment; and [Article 19](#), which is concerned about the effect on diverse communities.

Sigh.

We'll end this section with the irony that Donald Trump is [actively arguing](#) in N.D. Cal. that § 230 unconstitutional when applied to YouTube's decision to kick him out, but sees no problem with [including the specific language of the statute](#) in Truth Social's terms of service and [exercising the discretion granted thereby](#) to kick out people based on their viewpoint. I can just imagine his lawyers attempting to argue this: “See, judge, that's why they call it a *double standard...*”

B. Elections & Political Advertising

Nothing to report this month.

C. Content Moderation

Another complaint based on claims that Facebook is a state actor, another [dismissal](#) (M.D. Ala.). Another claim that a social media site was compelled to exclude someone by government jawboning, another [dismissal](#) (N.D. Cal.). A lawsuit by Donald Trump in N.D. Cal. claiming both of those things with respect to Twitter, [another highly skeptical judge](#) contemplating dismissal.

So, there are a number of antitrust bills floating around, and we'll talk more about that in the appropriate section below. But it's worth noting that Sen. Ted Cruz appears to be backing two Democratic bills not because he's looking to rein in anticompetitive behavior but [because he sees a back door](#) to go after platforms for that old Republican bogeyman, anti-conservative censorship.

Meanwhile, a [new bill](#) from Sen. Klobuchar would direct the National Science Foundation and the National Academy of Sciences, Engineering and Medicine to study whether it is possible to develop ways to slow the spread of misinformation and dangerous content online that are "content neutral." ([Obligatory Inigo Montoya clip.](#)) And if the NSF/NASEM somehow manages that -- which, good luck -- then social media platforms [would be required](#) to implement those recommendations and measure their impact subject to enforcement by the FTC. Ugh.

Then there's a new House bill that would [create](#) a new FTC Bureau dedicated to imposing transparency requirements on social media sites and offering guidance on safety features. I've talked before about the challenges of mandatory transparency in this space, and won't rehash that, but I pity anyone on this Board who has to come up with meaningful safety guidance for the wide range of platforms and communities that are out there. Look, despite what cynics say, it's not like the social media sites don't *want* to offer safe services.

I suppose we should talk about the whole Spotify/Joe Rogan thing, if only because the White House saw fit to wade into the mess by [calling on Spotify](#) to do more to fight COVID-19 misinformation. (Is that the first time I typed the word "COVID" this issue? That's an improvement!) Spotify [claims](#) it's just a platform and therefore shouldn't be in the position of censoring content, but I recommend [this article](#) from Ars Technica discussing this characterization and what Spotify's evolution as a business might portend for social media sites and the like. (Also, keep in mind that the "platform/publisher" distinction, to the extent that it's meaningful at all, [has nothing to do with whether § 230 applies](#) -- so Spotify's comments can only be interpreted as a policy statement rather than any kind of legal position.) Meanwhile, Spotify's CEO [invoked concern](#) over "canceling voices," language that of course ties into [a](#)

[much broader and problematic debate](#). But for what it's worth, Spotify recently [had no problem](#) yanking Alex Jones videos off the service; Jones was permabanned in 2018. And Spotify did remove 70 Joe Rogan episodes for...[other reasons](#).

Okay, let's see what's going on in the states. A new [California bill](#) targeting vax misinformation would require platforms to disclose information about their algorithmic promotion of content and share data for research. If you're interested in how that "theme park" exception made its way into Florida's already problematic social media moderation law, you might find [this](#) of interest. Speaking of social media laws, a Georgia senate committee [advanced a bill](#) in the mode of the now-enjoined Florida and Texas laws, declaring large social media sites to be common carriers just because.

Oh, and Ken Paxton. Again. In this section, he's [bothering](#) "investigating" [GoFundMe](#) for deciding not to support donations to the Canadian trucker protestors, and [TikTok](#) for posts "supposedly" – his word, not mine – related to human trafficking and drug smuggling. Do you think he has a little paper mask of Chuck Norris and a plastic "Texas Ranger" badge that he wears?

Finally, Parler is trying to drag Twitter into its fight with Amazon in Washington state court, [subpoenaing](#) the social media service for documents related to alleged collusion with Amazon Web Services. We'll see how that goes.

D. Terms of Service & Other Contracts

A California appellate panel has [rejected](#) the enforceability of a "sign-in wrap" contract where there was little evidence of actual assent to the terms of the agreement.

IV. Other Content Liability

A. Defamation

The Seventh Circuit [affirmed](#) dismissal of a law firm's lawsuit over allegedly defamatory online reviews, finding that all of the statements at issue were expressions of opinion and that a parallel conspiracy claimed failed for lack of an underlying tort.

The Yale MFIA secured [dismissal](#) of defamation claims against a local news website in connection with a broader lawsuit against the town of New Canaan, with a judge in D. Conn. holding that the court lacked supplemental jurisdiction over the state law claims against the site.

In D.D.C., retired Lt. Col. Alexander Vinman [filed](#) a § 1985 lawsuit against Donald Trump, Jr., Rudy Giuliani, Julia Hahn, and Daniel Scavino, alleging that they conducted a campaign of defamation against him in retaliation for his testimony before Congress during the Trump impeachment hearings.

A lawyer and client duo [sued](#) RELX, the publisher of website Law360, in S.D. Fla. alleging that they were defamed by four articles that allegedly accused them of extortion or blackmail and characterized their lawsuit as the “Extortion Case” or the “Blackmail Suit.”

And now a pair of media-on-media lawsuits. Hate to see these. A Maine news website obtained [dismissal](#) of a lawsuit brought in the District of Maine by the publisher/founder of the *Epoch Times*. The court ruled that statements referring to the founder as a “a far-right media personality and conspiracy theorist who has said she was among the supporters of former President Donald Trump who were present at the riot at the U.S. Capitol on Jan. 6” and the *Epoch Times* as a “right-wing multi-language newspaper and media company” were either opinion or substantially true. And in D. Mass., we have a new [complaint](#) filed by the founder of Barstool Sports against Business Insider, alleging that he was defamed by “two false and defamatory exposés into [his] private life.”

I ordinarily wouldn’t include a lawsuit against *The New York Times* in this article, but it’s worth noting that digital media played a significant role in Sarah Palin’s libel suit in S.D.N.Y., whether we’re talking about [tweet threads](#), the use of Twitter for a [newspaper’s apology](#), or [push notifications](#) reaching the jury.

In Cal. Super., band All Time Low [filed](#) a defamation suit against Doe defendants over social media accusations of sexual harassment and assault. In the same court, singer Phoebe Bridgers [filed](#) an anti-SLAPP motion to strike a studio owner’s complaint over statements that Bridgers made on Instagram.

Also in California, a judge in Los Angeles [ruled](#) that allegedly false tweets by one comic book writer accusing another comic book writer of making particular racist statements could support a defamation claim. (This decision was issued in December, but only turned up recently.)

Only two weeks after [oral argument](#), the Delaware Supreme Court [upheld](#) the dismissal of conservative pundit Candace Owens’ lawsuit against organizations that fact-checked her posts about COVID-19 on Facebook.

In an [omnibus ruling](#), a judge in D.C. Super. reaffirmed that the court’s earlier June 2020 decision, in which it held that the District’s anti-SLAPP law protected a DCist website article regarding a lawsuit filed by D.C.’s attorney general against a home contractor, remained valid following more by recent anti-SLAPP decisions in the D.C. Court of Appeals.

The Kentucky House of Representatives unanimously [passed](#) a new anti-SLAPP bill based on the Uniform Public Expression Protection Act, which now goes to the state senate.

A defamation lawsuit over a viral video of a high school pre-game locker room chant that included a racial slur, which led to the firing of the head football coach who was not present during the chant, has been [revived](#) by a Louisiana appellate panel.

A jury in South Carolina state court [awarded](#) a jaw-dropping \$50 million in actual and punitive damages to the mayor of the town of Bluffton, finding that a local gadfly (who failed to show up for the trial) had defamed the mayor in a series of emails. Eric Robinson has the [commentary](#).

B. Commercial & Professional Speech

Can a pyramid/Ponzi scheme, in which “an online promotions team posted tens of thousands of videos” to persuade people to buy into a cryptocurrency scam, evade the Securities Act because the videos were directed to the public at large instead of specific investors? The Eleventh Circuit rolls its eyes and says “What do you think?,” [reversing](#) the dismissal of claims against the alleged scammers.

So, one interesting phenomenon in online marketplaces is platform arbitrage: The “seller” offers a product for sale on platform A that they do not currently possess at a price higher than would the seller expects to pay for the product on platform B, with the intent of buying from B should anyone actually attempt to purchase the product from them on A. It’s a shady practice at best, and in a [decision](#) from C.D. Cal. a judge ruled that one such scheme could form the basis for false advertising and copyright claims. (The decision is from November, but we only recently saw it and it’s interesting enough that I wanted to be sure to flag it.)

Also in C.D. Cal., the SEC [sued](#) a Twitter influencer for pumping penny stocks to inflate the price of his own holdings. Meanwhile, in S.D.N.Y., super-tweeter Elon Musk is [protesting](#) what he calls harassment by the SEC in alleged retaliation for his political speech. And to round things out, we have a decision from S.D.N.Y. [holding](#) that social media influencers are not automatically considered agents of companies whose products they are shilling.

A judge in S.D. Tex. reviewed the standards on which preliminary injunctions can be granted against online publication of allegedly defamatory commercial speech, before [holding](#) that the standard was not met in the case at bar because some of the statements at issue were opinion and the others had not been shown to be false.

Amazon has [sued](#) two companies in Washington state court, alleging that their sales of positive reviews on Amazon are tarnishing the e-commerce site’s brand in violation of consumer protection law and are interfering with its contracts with its vendors.

The SEC received two whistleblower [complaints](#) this month alleging that Facebook made misrepresentations to investors about its handling of climate change and COVID-19 misinformation.

C. Threats, Harassment, and Incitement

Consolidated civil lawsuits against Donald Trump and others over their alleged incitement of the January 6 attack at the Capitol have [survived](#) a motion to dismiss, although some of the claims were trimmed and Donald Trump, Jr., and Rudy Giuliani were let off the hook.

A new [complaint](#) in D. Vt. challenges the constitutionality of Vermont's cyberharassment law, after it was invoked by the Brattleboro police against a woman who used Facebook to criticize a critic of the Black Lives Matter movement.

In a case involving an alleged threat sent via Facebook Messenger to a witness in a criminal case involving an encounter with a pit bull, a Michigan appellate panel [held](#) that the state's prohibition on retaliatory threats against a witness requires proof of an intent to threaten either physical injury or commission of a crime.

So, here's a thing. Meta is adding [built-in personal space](#) to certain of its VR environments to limit harassment; you'll enjoy a virtual two-foot radius bubble, which bumps up against others' bubbles for clearance of four apparent feet. Right now, you can't opt out because people still need to learn how to behave themselves, but if we all play nice then things could change.

V. Infrastructure

A. Accessibility

Nothing to report this month.

B. Antitrust

The Ninth Circuit heard oral argument in two cases this month seeking to revive antitrust claims against tech giants involving search and advertising, [one against Google](#) and [one against Meta](#). The court quickly [affirmed](#) the latter ruling in favor of Facebook, holding that the plaintiffs had failed to establish Article III standing and that the claims were time-barred.

A group of adult film performers [sued](#) Meta Platforms and two subsidiaries as well as the owner of website OnlyFans in N.D. Cal., alleging that the companies colluded to box out non-OnlyFans performers from advertising on Meta services.

In D.D.C., CenturyLink [agreed](#) to pay \$275,000 to settle DOJ allegations that it was in contempt of court-ordered conditions on its proposed merger with Level 3 Communications.

A regional newspaper [sued](#) Google and Facebook in W.D. Tenn. alleging that the companies unlawfully cooperated to monopolize the digital advertising market, resulting in the artificial suppression of the plaintiff's digital ad revenues. Meanwhile, the Senate Judiciary Committee

[met to discuss](#) the Journalism Competition and Preservation Act, which would permit collective bargaining between journalism organizations and tech platforms. Curiously, Breitbart has been active in [opposing](#) the measure.

In other legislative news, the Judiciary Committee [approved](#) the Open App Markets Act, which would require iOS and Android devices to allow for third-party app stores and in-app payment systems. Digital Content Next is [backing](#) the measure. Michael Bloomberg wrote a [piece](#) voicing strong opposition to the American Innovation and Choice Online Act, a bill that aims to prevent major e-commerce platforms from self-preferencing their own products but that Bloomberg argues would have serious negative side effects. And finally, the COMPETES Act, which contains the SHOP SAFE Act that I discussed in the last issue, was [approved by the full House](#) largely along party lines.

C. Net Neutrality

I know that the nomination of Gigi Sohn to the FCC has much broader implications than just how she'd vote on re-imposing net neutrality rules, but it's easier to leave the discussion here till we see this thing through.

In any event, Sohn's Commerce Committee vote was [delayed](#) because of the stroke suffered by Sen. Ben Ray Luján (D-N.M.), whose vote is critical when her nomination reaches the full Senate. In the interim, she was subjected to [another hearing](#) at the request of the main opponent to her nomination, Sen. Roger Wicker (R.-Miss.), at which Sohn called out the "unrelenting, unfair, and outright false criticism and scrutiny" targeting her. The Commerce Committee subsequently [rescheduled](#) her vote to March 3. [LATE UPDATE: Sohn's nomination [advanced](#) to the full Senate on a tie vote, 14-14.]

D. Domain Name System

E. Taxation

Nothing to report in these sections this month.

F. Wire & Wireless Deployment

The D.C. Circuit [held](#) that petitioners who claimed to have sensitivity to radio waves had alleged standing to challenge an FCC regulation allowing for the installation of antennas on private property with the owner's consent notwithstanding any state, local, or private restrictions to the contrary; however, their challenge had no merit.

Space is getting crowded, at least in Terra's local neighborhood. At least, that's what NASA has [claimed](#) with respect to a proposed launch of 30,000 Starlink satellites by Space X, which the agency claims will interfere with research and space flight.

Meanwhile, down on the ground, the FCC unanimously [voted](#) to block deals between landlords and ISPs that lock in apartment dwellers to a single broadband provider, and [launched](#) an inquiry into discriminatory rollouts of internet service.

G. Artificial Intelligence & Machine Learning

Nothing to report this month.

H. Blockchain, Cryptocurrency, & NFTs

The SEC will be permitted to continue to pursue a blockchain company for allegedly selling unregistered securities after a judge in D.N.H. [held](#) that the company had not been singled out for selective enforcement.

A new [lawsuit](#) in S.D.N.Y. challenges Sotheby's marketing of a non-fungible token as the first NFT to have been minted, with the plaintiff claiming that it had acquired the actual token during a lapse in the blockchain record while the NFT subsequently minted by the artist and sold by Sotheby's was not the proper continuation.

Website HitPiece [shut down](#) after extensive criticism for listing songs as NFTs without the rightholders' knowledge or permission; the RIAA continued to pursue the site thereafter for information about its profits. Meanwhile, NFT marketplace Cent has [suspended](#) most trading as it grapples with "rampant" fraud and infringement.

The father of a murder victim who has been struggling for years to have a video of the killing removed from the internet has [minted](#) an NFT for the video in aid of those efforts. Sadly, it's [really not clear](#) what exactly that's supposed to accomplish.

In a [new study](#), the Treasury Department identified NFT sales as a channel for money laundering and found that certain entities and transactions in the NFT market could be subject to Financial Crimes Enforcement Network regulations. Meanwhile, the FBI [launched](#) a new "Virtual Asset Exploitation Team" to deal with cryptocurrency-related crimes.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

Sens. Ron Wyden (D-Ore.) and Martin Heinrich (D-N.M.) are [raising the alarm](#) about a CIA program called "Deep Dive II" that, while classified, appears to involve the unsupervised bulk collection of data on Americans. Meanwhile, unsealed court documents have revealed that the FBI [used a geofence warrant](#) to identify all Android users near the Seattle Police Officers Guild during the 2020 Black Lives Matter protest in connection with an attempted arson investigation.

Massachusetts' Supreme Judicial Court [held](#) that there's no expectation of privacy in Snapchat posts that were shared with an undercover police officer.

B. Encryption

We talked about EARN IT up under Section 230, but it's worth noting here that Senator Blumenthal is [no longer pretending](#) that that the bill isn't intended to create legal problems for end-to-end encryption services.

C. Biometric Tracking

D. Domain Seizure

Nothing to report in these sections this month.

E. Content Blocking & Prior Restraints

A pro se lawsuit in D. Colo. resulted in an outlier [decision](#) that a police department could remove a citizen's comments from their Facebook pages because they were "obscene." In no sense were these comments obscene in the legal sense, and the judge should be ashamed of this ruling. Just goes to show that the First Amendment won't defend itself, folks. For a case that gets the analysis right, see this [recent decision](#) from N.D. Ill. involving a Chicago alderman who was blocking Facebook comments.

A judge in N.D. Ind. [held](#) that the Supreme Court's decision in *Seattle Times Co. v. Rhinehart* doesn't justify an injunction prohibiting a plaintiff from sharing excerpts from her own deposition online.

Okay, here's one that leaves me uneasy. A Spring Hill, Kansas, police officer was [granted](#) qualified immunity in D. Kan. after he told plaintiffs to remove a Facebook post about a different officer who shot their dog while off duty. The post allegedly triggered a threat against the shooter from a third party, but so what? Since when does that entitle cops to go censoring Facebook posts that were in no sense incitements to violence?

Speaking of which, a [new report](#) details how police in Brookside, Alabama, have been surveilling social media on the hunt for critics of the PD, who have then been subject to harassment for their posts. And a California lawyer was [ordered](#) by the DOJ to remove tweets about what she observed in immigration court, though the Department backed off that demand after it determined she had not actually been tweeting from the courtroom itself.

A Florida appellate panel [vacated](#) a preliminary injunction against allegedly defamatory speech, holding that such injunctions are not available in libel cases "absent a separate tort and a finding of special harm supported by competent, substantial evidence[.]" On the other hand, a Georgia

appellate panel [held](#) that enforcing a non-disparagement agreement against attorney L. Lin Wood was not an unconstitutional prior restraint.

F. Online Access to Government Information

That St. Louis Post-Dispatch reporter who discovered that teachers' social security numbers were exposed on the open internet [won't be charged](#) with a crime, Missouri prosecutors announced, and a police investigation [found](#) that the reporter hadn't accessed "anything that was not publicly available, nor was he in a place he should not have been." Which is the right result, but it's ridiculous how much time was wasted on this matter.

VII. Global

A. International

I thought I'd pull a few links together up front on international reactions to Australia's system of mandatory payments to news organizations.

- [Australia's Standoff Against Google and Facebook Worked—Sort Of, Wired](#)
- [Fleet Street confident new UK 'code of conduct' will soon force Google and Meta to pay for news, Press Gazette](#)
- [How Canada's Online News Act will differ from Australia's news media bargaining code, Press Gazette](#)
- ['Oh, yeah. It's a big deal': Meet the man who forced Google and Meta to start paying for news, Press Gazette](#)
- [Australia's latest export is bad media policy, and it's spreading fast, Nieman Lab](#)

B. Europe

- [European data watchdog calls for EU-wide ban on Pegasus spyware, TechCrunch](#)
- [Europe proposes rules for fair access to connected device data, TechCrunch](#)
- [Privacy Shield 2.0 is 'high priority' but 'not easy', warns EU's Vestager, TechCrunch](#)
- [US streaming giants feel squeeze of regulation in Europe, Financial Times](#)
- [Meta may be forced to shutter Facebook, Instagram in EU, Ars Technica](#)

- [Meta stock hits 52-week low as European leaders buck at threats to shutter Facebook and Instagram, MarketWatch](#)
- [Facebook Threatened to Pull Out of Europe. Is It Bluffing?, Slate](#)
- [EU watchdog clears Facebook's purchase of Kustomer startup, Associated Press](#)
- [Intel decision spells trouble for Vestager's Google campaign, Politico](#)
- [Google's advertising tech targeted in European publishers' complaint, Reuters](#)

C. Australia

- [Google loses Fortnite stay case against Epic Games, News.com.au](#)
- [Anger after News Corp and Google Australia set up journalism academy at university business school, The Guardian](#)
- [Google's 'anti-journalism' approach bad news for democracy: ACCC boss, Sydney Morning Herald](#)
- [Facebook appeal over Cambridge Analytica data rejected by Australian court as 'divorced from reality', The Guardian](#)
- [Australian mining magnate takes legal action against Facebook over scam ads, CNN](#)
- [The missing puppy, the pet detective and the defamation claim, Sydney Morning Herald](#)
- [Australian encryption laws used to force provider to help in homicide case, ZDNet](#)

D. Austria

- [Austria court orders Facebook to remove defamatory content, AFP](#)

E. Belgium

- [Behavioral ad industry gets hard reform deadline after IAB's TCF found to breach Europe's GDPR, TechCrunch](#)

F. Brazil

- [Brazil's Joe Rogan Faces His Own Firestorm Over Free Speech, New York Times](#)

G. Cambodia

- UN officials urge Cambodia to scrap plan to keep tabs on all internet traffic, Radio Free Asia

H. Canada

- Feds poised to re-table Broadcasting Act bill, CTV
- How Facebook Twisted Canada's Trucker Convoy Into An International Movement, Verge

I. China

- China charges former journalist Luo Changping over 'insults' about Korean war movie soldiers, SCMP

J. Czech Republic

- Google Vanquished a Rival in Prague. Payback Could Hurt., New York Times

K. France

- France's privacy watchdog latest to find Google Analytics breaches GDPR, TechCrunch
- Auguste Rodin's Sculptures Are In The Public Domain; 3D Scans Of Them Should Be, Too, Techdirt

L. Germany

- Website fined by German court for leaking visitor's IP address via Google Fonts, The Register
- Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms, CREATE Working Paper Series

M. India

- Koo: India's Twitter alternative with global ambitions, BBC News
- India bans Garena Free Fire, 53 more China-linked apps, TechCrunch

N. Iran

- Iran arrests prominent blogger over critical tweets, Arab News

O. Ireland

- Juries set to be abolished for libel trials, *Independent*
- Reform of defamation laws to be brought to Cabinet, *Irish Times*
- Meta sent a new draft decision on its EU-US data transfers, *TechCrunch*

P. Israel

- Police use Israel's NSO to target politicians, businessmen, journalists - report, *Jerusalem Post*
- NSO threatens legal action against Calcalist over 'sensationalist' spyware report, *Times of Israel*
- Israel's Mossad Used Pegasus Spyware to Hack Cellphones Unofficially, *Haaretz*
- NSO Never Engaged in Illegal Mass Surveillance, *Wall Street Journal*

Q. Japan

- Attack on Titan: Four Japanese Manga publishers sue Cloudflare, *The Register*

R. Netherlands

- Dutch foundation seeks consumer damages over Apple, Google app payments, *Reuters*
- Apple to charge 27% fee for Dutch dating apps using alternative payment options, *TechCrunch*
 - Apple fined again over Dutch dating app payments order, *TechCrunch*
 - Apple's standoff with Dutch antitrust authority over dating apps' payments continues, *TechCrunch*
 - EU swipes at Apple snubbing Dutch antitrust enforcement, *TechCrunch*
 - Apple hit with sixth antitrust fine over Dutch dating apps payments, *TechCrunch*
 - Why Apple's Fight in the Netherlands Matters, *New York Times*

S. North Korea

- North Korea Hacked Him. So He Took Down Its Internet, *Wired*

T. Pakistan

- What is Pakistan's 'draconian' media law, and why is it being opposed?, India Express

U. Philippines

- Philippines passes law to tackle anonymous social media abuse, WHBL
- Prosecutor junks Manny Pacquiao cyber libel complaint vs Quiboloy, Rappler

V. South Korea

- Google sues S.Korean regulator to overturn \$173 mn fine, IANS

W. Sweden

- Price comparison site sues Google for \$2.4 billion over alleged antitrust breach, CNBC

X. United Kingdom

- Regulated media to be exempt from new offences making online disinformation illegal, Press Gazette
- Britain takes aim at online fraud, revenge porn with beefed-up rules for Big Tech, CNBC
- UK wants to squeeze freedom of reach to take on internet trolls, TechCrunch
- UK Tells Tech Giants to Provide Better Protection Against Anonymous Trolls, CNET
- UK revives age checks for porn sites, TechCrunch
- UK's CMA accepts Google's post-cookie pledges, will 'closely monitor' Privacy Sandbox plan, TechCrunch
 - Google gives UK watchdog final say on removal of third-party cookies, Press Gazette
- Lawyers in 'Wagatha Christie' libel case criticised by judge, Law Society Gazette
- Former GB News Anchor Andrew Neil Sues U.S. Tech Entrepreneur Jennifer Arcuri for Defamation, Variety
- Sunday Times journalist Tim Shipman pays 'substantial' damages to shadow minister over tweet, Press Gazette

VIII. Miscellaneous

And finally, the bits and pieces.

The Supreme Court [granted cert](#) in *303 Creative v. Elenis*, about whether a web designer has a First Amendment right, overriding Colorado state antidiscrimination law, not to design sites for gay weddings. The Court took the case exclusively on the free speech rather than the free exercise issue.

The Third Circuit [held](#) that *Younger* abstention should have kept the federal courts out of a New Jersey dispute over pro-rating the final month of consumers' cable service bills while that dispute was pending before the state's Board of Public Utilities.

The Kansas Commission on Judicial Performance [censured](#) a magistrate judge for posting nude selfies on a "dating website for couples," but not without some questions as to whether such entirely personal behavior should be within the scope of the canons.

Finally, speaking of online romance, a coalition of federal agencies have joined together to [warn the public](#) about scams targeting the hearts of dating app and social media users.

* * *

Thanks, everyone! As I mentioned at the top of the article, I'm in Los Angeles for Entertainment at the beginning of next month, so the next issue will be a March/April double-header. In the interim, I'd love to [see you in L.A.!](#)