The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone! It was great to see many of you in Mountain View for *Legal Frontiers in Digital Media* last month – thank you for attending!

The top developments in this issue involve the drama at the Fifth Circuit and the Supreme Court in *NetChoice v. Paxton*, as we get some early signs about how the justices – at least as presently constituted – might think about the First Amendment rights of online services to moderate content. Other than that, it's actually a pretty slow month, so let's get to it.

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I. Privacy

A. Anonymity

The Jehovah's Witnesses have backed down on an attempt to identify an online critic through the mechanism of seeking a highly questionable DMCA subpoena in S.D.N.Y. based on the use of JW materials in the criticism.

B. Personal Information

Twitter settled a case in N.D. Cal. over its use of user information to assist third parties with targeted advertising, agreeing to pay $150 million for violation of an earlier FTC settlement. International users of Zoom filed a similar lawsuit against Zoom in the same court, accusing it of sharing data with Google and Facebook for use in targeted marketing. And in N.D. Ill., online directory Whitepages obtained preliminary approval of a $4 million settlement in a proposed class action over its alleged use of consumer information to advertise its services.

The District of Columbia AG has sued Mark Zuckerberg personally in D.C. Super. over the disclosure of user information to Cambridge Analytica, asserting claims under the District's Consumer Protection Procedures Act.

The new California Privacy Protection Agency held stakeholder meetings this month to obtain comment on its rulemaking under the state's Consumer Privacy Rights Act ("CPRA"); familiar faces including Eric Goldman and the Copia Institute provided comment. The first draft of the Agency's regulations under CPRA arrived at the end of the month.

Connecticut joined the growing number of states with its own consumer online privacy legislation this month.

Meta and Twitter both took steps to make their privacy policies easier to understand, with Meta attempting to consolidate and simplify its policies while Twitter created a browser game to teach users about their control over how their data is collected and used. (If you're interested, the game is here. I'm not a platformer guy myself, and my little dog avatar kept getting spammed by ads targeted at cats. Sigh.)

C. Children's Privacy

A new lawsuit in N.D. Cal. brings defective design claims against Snap, asserting that Snapchat failed to protect a minor against sexual exploitation by permitting an adult to copy and share nude images that the minor believed would automatically be deleted. Expect to see the Section 230 argument on this one in a few months.

The FTC approved a policy statement on ramping up enforcement of COPPA with respect to technology used by schoolchildren. This will be particularly interesting in light of the increased surveillance of children in remote learning environments during the pandemic.

D. Rights of Publicity

Publicity rights claims against operators of yearbook and people search services continue to roll in at an accelerated clip. Eric Goldman catches us up on three decisions (one from N.D. Cal. and two from W.D. Wash.) from March and April.

E. Biometrics

We have a new BIPA class action in N.D. Ill. brought against Snap by Illinois users; the claims are the usual, with perhaps a slight wrinkle in that they include voice prints as well as facial biometrics.

Clearview AI settled a case in Ill. Cir. brought by the ACLU; the company has agreed to restrict sales of its facial recognition search tools in the United States to government agencies, ceasing most sales to private organizations. Want to know how governments are using Clearview's system? Check out this article about the Staten Island DA's use of the tool.

F. Manipulated Media

Nothing to report this month.

G. Hacking, Scraping & Data Breach

Following a grant-vacate-remand from the Supreme Court based on its landmark decision in *Van Buren*, the Ninth Circuit again held in *hiQ v. LinkedIn* that hiQ was entitled to a preliminary injunction against blocking of hiQ's scraping of public-facing user information from LinkedIn's website. As you'll recall, hiQ alleged that this blocking constituted tortious interference in its business, while LinkedIn claimed the scraping violated the Computer Fraud & Abuse Act. The Ninth Circuit found that *Van Buren*'s "gates up or down" analysis for whether access is "without authorization" supported the conclusion that scraping LinkedIn user data accessible to the public (where the gates are "up") does not violate the CFAA, even if LinkedIn acts selectively to block a particular user.

Some of you might recall that I was highly critical of the Ninth Circuit's earlier opinion; I stand by those comments, inasmuch as the court relied on some questionable analogies to common law trespass and breaking-and-entering, but I agree that *Van Buren* changes the landscape. Still, I'm not entirely certain how many people need to be blocked for a site no longer to be considered "public-facing"; if LinkedIn were to geoblock all users outside of California and say its services are only for California residents, would a scraper based in Oregon still be able to defeat a CFAA claim? What if it *only* geoblocked Texas and Florida because it doesn't want to deal with those states' radical ideas about social media regulation? Would attempts by residents of those states to circumvent a geoblock be CFAA violations?

In any event, I will leave as a puzzle for the reader whether this decision squares with a consent judgment in N.D. Cal. this month, pursuant to which defendants accepted a permanent injunction against scraping of LinkedIn consumer data. Oh, and while we're at it, the Department of Justice adopted a new policy against invoking the CFAA against researchers acting in good faith to improve technology.

In other news, the DOJ filed a criminal complaint in E.D.N.Y. accusing a Venezuelan cardiologist of developing and deploying a hugely destructive "ransomware-as-a-service" platform.

Finally, the Maryland legislature sent a bill to Gov. Hogan's desk that would require law enforcement agencies to be trained in the recognition of electronic surveillance used to stalk victims.

H. Other Privacy Issues

A judge in W.D.N.Y. granted summary judgment for the defense on an emotional distress claim against a teacher's aide, who posted online comments challenging the assertion that a student had committed suicide due to being bullied at school and rejecting responsibility on the part of the school. The court held that the statements were not "extreme and outrageous" under New York law.

II. Intellectual Property

A. Copyright

The Ninth Circuit heard argument this month on whether Pandora Media could invoke California's anti-SLAPP law to defeat copyright claims brought by Flo & Eddie, Inc., over its streaming of pre-1972 musical works. [Spoiler for next month: No.]

Speaking of anti-SLAPP in copyright cases, a China-based company was smacked with $160K in attorneys' fees after its state law counterclaims in an N.D. Cal. copyright case were stricken.

Pinterest successfully invoked the safe harbor provisions of the DMCA against a photographer's claim in N.D. Cal. that his copyright in a photo of a rose was violated by its display near advertising and in user notifications.

Our old friend Richard Liebowitz was ordered to pay a copyright defendant $7,900 for fees expended in dismissing a case in D. Colo., which Liebowitz filed without any plausible basis for asserting that the court was a proper venue or had personal jurisdiction. In another case in S.D.N.Y. involving Emily Ratajkowski's posting of a photo of herself on Instagram, Liebowitz's

firm is on the hook for $2,500 to Ratajkowski's company as part of a dismissal of the case with prejudice.

In a copyright case brought in D.N.J. by major record labels against internet service provider RCN over user infringement, the judge dismissed RCN's amended counterclaim alleging that the manner in which the providers' representative submitted copyright notices constituted an unfair and fraudulent trade practice.

We have a dramatic series of orders issued by a judge in S.D.N.Y. ordering every ISP in the United States to deny access to the entirety of three websites based on their hosting of particular infringing content. Now, these were pretty clearly pirate streaming sites, but allowing a particular copyright plaintiff to black out an entire website – as opposed to, for example, merely requiring the blocking of that plaintiff's particular content – is a pretty radical remedy that has some disturbing implications for other speech on the site that might be lawful.

The Source was accused in S.D.N.Y. of copying stories either verbatim or near verbatim from a sports blog. In E.D. Va., there's been a changeup on the bench for the DOJ's case against Megaupload founder Kim Dotcom (the guy who's fighting extradition in New Zealand for about a decade): Judge Liam O'Grady has been replaced by Judge Anthony Trenga. And in W.D. Wash., copyright claims brought by video game developer Bungie against a developer of software used to cheat in Bungie's game "Destiny 2" were dismissed without prejudice, with the court holding that Bungie had failed to explain how the cheat software copied its own products; Bungie's trademark claims survived.

Well, law students interested in IP practice have a brand-new forum in which to hone their skills. The brand-new Copyright Claims Board issued a rule allowing law students to represent clients before it. There are a bunch of hoops through which would-be student advocates need to jump before they'd be qualified to appear, but we can expect this to become a major part of law school media/IP clinical programs.

I'll end this section with a couple of updates from Eugene Volokh about attempts to misuse the DMCA to block materials regarding other attempts to block materials.

B. Trademark

The Ninth Circuit held that Arizona State University had no valid trademark claim against an anonymous Instagram user who promised "ASU COVID parties" and mocked the University for taking health precautions against a "big fat hoax." The claims failed for lack of a likelihood of confusion, use of ASU's logo and color scheme notwithstanding.

Meta is facing a lawsuit in N.D. Cal. alleging that its new logo, which reminds me of something I saw on an oscilloscope in the heady days of my youth, infringes the trademarked logo of non-

profit blockchain company Dfinity. The plaintiff's logo, for what it's worth, is shaped much more like a traditional infinity sign than Meta's slightly skewed Lissajous curve. Moreover, while both logos have a color distinction at the point where the twisted loop crosses itself, that is much more obvious in the plaintiff's multicolor version than in Meta's logo with its shades of blue.

C. Patent

The Supreme Court denied certiorari this month in, inter alia, *Cisco Systems v. SRI International* (Fed. Cir., enhanced damages in patent case); *PersonalWeb Technologies v. Patreon* (Fed. Cir., application of preclusion doctrine in patent case); and *Universal Secure Registry v. Apple* (Fed. Cir., interpretation of § 101 of Patent Act and *Alice*).

Does the concept of a "buffer" include the concept of a "cache"? Perhaps, says the Federal Circuit, reversing the dismissal of a patent case against Hulu over streaming technology and remanding for another shot at claim construction.

In W.D. Tex., Meta is facing a claim that it infringed patented haptic technology for VR systems. Haptics, for those of you who didn't read *Ready Player One*, is the science of touch, and haptic devices simulate tactile experiences for the user.

D. Trade Secrets/Misappropriation/Conversion

A judge in D. Del. granted summary judgment for the defendant in a Defend Trade Secrets Act case this month. The case was brought by Peloton against a competitor for allegedly accepting stolen content for an upcoming TV/digital ad campaign.

I'm sorry, whenever I hear about stolen plans, this is all I think of.

III. Platform Management

A. Section 230

A background check agency argued before the Fourth Circuit this month that it is protected by § 230 against a claim under the Fair Credit Reporting Act over its resale of data about individuals purchased from third parties.

A judge in S.D. Fla. and another in N.D. Ill. have sided with the growing block of federal judges who have concluded that the FOSTA exception to § 230 for civil sex trafficking claims applies only to those defendants who possessed the higher level of scienter necessary to show a violation of the parallel criminal statute. Prof. Goldman notes with respect to the Illinois case that the claim attempted to establish *tertiary* liability as to a provider of services to the website that

allegedly hosted third-party sex trafficking content – so no surprise that the scienter requirement could not be met.

The Supreme Court of New Hampshire has reached a conclusion that I always felt was plain from the text of § 230(c)(1): The law protects retweeters of third party content on Twitter from liability from the original tweet. It's right there in the statute, folks: "No provider *or user* of an interactive computer service…"

Rep. Marjorie Taylor Greene (R-Ga.) has offered a bill to abolish § 230 and replace it with a law regulating online platforms as common carriers. Once again, just declaring online platforms to be common carriers doesn't make it so. A common carrier is defined by the manner in which it offers services to the public, and when we're talking about organizations that disseminate speech, forcing a non-common carrier to become one raises severe First Amendment issues. Sadly, though, enough people are confused about that point that we'll be talking about that issue ad nauseam for the foreseeable future.

Though in all honesty, when it comes to half-baked ham-fisted attempts to distort public discourse for the benefit of a particular ideology, I reach the point of nausea very, very quickly.

B. Elections & Political Advertising

So, here's a job for which I will not be submitting my resume: Connecticut is offering $150K/yr. for someone who will take the lead in hunting down election misinformation on sites like 4chan, Getter, Rumble and more, and then pressuring those sites to take some sort of corrective action with respect to such posts. Yeah, good luck with that.

The Department of Homeland Security's new "Disinformation Governance Board" – a "small working group" with no "operational authority or capability" but a vague remit to do something about disinformation on elections and other topics – was launched to widespread derision this month, leading to a "pause" of the Board's activities and the resignation of its chair after she received death threats. It's sad, because after the fact it seems like what the Board was intended to do was to help to develop information literacy tools for the public, not to be an arbiter of truth; that's a great idea, but one that wasn't ever really made clear during the launch and that was poorly described by the Orwellian name for the group.

C. Content Moderation

Okay, buckle up, because we've reached the big story for this issue. The Fifth Circuit heard argument this month on Texas' appeal of the preliminary injunction issued by a federal district court against the enforcement of HB20, the Texas law that would, among other things, prohibit social media sites from exercising editorial discretion over the subject matter and viewpoints discussed by Texas users on their services and require extraordinarily burdensome disclosures

regarding their moderation decisions and procedures. It…didn't go well. While one judge seemed to get the point that social media sites aren't public utilities or common carriers, the other two judges displayed a shocking level of technological illiteracy.

An example, from Judge Edith Jones referring to social media services: "Your clients are internet providers. They are not websites." Really? *Really?* Meanwhile, Judge Andrew Oldham seemed concerned that allowing social media sites to moderate would mean that phone companies could block users. In a totally unrelated piece of news, I've just noticed this dent in the wood top of my desk that for some reason precisely matches the dimensions of my forehead.

The Fifth Circuit hasn't ruled yet on the appeal, but while these judges were cogitating why we can't just print out the internet and deliver it to people's doorstep every day like those nice boys on their bicycles did back in the old days, they issued an order without opinion staying the lower court injunction during the pendency of the appeal. (The order was a split decision, 2-1…we can probably guess the split.)

So, this law which would radically change the online landscape was back in effect, without any reasoned decision other than what we could glean from the intensely disturbing hearing. This, not surprisingly, generated some feelings. It also generated an emergency application for relief to the U.S. Supreme Court by NetChoice and CCIA, the plaintiff organizations that sued to block HB20 on behalf of the affected tech companies. The plaintiffs argued both on procedural grounds that the Fifth Circuit's unexplained action would through the appellate process into chaos and on substantive grounds that the district court was right in the first place.

This application went to Justice Alito as the Circuit Justice for the Fifth Circuit, who asked Texas for a reply and who referred the application to the other justices for consideration by the full court. Texas, naturally, opposed the application for relief, relying heavily on blinkered comments by Justice Thomas about social media sites in past cases. Also naturally, a wide array of amici (including the MLRC, which signed onto an elegant brief drafted by the Reporters Committee in support of NetChoice and the CCIA) filed briefs supporting one side or the other.

Meanwhile, confusing matters further, the main author of HB20 started tweeting that he never intended the law to conflict with § 230…which makes no sense whatsoever given that § 230 specifically protects the exercise of editorial functions over third-party content. So, yeah, there's that.

And then, with all of this in the works, the Eleventh Circuit dropped its opinion in the appeal of an injunction issued against the enforcement of Florida's S.B. 7072, that state's somewhat more limited version of a law purporting to restrict how social media sites moderate the content of Florida users. In a thorough (though not entirely unproblematic) analysis, the Eleventh Circuit recognized the First Amendment rights of online services as on par with newspapers and other media outlets; it affirmed the injunction as to the content moderation provisions, which it held

would survive neither strict nor intermediate scrutiny, and most of the law's transparency obligations, to which it applied *Zauderer* as a framework for analysis. (That's the problematic bit – *Zauderer* isn't clearly appropriate for compelled speech outside the context of advertising.)

After notification of the Eleventh Circuit's decision, the Supreme Court reinstated the district court's injunction pending the resolution of the Fifth Circuit appeal. (Remember, this whole drama is taking place as a result of the Fifth Circuit's stay of the preliminary injunction pending resolution of the appeal of that injunction – we still don't at this point have an answer from the Fifth Circuit on the appeal itself.) The Supreme Court was split 5-4, with Justice Kagan voting with Justices Alito, Thomas, and Gorsuch to let the Fifth Circuit's stay of the injunction stand, but not joining the latter three justices in a dissenting opinion. We did not get a written opinion from the five justices (Roberts, Breyer, Sotomayor, Kavanaugh, and Barrett) who voted to lift the Fifth Circuit's stay.

One more time, for clarity: Lifting the Fifth Circuit's stay = letting the district court's injunction against enforcement of HB20 take effect, pending resolution of the Fifth Circuit appeal. So as of the date of the latest events described in this article, the Texas law is enjoined, but the Fifth Circuit could still flip the injunction in its final decision.

I keep coming back to the attenuated procedural posture because it significantly limits the conclusions that we can draw from the Supreme Court's action. This is particularly true given the fact that all of this took place on the so-called "shadow docket." Nevertheless, engaging in tasseography, we can infer from the typical standard of review that the Supreme Court applies when granting emergency relief that five justices agreed that (1) the application for relief involves an issue on which the Court would likely grant certiorari after a final order and (2) the party seeking relief is likely to succeed on the substance of its underlying claims. Seeing Justice Kavanaugh leaning in that direction isn't too surprising given some of his nods toward the issue in *Manhattan Community Access Corp. v. Halleck*, but Barrett in particular was something of a question mark.

We also can't tell why Justice Kagan went to the other side, whether it had to do with her previously voiced concerns about granting relief on the shadow docket or some concern about the merits. At a meeting last week of the MLRC's Internet & Technology Law Committee, Grayson Clary from the Reporters Committee posed the interesting possibility that Kagan might have been leaning towards finding some of the transparency requirements of HB20 to be constitutional – as per the Eleventh Circuit's ruling – but could not rally five votes for a partial lifting of the Fifth Circuit stay. (Speaking of which, that was a great discussion, so if you missed it I highly recommend checking out the recording when it's available.)

We do at least have the reasoning of three of the dissenting justices. Alito's dissent raises familiar themes for those who have followed the prior statements of Justice Thomas in particular, questioning whether the Court's First Amendment jurisprudence with respect to other media

outlets is applicable to online speech and asking whether large social media sites should be treated like common carriers, cable systems, or other services that have been subject to some degree of government regulation. In view of those open questions in the law, Alito argued that the Court's intervention at this stage was premature though he acknowledged that the questions would inevitably need to be addressed by the Court on their merits.

More chillingly, Alito stated: "While I can understand the Court's apparent desire to delay enforcement of HB20 while the appeal is pending, the preliminary injunction entered by the District Court was itself a significant intrusion on state sovereignty, and Texas should not be required to seek preclearance from the federal courts before its laws go into effect." But of course, the problem is that the state is exercising its sovereignty to intrude significantly upon the constitutional rights of private organizations. Federalism cannot require federal courts to allow states to violate our rights at will until a final judgment enters on a particular challenge.

So what now? It's not entirely clear, other than that either the Texas law, the Florida law, or both will probably make their way to the Supreme Court on a formal petition for cert; it seems probably that Florida will petition from the Eleventh Circuit decision. (Query whether the Supreme Court should just have treated NetChoice's application as a petition for cert and cut to the chase.) In the meantime, we still are waiting for the Fifth Circuit's actual opinion. It was clear when the Fifth Circuit issued its stay that at least two justices of the Fifth Circuit panel were leaning toward flipping the injunction, but do they still feel the same way now that the Eleventh Circuit has laid out the countervailing argument in compelling detail and five justices have signaled, albeit without formal explanation, that they're leaning the opposite way? Who knows.

In the meantime, courts continue to shut down lawsuits over the blocking of content and deplatforming of users. The Ninth Circuit quickly affirmed the dismissal of a claim arguing that Twitter should be treated as a state actor, while Twitter and Facebook defeated four separate lawsuits in N.D. Cal. (including Donald Trump's lawsuit against Twitter), and an online newswire service fought off a claim in D.N.J. over its retraction of the plaintiff's press release (though the plaintiff was given a chance to amend its complaint).

Meanwhile, public officials have defeated claims in S.D. Ohio and W.D. Wash. that they jawboned online platforms into blocking plaintiffs' content. These occasionally bizarre claims continue to roll in; case in point, this recent complaint from W.D. La. In which the attorneys general of both Missouri and Louisiana are suing members of the Biden administration for pressuring Twitter to remove content, much of which was removed before Biden took office.

What else…well, we've got a new lawsuit in E.D. Pa. claiming that TikTok's "defectively designed" algorithm led to the death of a 10-year-old by feeding her content involving a "blackout challenge."

And then we've got a ruling in the pending lawsuit in Ohio's Court of Common Pleas in which Ohio's AG has asserted that Google's search engine is a common carrier. The correct answer is no, god no, of course not, the whole point of a search engine is that it's not neutral, it finds and ranks content based on relevance. Never the mind that it's entirely unclear how Google Search has opened itself to "carry" content for customers, on a "common" basis or otherwise. Yet somehow, somehow, some benighted judge in Ohio managed to be convinced that the AG had cobbled together enough allegations to assert that Google Search might qualify as a common carrier. For whatever it's worth, the judge did reject the suggestion that § 230 turned Google into a public utility (?!), so there's that, though rejecting that claim would be pretty easy for Ken Clean-Air System.

And if that last case makes you crazy, we have a coalition of Republican groups filing a complaint with the FEC asserting that Gmail, through the operation of its spam filter, made unlawful in-kind contributions to Democratic campaigns by disproportionately filtering out Republican political mailings. Mike Masnick explains why this allegation is tripe.

Platform transparency continues to be an issue of interest in Congress, with a hearing on the topic before the Senate Judiciary Committee. Minnesota's House passed an omnibus bill containing a provision that would prohibit social media sites from using algorithms to target content at users in the state under the age of 18. New York's AG is investigating Twitch, Discord, 4chan and 8chan over the use of those platforms by the shooter in the recent incident in Buffalo, launching a probe at Gov. Hochul's request and cranking the rhetoric up to 11. Not that this will result in anything, of course.

I spent probably too much time in my last issue collecting links about Elon Musk's agreement to purchase Twitter. I'll just note this month that Musk has come out firmly against Twitter's deplatforming of Donald Trump as "morally wrong and flat-out stupid." It's a view shared, if perhaps not in those particularly Muskian terms, by the ACLU. However, Trump returning to Twitter raises other problems for the former president given his involvement in Truth Social.

Incidentally, did you know that there was a marked jump in both liberal *and* conservative users on Twitter after Trump was banned? It's almost as if, once they stopped him from sucking all of the air out of the room, everybody else felt freer to speak. Funny that. Just like every time a blowhard leaves the room.

Finally, Casey Newton reports at The Verge that concerns over the safety of Meta's Russian employees and their families led the company to withdraw a request to the Oversight Board for its input on the handling of content related to the war in Ukraine. Sources have suggested that there was concern that the Board, while separate, would be perceived by the Russian government as speaking for Facebook and thus imperil personnel if it departed from the company's carefully controlled position.

D. Terms of Service & Other Contracts

Two TOS cases this month to report, one involving a failure of Roblox's TOS in N.D. Cal., and one in which Triller's TOS was upheld in the Southern District of New York.

IV. Other Content Liability

A. Defamation

The Supreme Court passed on reconsidering whether the plaintiff should have the burden to prove falsity in a defamation case, denying cert in *Page v. Oath* on a petition from a ruling of the Delaware Supreme Court. *Hepps* is safe for another month, folks.

Regular readers, and especially those who click the links (please click the links – I hide treats in them all the time!), will know that there are certain superstars when it comes to spotting and reporting developments in digital media law. For example, in the Section 230 and Content Moderation sections, as well as other areas, we owe huge thanks to our friend Professor Eric Goldman; in Defamation, and other sections, we also owe a great debt to Professor Eugene Volokh. You might agree or disagree with their analyses, but they perform a huge service in simply helping to identify these developments as they occur. I was reminded to emphasize their work this month because *Volokh Conspiracy* was overwhelmingly responsible for calling our attention to the digital defamation cases covered in this issue. So, once again, our thanks.

In E.D. La., a man who had the temerity to send emails critical of the St. Tammany Parish Sheriff's Office has been allowed to proceed with First and Fourth Amendment claims after he was arrested under Louisiana's criminal libel statute. That statute had already been declared unconstitutional as to public officials, and moreover the Sheriff's Office had been specifically advised of that fact by the DA's office with respect to this particular incident, but they decided to arrest the plaintiff anyway.

A convicted killer's defamation lawsuit arising out of a YouTuber's analysis of his psychology was bounced out of D.N.J. for lack of personal jurisdiction. For the same reasons, Alec Baldwin will not face a defamation claim in D. Wyo. over statements on social media regarding the plaintiff's attendance at the January 6 riot.

In N.D. Tex., high-IQ society Mensa will pay $300K to settle claims over statements that a member "verbally abused," "stalked," and "harassed" Mensa staff and other members.

The plaintiffs in the Connecticut state and Texas federal defamation lawsuits against Alex Jones agreed to drop his corporate platform InfoWars as a defendant from the suit, in order to bypass InfoWars's alleged attempt to evade or delay the lawsuit by declaring bankruptcy. Also in

Connecticut, a Superior Court judge held that labeling someone a "white supremacist" in the context of a Facebook spat was non-actionable opinion.

An appellate panel in Michigan held that a pair of tweets which connected a former coach at Central Michigan University to another figure convicted of child molestation could create the false implication that the coach's termination was based on similar circumstances.

In New York, the Second Department of the Appellate Division held that tweeting a screenshot of another person's statements and calling them threats constituted an expression of opinion based on disclosed fact. In another case, the First Department doubled down on holding that New York's 2020 anti-SLAPP law is not retroactive, in a case involving statements posted on Glassdoor; the court nevertheless dismissed the case on a regular motion to dismiss standard, holding that the user's statements were opinion and that Glassdoor itself is protected by § 230. Moreover, in another case the First Department held that consumer reviews are precisely the kind of statements that the anti-SLAPP law was intended to protect. Meanwhile, the state senator who introduced the new anti-SLAPP law has introduced a proposed amendment to clarify that the statute was indeed intended to be retroactive.

And in Ohio, an appellate panel applied the discovery rule with respect to the application of a statute of limitations to a defamation lawsuit arising out of an allegedly forged email.

B. Commercial & Professional Speech

I'll admit that I'm inconsistent about covering shareholder lawsuits in this article, but given everything else that's going on around Elon Musk and Twitter I wanted to mention this order from N.D. Cal. holding that Musk made misleading tweets in 2018 that led to artificial inflation of Tesla's stock prices. And since we're in N.D. Cal. already, here's a new lawsuit alleging that Netflix failed to disclose slowing user growth and a loss of subscribers.

Heading south to C.D. Cal., Frontier Communications agreed to a stipulated injunction in response to FTC accusations that the company lied about the internet speeds that it could or would provide to its customers.

C. Threats, Harassment, and Incitement

The Third Circuit flipped an National Labor Review Board decision that the publisher of online magazine The Federalist unlawfully threatened workers with a tweet promising to send them "back to the salt mine" if they attempted to form a union. The Court of Appeals found nothing in the record to support the conclusion that any employee could reasonably view the statement as an actual threat.

The Sixth Circuit held that a fake Facebook page for the City of Parma Police Department was not so clearly protected speech that police should be denied qualified immunity for arresting the creator for interfering with police business. Criticizing the cops, that's protected; copying the official page and deleting comments that would have revealed the copied page wasn't official, perhaps not so much.

The Tenth Circuit heard argument this month about whether a high school student was properly expelled for posting to Snapchat the statement "Me and the boys bout to exterminate the Jews." The argument centered on whether or not any perception of a threat was realistic and whether there was substantial disruption to the school, per the Supreme Court's 2021 decision in *Manahoy Area School District v. B.L.*.

We'll end this section by tying up the weird saga of eBay executives who cyberstalked and harassed the authors of a newsletter who criticized the company. The last remaining defendant in the prosecution in D. Mass. pleaded guilty to a number of crimes that carry potential prison time and heavy fines.

V. Infrastructure

A. Accessibility

The Senate Commerce Committee voted to advance a bill that would have the FCC look into requiring tech and social media companies to contribute to the Universal Service Fund, in order to help subsidize affordable internet services.

However, President Biden's broader agenda to improve internet access and affordability remains stymied by the failure of the Senate to confirm a third Democratic FCC commissioner. As discussed in earlier issues, the failure to confirm Gigi Sohn to the FCC also imperils the Democratic agenda on issues such as net neutrality, but some senators may be feeling rising political headwinds against moving forward with her nomination.

B. Antitrust

A few developments in N.D. Cal.: Dating app company Match Group has sued Google over is control of payments in its Android app marketplace; a judge allowed a claim against Apple by a rival app distributor to move forward on allegations that certain iOS updates were overt acts to stifle competition; and Google reached a proposed settlement with app developers in litigation over its Play Store.

A game developer fought off a motion to dismiss its second amended complaint in an antitrust action in W.D. Wash. against Valve Corporation over its control of the gaming marketplace and commissions via its Steam platform. Third time's the charm, sometimes.

A new bipartisan bill spearheaded by Sen. Mike Lee (R-UT), the Competition and Transparency in Digital Advertising Act, would prohibit companies processing more than $20B in digital advertising transactions from doing business in multiple sectors of the digital advertising marketplace.

While the FCC remains in limbo, the Senate did manage to confirm a third Democratic commissioner to the Federal *Trade* Commission, allowing their antitrust agenda at that agency to begin finally to move forward. Rep. Jim Jordan (R-OH), meanwhile, is seeking answers from FTC Chair Lina Khan about her former employer's call for the FTC to block Elon Musk's purchase of Twitter (because, of course, Jordan sees Musk as the great hope for ending the much-decried but largely fictional problem of censorship of conservative viewpoints on social media). For what it's worth, FCC Commissioner Nathan Simington is firmly on board with Jordan's point of view, which is not at all surprising given Simington's history.

The lead antitrust attorney at the DOJ will not work on antitrust matters involving Google while a review is conducted as to whether he must recuse himself based on his pre-DOJ work for competitor companies. This concern over apparent or actual conflicts of interest is…refreshing, to say the least.

C. Net Neutrality

Trade associations representing the broadband industry have dropped their lawsuit in E.D. Cal. against California's state net neutrality law following a string of losses in court.

The Washington Post has an interesting article this month discussing how the Republican push to treat social media sites as common carriers is wholly inconsistent with their entrenched position that internet access providers should not be treated as such in the context of net neutrality regulations. Not that logic necessarily matters much in government, but the fact that politicians argue with straight faces that internet infrastructure providers are not common carriers, while edge providers that curate content are, is further evidence that we are politically through the looking glass (or beyond).

Meanwhile, just to show how bizarre (or Bizarro) the whole situation is, a recent study shows that almost two-thirds of Republican voters want net neutrality when it is actually explained to them.

D. Domain Name System
E. Taxation
F. Wire & Wireless Deployment
G. Artificial Intelligence & Machine Learning

Nothing to report in these sections this month.

H. Blockchain, Cryptocurrency, & NFTs

In D.D.C., a magistrate found that there was probable cause for charges in a first-of-its-kind prosecution alleging that a U.S. citizen violated U.S. sanctions law by transferring $10M in Bitcoin to a virtual currency exchange in Cuba, Iran, North Korea, Russia, or Syria. (The specific country was redacted in the court filings.)

This case could be under Trademark, but it involves NFTs: A judge in the Southern District of New York held that Hermès International (either no relation or a very distant one, depending on which of my family's self-appointed genealogists you consult) had stated claims under the Lanham Act based on the defendant's sale of "MetaBirkins" non-fungible tokens. These NFTs were digital reproductions of the iconic Hermès Birkin bags.

Finally, a new bill in the Senate would preclude the iOS and Android app stores from accepting apps that themselves accept China's digital yuan cryptocurrency, e-CNY, as a form of payment. The bill is motivated by concerns over the privacy of users who could be tracked through their transactions.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

Prof. Orin Kerr has some thoughts (highly, highly critical thoughts) on the Ninth Circuit's off-handed and radical holding in *U.S. v. Rosenow* limiting the privacy rights of individuals with respect to their data held by online services. (If you don't recall *Rosenow* from April, that's the one where the Ninth Circuit held in two brief paragraphs that orders to services to preserve user data don't constitute seizures under the Fourth Amendment.)

Speaking of which, four members of the U.S. House asked Meta, TikTok, Twitter and YouTube to preserve content that could be evidence of Russian war crimes in Ukraine. (Some of you, I hope, were present at our recent Digital conference for our discussion of the evidentiary and privacy issues around using social media posts to document war crimes.)

In New York, a new bill that would ban search warrants authorizing the use of reverse location and reverse keyword searches has picked up the support of major tech companies.

B. Encryption

So, we have an interesting article from Riana Pfefferkorn about the parallels between the abortion and encryption debates, and the ways in which strong encryption is essential to protect abortion rights. Along the same lines, Zeynep Tufekci writes in the New York Times about how much information phone apps can have about someone's pregnancy status – information that

would be an obvious target of law enforcement efforts to determine whether someone has had an abortion.

Meanwhile, the Biden administration is planning to harden the encryption standards on which the U.S. economy is based in order to defend against attacks based on quantum computing. One, good luck with that. Two, the NSA has promised not to build backdoors into the encryption scheme for its own purposes. Uh-huh. Sure.

C. Biometric Tracking
D. Domain Seizure

Nothing to report in these sections this month.

E. Content Blocking & Prior Restraints

The Ninth Circuit held this month that the gag orders attached to national security letters (a/k/a NSLs) from federal agencies do not require periodic reviews of their constitutionality under the First Amendment. Because recipients can request judicial review at any time, the panel affirmed the district court's order requiring the recipient of three NSLs to comply with the nondisclosure requirements set forth in 18 U.S.C. § 2709(c) "unless and until the Government informs it otherwise."

The Tenth Circuit held that an officer who briefly detained a YouTuber filming a police encounter with a mentally ill woman was entitled to qualified immunity, inasmuch as the arrest was not based on the plaintiff's filming activity but on his agitation of the woman involved and his refusal to obey police commands to cease interfering with their efforts.

A school's demand that a parent remove a video from Facebook that was allegedly created in violation of Massachusetts' two-party notice wiretapping law (note: the statute does not require two-party *consent*) triggered a lawsuit against the school in the District of Massachusetts.

A judge in M.D. Pa. enjoined the enforcement of a Pennsylvania law intended to protect the confidentiality of Child Protective Services records against the grandmother of a deceased child who posted information that she gleaned from such records on Facebook.

Not every suggestion by a judge that someone keep their mouths shut is a prior restraint backed up by the threat of court sanctions. At least, that's the upshot of a ruling from N.D. Tex. regarding a judge's advice to a litigant to "zip it" on social media in order to facilitate settlement.

Appellate courts in both Illinois and Indiana struck down anti-disparagement injunctions this month.

A Nevada state judge ordered that a website containing allegedly defamatory statements against a Las Vegas City councilor be shut down. Given that the councilor's lawsuit was never served on the creator of the website – and indeed the councilor never identified the creator – I have serious concerns about the legitimacy of this ruling.

A federal judge in New Jersey whose son was killed in an attack at her home is actively lobbying for a federal bill that would limit, among other things, the online publication of personal information of public officials. I get it, I really do, but I have serious concerns about the idea of allowing public officials to require removal of information about them that is already in the public sphere. And how far does that principle extend? What other information about public officials is considered "dangerous" in this sense? How judges voted in particular cases?

How a Marine behaves online is part and parcel of their role as soldiers, according to a forthcoming policy from the Marine Corps that categorizes information as one aspect of military operations.

F. Online Access to Government Information

The Ninth Circuit held that the complete closure of a suppression hearing and trial as a COVID precaution, with the public given only an audio feed, was a violation of the defendant's Sixth Amendment right to a public trial; the closure was not narrowly tailored, said the court, when video feeds of trial proceedings are now commonplace.

Speaking of online access to court proceedings, almost all of the U.S. Courts of Appeals have stated that they plan to continue some form of livestreaming of proceedings beyond the end of the pandemic (whatever the "end" means in this context).

Meanwhile, the Judicial Conference of the United States has apparently agreed not to charge non-commercial users fees for running searches on "any future new modernized case management, electronic filing, and public access systems implemented by the judiciary." So, key limitations here: (1) it doesn't apply to the current PACER system, because that would require "extensive development work," so we'll keep getting charged until a new system is implemented (presumably sometime after Hell's refrigeration comes online); and (2) you'd still get charged for actually wanting to look at the documents you find, other than the limited category of court opinions that are already free.

In other news, a judge in N.D. Ohio agreed to redact the name of a rape victim from the court's online version of a 16-year-old ruling, but denied a motion to order private sites to remove that information.

Finally, Republican state legislatures are pushing legislation that would require companies that develop online library databases, upon which public school libraries depend, to remove

information about material that is obscene, pornographic, sexually exploitative of children or "harmful to minors" and block student access to those works. Great.

VII. Global

A. International

- WIPO Blocks Wikimedia Chapters As Observers, Because China Is Mad That There's A Taiwanese Wikimedia Chapter, *Techdirt*

B. Europe

- Top EU Court Hands Down Judgment On Upload Filters That Is As Clear As Mud, *Techdirt*
    - Internet filters do not infringe freedom of expression if they work well. But will they?, *Euractiv*
- EU's new rules for Big Tech will come into force in Spring 2023, says Vestager, *TechCrunch*
    - Europe's New Law Will Force Secretive TikTok to Open Up, *Wired*
    - Because Of Course: Rightsholders Pushing To Turn Digital Services Act Into Another Anti-Piracy Tool, *Techdirt*
- "War upon end-to-end encryption": EU wants Big Tech to scan private messages, *Ars Technica*
    - Europe's CSAM scanning plan unpicked, *TechCrunch*
- Commission pitches ban on 3 more Russian broadcasters, *Politico*
- Elon Musk gives Europe's speech platform rules the thumbs up, *TechCrunch*
- Google Attacks EU for Treating It Almost Like a 'Criminal', *BloombergQuint*
- Google to Pay Over 300 EU News Outlets to Publish Content, *Bloomberg*

C. Australia

- High Court asked to decide if search engine giant Google is a publisher of content, *ABC*
- Facebook Deliberately Caused Havoc in Australia to Influence New Law, Whistleblowers Say, *Wall Street Journal*

  - Why Are People Still Blaming Facebook For Australia's Terrible News Linking Tax Law?, *Techdirt*

- Shane Bazzi wins appeal in defamation case over Peter Dutton tweet, *The Guardian*
- The Australian Electoral Commission Has Gone Rogue On Social Media, And It's Working, *Junkee*

D. Brazil

- An unholy coalition torpedoes social media reform legislation in Brazil, *Poynter*

E. Canada

- Duopoly battle moves to Canada as Google and Meta issue warnings over Online News Act, *Press Gazette*
  - Google hits back at Canada's Online News Act, claiming it would 'break' its search engine, *Press Gazette*

F. China

- Chinese tech executives retreat from social media amid industry woes, tightening internet content regulations, *South China Morning Post*
- China shuts down talk of covid hardship; users strike back, *Washington Post*
- Kids 'Tipping' Streamers & Watching After 10pm Is Being Banned In China, *Kotaku*
- How censoring China's open-source coders might backfire, *MIT Technology Review*
- Court Issues Landmark Ruling in Case Over Infringing NFTs, *The Fashion Law*
- China's tech giants are having FOMO on NFTs, *TechCrunch*

G. Costa Rica

- Ransomware gang threatens to overthrow Costa Rica government, *Associated Press*

H. Denmark

- Denmark hits streaming services with levy to support local TV, *Reuters*

I. Finland

- The Finnish transposition of Article 17 of Directive 2019/790: progress or regress?, *Journal of Intellectual Property Law & Practice*

J. France

- Woman Who Invented French MeToo Hashtag Wins Defamation Suit, *Bloomberg*

K. Germany

- Meta faces years of tougher antitrust oversight in Germany, *TechCrunch*

L. India

- Indian Government Now Wants VPNs To Collect And Turn Over Personal Data On Users, *Techdirt*
    - India pushes ahead with its strict VPN and breach disclosure rules despite concerns, *TechCrunch*

M. Ireland

- US-based anti-vaxxer uses Irish courts to sue Twitter for defamation, *Independent*
- George Galloway defiant on Russia as he sues Twitter for defamation, *The Times*

N. Italy

- Ukraine war causes free speech headache in Italy, *Politico*

O. Kenya

- Facebook Faces New Lawsuit Alleging Human Trafficking and Union-Busting, *Time*

P. Netherlands

- Match Group Google Play Store complaint triggers Dutch antitrust probe, *TechCrunch*

Q. New Zealand

- Coroner signals social media's role in mosque terror attacks a priority for inquest, *Radio New Zealand*

R. Philippines

- In the Philippines, a Flourishing Ecosystem for Political Lies, *New York Times*
    - TikTok and the son of Ferdinand Marcos take the Philippines back to the future, *Columbia Journalism Review*
    - The Triumph of Marcos Dynasty Disinformation Is a Warning to the U.S., *New Yorker*
- Court dismisses cyber libel charges against editor, reporter, *Rappler*

S. Russia

- Russia's Independent Media, Battling for Survival, Defies Kremlin Crackdown, *Wall Street Journal*
    - Russian journalists fill pro-Kremlin site with anti-war articles, *The Guardian*
- Russia says Western reporters to be expelled if YouTube blocks foreign ministry briefings, *Reuters*
- Russia hammered by pro-Ukrainian hackers following invasion, *Ars Technica*
- US, UK and EU blame Russia for 'unacceptable' Viasat cyberattack, *TechCrunch*

T. South Africa

- Showdown over copyright laws in South Africa, *BusinessTech*

U. Spain

- Hack of Spanish PM's phone deepens Europe's spyware crisis, *Politico*

V. Turkey

- Turkey seeks to tighten media control with 'fake news' bill, *Deutsche Welle*

W. Ukraine

- Ukraine targeting Russians in information war, Kyiv says, *Politico*

X. United Kingdom

- Online Safety Bill threatens rights to free speech, claims top lawyer, *The Times*
- UK opts for slow reboot of Big Tech rules, pushes ahead on privacy 'reforms', *TechCrunch*
- UK Considers How to Tackle Trend of Social Media Influencers Promoting Counterfeit Products, *JD Supra*
- UK's Big Tech regulator 'to boost switching, cut killer acquisitions', *TechCrunch*
- Social media giants are failing women, finds Ofcom, *TechCrunch*
- Elon Musk Summoned By UK Parliamentary Committee To Discuss Twitter, Free Speech And Online Harms, *Deadline*
- Google and Meta earn £1bn a year from UK news content, new study claims, *Press Gazette*
- Google sued for using the NHS data of 1.6 million Britons 'without their knowledge or consent', *Sky News*
- Russian oligarch's libel lawsuit against Bellingcat founder thrown out of court, *City A.M.*
- Laurence Fox must pay £36,000 legal fees for Coronation Street star and others in 'paedophile' Twitter row, *Metro*
- Hacking claims against Mirror publisher allowed to continue despite time lapse, *PA Media*

VIII. Miscellaneous

Sen. Michael Bennet (D-CO) has introduced a bill to create a new expert agency, the Federal Digital Platform Commission, designed to implement a "thoughtful and comprehensive approach to regulating digital platforms" and to "protect the public interest through common sense rules and oversight for complex and powerful sectors of the economy," "with specific directives to protect consumers, promote competition, and assure the fairness and safety of algorithms on digital platforms, among other areas." So, essentially, wrapping up all of the issues discussed in the other sections of this article and making them someone else's problem.

Finally, Prof. Goldman brings us a case from Texas' appeals court discussing the interpretation of smiley emojis.

* * *

Thanks, everyone. I'll be on vacation at the beginning of July, so I'll return with a double-header at the beginning of August. Till then, enjoy the beginning of summer!