The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone, and I hope the summer has been treating you well! As I mentioned last issue, I was on vacation at the start of July and so this issue will be a double-header.

The big development for this issue is the Supreme Court's decision to overturn *Roe v. Wade*, which sounds pretty weird to say for a publication about digital law until you think about how anti-abortion laws are going to be enforced – namely, by state law enforcement officers combing through social media, cell phone location data, emails and text messages, and any other digital traces of someone either seeking or obtaining an abortion. And that's before we consider new laws that attempt to make it illegal even to talk about abortion services depending on where you're located.

It's a tragic state of affairs, whose chilling effects will drive women's discussions about fundamental health services into the same heavily encrypted and anonymized underground currently inhabited by drug dealers and hacker collectives – and of course, by journalists, activists, and other more admirable types who upset the powerful. (Query whether this convinces some Democrats in Congress to change their attitudes toward encryption.) Sure, we've got some proposals on the table in Congress to beef up the privacy of health and location data by telling online services not to store it and data brokers not to sell it. However, (1) it's not always obvious what information relates to health, (2) state law enforcement doesn't have to buy this stuff from brokers – they just use a warrant or subpoena to the company, and (3) those warrants/subpoenas don't necessarily tell the company the reason for a data demand so that they can put up a fight.

Really, to make this work you'd need to suppress the use of any evidence obtained from digital services in an abortion-related prosecution (cf. the suppression provisions of the federal wiretap act, 18 U.S.C. § 2515) – and at that point you're pretty much creating a national right to abortion. Which, y'know, okay, but it's so stupid that things have turned out like this.

Anyway, let's get started.

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I. Privacy

A. Anonymity

The Second Circuit ruled on two interesting issues of online anonymity this month. In one case, the Court affirmed a ruling that a consulting agency had no duty of care to an anonymous Twitter user that the agency outed as being a leading critic of the government of Saudi Arabia. In the other, a case in which a gun safety nonprofit sued anonymous social media posters for posting 3D printing instructions for gun parts bearing the nonprofit's trademark, the court held that a district court order conditionally denying a motion to dismiss for lack of personal jurisdiction if the individual defendants remained anonymous did not determine those defendants' First Amendment right to proceed anonymously for the rest of the case.

We had a rare decision from N.D. Cal. finding that the First Amendment must be considered in determining whether to compel Twitter to disclose the identity of an anonymous critic sued for copyright infringement. Most of the time, courts have found that the First Amendment is adequately addressed in the copyright context through application of the concepts of fair use and the idea/expression dichotomy, but not so in this case: "[W]hile it may be true that the fair use analysis wholly encompasses free expression concerns in some cases, that is not true in all cases—and it is not true in a case like this. That is because it is possible for a speaker's interest in anonymity to extend beyond the alleged infringement." This isn't the only case of its type wending its way through N.D. Cal. right now, so watch this space.

Meanwhile, in the same court, employer-review site Glassdoor was ordered to disclose the identity of reviewers to a toy company seeking to pursue defamation claims in New Zealand. The district court's off-handed dismissal in a footnote of the polices underlying the SPEECH Act was disappointing to say the least.

Speaking of copyright cases, Prof. Volokh brings us two decisions (one in D.N.J., one in E.D. Pa.) denying defendants accused of online infringement of pornographic works the right to proceed pseudonymously in court; he goes on to discuss the deep division between different courts on this issue. And it's always worth remembering that it's not always necessary to get the assistance of a court to identify someone behaving badly online, as shown in this case from W.D. Wash. against a sender of fraudulent DMCA takedown notices.

In other items, we have Cathy Gellis (whom you might remember from recent MLRC Zoom calls) warning about the effects of the pending INFORM Act bill, which is intended to identify sellers in online marketplaces, on the anonymity rights of purveyors of expressive materials, and Prof. Goldman warning that a pending California bill intended to protect children online will, among other undesired effects, require websites to gather detailed personal information from users in order to confirm their ages.

B. Personal Information

A member of two "private" Facebook groups had no enforceable privacy rights against a "strategic communications" service that allegedly infiltrated the groups to gather information on their discussions, held a judge in D. Ariz.; there was no real barrier to the public accessing the groups, which were open to any expressing an interest in the subject matter, and in any event the plaintiff didn't control access to the groups.

We have a few developments in N.D. Cal. involving class actions against tech giants. A class of Google account holders defeated a motion to dismiss filed by Google in a case in N.D. Cal. alleging the unlawful sale of personal information to bidders in advertising bidding auctions. A magistrate judge ordered Google to pay over $970K in sanctions for discovery failures in a case involving tracking of users of Chrome's "incognito" mode. And a $90 million settlement of claims against Facebook for tracking logged-out users received preliminary approval.

We've got a pair of new cases to add to a growing roster of claims of against companies accused of unlawfully sharing subscriber data with Facebook, including one in N.D. Ill. against Paramount and another in S.D.N.Y. against Forbes.

A few developments in revenge porn lawsuits: Blac Chyna settled her revenge porn claim against Rob Kardashian in Cal. Super. on the eve of trial; former U.S. Rep. Katie Hill has filed for bankruptcy in what the prevailing defendants in her revenge porn case have alleged is an attempt to evade paying their attorneys' fees per a 2021 Cal. Super. ruling; and a revenge porn plaintiff in Tex. Dist. was awarded $250K in damages against an ex-boyfriend who published intimate images that propagated across hundreds of websites.

Meanwhile, Florida Governor Ron DeSantis signed a bill that, would, among other things, make it a felony to buy, sell, or trade sexually explicit images stolen from digital devices. (More on this below.)

There has been recent motion on a bipartisan federal data privacy bill, the American Data Privacy and Protection Act, with supporters in both the House and Senate. A draft that emerged in June would have preempted any state laws on the topic and create a private right of action. The U.S. Chamber of Commerce has objected to both aspects of the bill, asserting that the preemption is not broad enough (it would leave intact state laws around biometrics, data breaches, and cyberstalking) and that the private right of action is too broad given the bill's subjective standards for liability. Nevertheless, the bill sailed through both a subcommittee and the full House Energy and Commerce committee – but with substantial changes along the way that have changed the bill's focus to be on minimizing the data that online services are allowed to collect (the private right of action has been limited as well).

The bill seems like it's got a chance as it heads to a floor vote in the House, but the Senate, which seems to be devoting its attention span for digital privacy to two other bills focused solely on children, might be a tougher nut to crack. (More on those other Senate bills below.) There are also a pair of bills intended specifically to protect women's data in the wake of the overturning of *Roe v. Wade*; more on those below under Government Data Surveillance.

TikTok is again in the crosshairs of regulators and legislators over privacy concerns related to the company's relationship with China, with FCC Commissioner Brendan Carr leaning on Apple and Google to remove the TikTok app from their respective app stores and Sens. Warner (D-Va.) and Rubio (R-Fla.) asking for an FTC investigation. TikTok's head of public policy has denied that the app collects browser history or uses facial scans to identify people, and denied that information regarding U.S. individuals has ever been shared with the Chinese government.

FCC Chair Jessica Rosenworcel sent letters of inquiry to major mobile phone service providers seeking information about how they use, share and protect users' geolocation data. Notably, however, the American Data Privacy and Protection Act would, if it passes, also hand authority over digital privacy to the FTC and largely deny the FCC the ability to act on these concerns. As for the FTC itself, well, it's lately been focusing on data collection in online advertising marketplaces, and has warned participants that the anonymization of consumer data is not by itself sufficient to avoid regulatory action.

In early July, the California Privacy Protection Agency Board began its formal rulemaking process under the California Privacy Rights Act amendments to the California Consumer Privacy Act, kicking off a 45-day public comment period.

C. Children's Privacy & Safety

So, as mentioned in the prior section, we've got a pair of bills on children's online privacy continuing to make their way through the Senate. The first bill, the "Kids Online Safety Act," creates mechanisms to allow state and federal authorities to require internet platforms to block access to content that is "harmful" or "unlawful for minors." Didn't the Supreme Court say this wasn't okay in *Reno v. ACLU* way back in 1997, not that precedent means much these days? (Speaking of a lack of respect for precedent, for more on why the bill is particularly problematic right now, see here.) The other bill, the "Children and Teens Online Privacy Protection Act," would enlarge COPPA to reach people up to the age of 16 and under.

A string of lawsuits was filed against Meta Platforms over the last two months in federal courts across the country, accusing the company of addicting minors to its services with harmful and sometimes fatal results. Eight lawsuits were filed in Texas, Tennessee, Colorado, Delaware, Florida, Georgia, Illinois and Missouri in early June, followed by four more separate lawsuits in California and one in Kentucky.

Meta isn't the only tech company targeted with such allegations; a new case in Cal. Super. levels similar claims against TikTok. Meanwhile, a pending California bill to stem children's addiction to social media, the "Social Media Platform Duty to Children Act," has passed the state's Judiciary Committee with amendments (including dropping a private enforcement provision). The bill would impose a duty on platforms not to addict minor users through a series of restrictions on how content is moderated and presented. If this strikes you as a restriction on the editorial discretion of platforms, you're not alone. (Incidentally, this bill is separate from the "Age-Appropriate Design Code Act," another pending California bill intended to protect kids online with a related set of problems.)

D. Rights of Publicity

We continue to see rulings allowing claims to proceed against Classmates.com operator PeopleConnect over the allegedly unauthorized use of individuals' photos, including recent decisions from N.D. Cal. and S.D. Cal. rejecting PeopleConnect's § 230 defense on Rule 12 motions on the basis that the defendant was the developer of the content at issue. However, the Ninth Circuit ruled that a judge in W.D. Wash. should have allowed discovery on the question of whether PeopleConnect could compel arbitration based on the plaintiff's attorney agreeing to the site's terms of service during investigation of the site. Whoops.

Rep. Devin Nunes saw his right of publicity and cyberstalking claims in E.D. Cal. against the operator of a satirical Twitter account dismissed under California's anti-SLAPP law, with the court finding that the account was exempt from California's ROP law under the news and public affairs exemptions and that the stalking claim was unsupported by the evidence Nunes submitted. However, the court granted leave to amend the latter claim.

"Jeopardy!" host Mayim Bialik filed suit in S.D. Fla. against a raft of websites and digital marketplaces that allegedly used her name to sell CBD products; she quickly obtained a preliminary injunction.

Former employees of 3M lost their ROP case against the company in N.D. Ind.; they alleged that 3M exploited their identities by maintaining their email addresses after their departure, but the court held that wasn't enough to make out a claim under either Pennsylvania or Florida law. Weird claims, but a fact pattern that probably arises pretty frequently, so there you go.

A judge in S.D.N.Y. booted ROP, RICO, privacy, conspiracy and other claims against a reputation management company that allegedly conspired with a complaint website to host negative statements about people and then milk them for cash to get the statements removed. The ROP claim failed for a lack of allegations that the defendants themselves posted the negative comments about the plaintiff, but the court allowed the pro se plaintiff to seek leave to file an amended complaint.

E. Biometrics

A lawsuit in S.D.N.Y. against social media app Triller alleging the unlawful collection of facial biometric data was voluntarily dismissed in June.

Following the settlement of a lawsuit against Google in Illinois state court for violations of the state's Biometric Information Privacy Act, Illinois residents can now file claims for a portion of the settlement proceeds.

F. Manipulated Media

The Florida revenge porn law signed by Gov. DeSantis (discussed above) also makes it a felony to disseminate "altered sexual depictions," defined as any visual depiction that, as a result of any type of digital, electronic, mechanical, or other modification, alteration, or adaptation, depicts a realistic version of an identifiable person" nude or engaged in sexual conduct in which the person did not engage.

It is no defense under the bill to include a disclaimer that the images are fake or that the depicted activity did not occur, making me uncertain if this aspect of the law is constitutional. The law seems to sound in a theory of liability something like false light invasion of privacy, but without the requirement that the audience believes the images to be real. Deepfakes can be offensive, certainly, but I'm not sure that's enough without the suggestion that the faked images are authentic.

With respect to minors, the statute is broader, prohibiting "created" images as well as modified images. This section of the bill brings to mind *Ashcroft v. Free Speech Coalition*, in which the

Supreme Court held that a prohibition on manufactured images appearing to depict minors who are not actual people engaged in sexual activity was unconstitutional. However, the Court specifically left open the question of whether a prohibition on the "alter[ation of] innocent pictures of real children so that the children appear to be engaged in sexual activity" would survive First Amendment scrutiny, because "they implicate the interests of real children and are in that sense closer to the images in *Ferber*."

G. Hacking, Scraping & Data Breach

The Supreme Court requested briefing from the Justice Department on the Biden administration's position on whether "Pegasus" spyware developer NSO Group was acting as an agent of foreign governments when it deployed the spyware and should thus be immune from WhatsApp's hacking claims.

Here's one that will have the CFAA folks talking about whether the gates were up or down. A judge in D. Ariz. held that a Google Drive account was not public despite the fact that it could be accessed by anyone with the right URL, given that (1) the URL was a string of 68 characters and (2) the Drive was not indexed by any search engines. Thus, access was limited under the CFAA and the defendant's use of the inadvertently disclosed URL required authorization.

Facebook is pursuing claims in N.D. Cal. against a number of companies over data scraping, including MyStalk, a company that scrapes profiles from Instagram so that its users can stalk people anonymously, BrandTotal, a company that incentivized Facebook users to install researchware to let it gather data about their activity, and Octopus Data, a company offering data scraping software and services targeting a number of social media platforms.

Also in N.D. Cal., the trial began in the case of a former Twitter employee who allegedly sold information about political dissidents to the government of Saudi Arabia. The defendant is charged with citing as an agent of a foreign power inside the U.S., committing wire fraud, and laundering money, but since the case is about the misuse of authorized access to user data it seemed like it belonged here.

In W.D. Mo., T-Mobile sought preliminary approval for a $350M settlement of claims stemming from a massive 2021 data breach.

In a case brought by American Airlines in N.D. Tex. against the developer of an app that helps airline passengers maximize the benefits of their frequent flyer rewards programs but requires that users provide their login information to airline websites, a judge dismissed a pair of Texas state claims but allowed a CFAA claim and a parallel state claim to continue.

In W.D. Wash. in June, a trial began in the case of a software engineer who downloaded the personal information of more than 100 million Capital One customers in order, she claims, to

demonstrate weaknesses in the bank's security. She was convicted for wire fraud and CFAA violations.

In other news, the Justice Department seized about $500K from North Korean hackers who deployed ransomware against U.S. health care providers. Good news, as is this: Fewer victims are choosing to pay ransoms, leading to an overall drop in amounts paid despite the average payment among those who knuckle under going up.

Finally, the Justice Department is investigating a breach of the federal court records management system, which as we all know is old and janky and would seem to be particularly attractive target for anyone who wanted to cause some real chaos.

That's the first time I've ever typed the word "janky," and I'm not sorry.

H. Other Privacy Issues

Nothing to report this month.

II. Intellectual Property

A. Copyright

A new petition to the Supreme Court raises the issue of whether copyright infringement can constitute an unconstitutional taking for the purposes of bringing claims against state employees, and whether such claims are barred by state sovereign immunity.

A group of prominent intellectual property scholars filed an amicus brief with the Second Circuit in *Capitol Records v. Vimeo*, addressing the proper standards for determining knowledge of infringement and the right and ability to control infringement under the Digital Millennium Copyright Act.

The Ninth Circuit held that merely streaming music performed by The Turtles did not constitute "speech on an issue of public interest that has a functionally close relationship to the public issue and that furthers debate on the public issue," and accordingly affirmed the denial of Pandora's anti-SLAPP motion against state copyright claims relating to pre-1972 music. The Ninth Circuit also reversed the dismissal of a copyright claim brought by a California music producer against the Vietnamese developer of a music app, holding that there was jurisdiction over the foreign defendant based upon its alleged inclusion of the plaintiff's music and making the app available in the United States where it has been downloaded hundreds of thousands of times.

Photographers who brought claims against Instagram over the embedding of their photos by the platforms' users and had those claims dismissed under the so-called "server test" have appealed

their loss to the Ninth Circuit. Speaking of the server test, Meta moved to dismiss another similar claim filed in the Northern District of California.

Also in N.D. Cal., a jury awarded Oracle $54 million in damages for Hewlett Packard Enterprise's vicarious infringement of its copyright in its Solaris software. The case related to distribution of unauthorized Solaris patches by an HP Enterprise business partner. In the same district, Epidemic Sound sued Meta Platforms alleging infringement of music by Facebook and Instagram users and Meta's own inclusion of allegedly unauthorized tracks in its music library.

We have more photographer lawsuits in C.D. Cal.; this time around, we've got a second lawsuit against Dua Lipa over her posting of a paparazzo's work, a lawsuit against Google claiming a failure to comply with DMCA notices, and a lawsuit from the estate of an award-winning photographer of hip-hop stars over Universal Music's alleged posting of a photo of Tupac Shakur. Meanwhile, "Real Housewife of Beverly Hills" Lisa Rinna settled a claim brought by a photo agency over her Instagram posts.

The eternally angry Lewis Black has joined the roster of comedians suing Pandora in C.D. Cal. for infringement of rights in his performances, which in retrospect is entirely on brand for him. Activision Blizzard and Rockstar Games defeated a claim in C.D. Cal. that they infringed a copyrighted video game pitch; the plaintiff wound up tagged with sanctions as well.

UMG Recordings sued an energy drink manufacturer in S.D. Fla. for allegedly using its music in TikTok ads without authorization.

In D. Md., a judge held that the Copyright Act preempted a Maryland law that required publishers to make e-books available to libraries at favorable pricing.

NBC Boston is facing a new lawsuit alleging that it used video of an apartment complex fire that it obtained from Twitter without permission, after the plaintiff offered to license the video to Boston news organizations including the defendant. I feel compelled to note that as a general matter the existence of an offer to license a use of a copyrighted work undermines but does not necessarily obviate a fair use defense.

We've got dueling summary judgment motions in S.D.N.Y. in the infringement case brought by major publishers against the Internet Archive over a free digital lending library created by scanning purchased physical copies of books. A coalition of IP law professors weighed in with an amicus brief supporting the Archive's motion, arguing that nonprofit library lending occupies a special place in the copyright framework.

In S.D.N.Y., major technology organizations weighed in to support Cloudflare's refusal to comply with a vastly broad anti-infringement injunction that prohibits any company (including ISPs, webhosts, CDN providers, DNS providers, domain companies, advertising services,

financial institutions, and payment processors) from doing any business now or in the future with the operators of three websites deemed to be serial copyright infringers. (The court had earlier stayed a portion of the order requiring all ISPs to block the targeted sites entirely regardless of what non-infringing material they might have carried.) The plaintiffs backed down from attempting to enforce the order and agreed to submit a revised injunction to the court that deleted the blocking provisions and the prohibitions on doing business; the court issued the revised injunction shortly thereafter.

In the same court, we have: Emily Ratajkowski facing another paparazzo suit over an Instagram post; Michael Che defeating a TikTok creator's claim over uncopyrightable ideas for jokes about a "HomeGirl Hotline"; and BET losing a motion to dismiss a claim that it infringed a show treatment with its show "House Party" on Instagram Live.

Moving down the alphabet, in M.D. Tenn., the publisher of Eminem's music, Eight Mile Style, defeated a motion for a protective order seeking to block Spotify's CEO from appearing for deposition in a fight over the allegedly unauthorized streaming of 243 songs. In the same court but with a lower profile, a motion to dismiss a dispute over the creation of a website for the sale of copper fixtures led to the dismissal of a host of trademark and state law claims, but a copyright claim survived. In W.D. Tex., Dow Jones sued an investment manager/college professor for copying almost 6,200 *Wall Street Journal* and *Barron's* articles verbatim for his newsletter. Pursuant to a warrant issued in E.D. Va. in a case alleging criminal copyright infringement of musical works, the DOJ and U.S. Homeland Security Investigations seized the domains of six websites as part of a cooperative effort with the government of Brazil, which took down another 266 websites in that country. Also in E.D. Va., indie movie producers sued a VPN service for promoting film piracy. And in W.D. Wash., video game developer Bungie agreed to a $13.5 million consent judgment (plus permanent injunction) to be entered against a developer of cheat software for Bungie's game *Destiny 2*.

The U.S. Copyright Office issued a report at the end of June on its study of the need for additional protections for the press, in which it rejected the concept of ancillary copyright (think linking and snippet fees) on the basis that publishers already enjoy substantial protection under copyright law.

And the Copyright Claims Board is here! The CCB launched in mid-June, and by mid-July had received 58 claims. Prof. Goldman brings us a review of the 48 claims that were publicly available at that time, while Mike Masnick suggests that there's a lurking constitutional question about the authority of Congress to create adjudicative bodies outside of the judiciary.

B. Trademark

The Eleventh Circuit reversed a grant of summary judgment for Amazon, allowing porn streaming service FyreTV to proceed to trial on claims of reverse confusion stemming from Amazon's sale of its Fire TV set-top box.

A Lanham Act duel between E.D. Cal. between political nonprofits over their use of the terms "Woke" and "Vote" was dismissed on the pleadings, with the court holding that the Lanham Act created no cause of action where there was no attempt to profit. In N.D. Ga., we've got an online mental health service facing a new TM claim over its use of the phrase "Therapy For Black Girls," which sounds awfully descriptive if not generic to me. In E.D. La., trademark claims over a law firm's use of a competitor's name in keyword advertising were allowed to proceed to discovery. Meta Platforms was sued in E.D. Mo. for allegedly failing to take down content on Facebook and Instagram that falsely appear to originate from fragrance company Aromatica Global. In D. Nev., the court granted summary judgment for defendant Groupon and awarded the company its attorneys' fees incurred in defending against a skydiving company's trademark lawsuit, which complained of Groupon's suggesting competing vendors when a search for the plaintiff's trademark turned up no results. Also in D. Nev., Parler defeated a trademark claim over its "P" logo, with the court ruling that the plaintiff tech company's telephony platform was not sufficiently similar to Parler to create a likelihood of confusion.

A judge in S.D.N.Y. held that the continued availability of a band's music online between the time of the band's breakup and its reunion about a decade later was sufficient basis for the band to assert a laches defense against a TM claim over the band's name filed only after the reunion. In the same court, 1-800 Contacts lost another keyword advertising lawsuit (this time filed against Warby Parker), Meta Platforms faces a new lawsuit from METAx, a virtual and augmented reality company, and the moderator of a Reddit forum obtained a preliminary injunction against a podcaster and two cryptocurrency traders' use of the mark "SATOSHISTREETBETS." (You might recognize the name "Satoshi" as the pseudonym used by the reputed – or perhaps "mythical" would be a better word – inventor of bitcoin.)

Finally, a judge in E.D.N.Y. rejected the argument that a plaintiff's anticompetitive tactics against rivals in the corrective lens marketplace provided a defense to trademark claims.

C. Patent

A new petition at the Supreme Court seeks review of a Federal Circuit decision that invoked *Alice* to invalidate four patents for virtual reality gaming, asking the court to clarify the standard for determining whether a patent is directed to a patent-ineligible concept. Meanwhile, the justices denied cert in *Apple Inc. v. Qualcomm Inc.*, involving the question of how a multi-patent license agreement affects the plaintiff's standing to challenge the validity of a subset of those patents via inter partes review.

The Federal Circuit heard argument in June on whether an artificial intelligence can be an "inventor" for the purposes of a patent under U.S. law. It also granted wins to Netflix in two cases, one in which it remanded a case over a video deblocking patent for another review of the patent's validity, and one in which it affirmed an award of $400K in fees to Netflix due to the plaintiff's unduly burdensome procedural maneuverings.

In cases alleging the unauthorized use of the plaintiff's special effects technology in blockbuster motion pictures, a judge in N.D. Cal. granted motions for reconsideration and reversed his denial of major movie studios' motions for summary judgment as to two of the films at issue due to a failure to establish a causal nexus between the use of the technology and the defendants' profits.

In D. Del., video game developer Take-Two Interactive was denied its attorneys' fees after it defeated a patent lawsuit over its *Grand Theft Auto* and *NBA* game series.

Finally, the brief and terrible reign of Judge Alan Albright over the nation's patent cases is at an end, with the Western District of Texas announcing that all patent cases in the District will be randomly assigned to a judge in the District, but not necessarily in the division where filed. The chance of drawing the openly plaintiff-friendly Albright (the sole federal judge in the Waco division) is now just 1 in 12, meaning that plaintiffs can no longer guarantee that Albright will hear their cases if they file in Waco.

Personally, I think that if the District is going to turn patent litigation into "Wheel of Fortune," there should also be two spaces on each spin that will send the plaintiff directly into bankruptcy.

D. Trade Secrets/Misappropriation/Conversion

We'll end the IP section this issue with two cases from California state court. In the first, a judge ruled that an Oakland woman had sufficiently stated claims against Pinterest for deferred compensation for her contributions to the platform's concept. In the second, anonymous Q&A social app NGL has been sued for misappropriating the trade secrets of a competitor with respect to the use of bots to send questions to the app's users.

III. Platform Management

A. Section 230

Omegle, an online chatroom that matches random strangers for one-on-one chats, was sued in D. Or. for a variety of product liability, negligence, and FOSTA-related claims by a former user who, as a minor, was connected by the service with an adult male who sexually exploited her. The court denied Omegle's attempt to invoke § 230 as to the product liability and negligence claims, holding that those claims related to facilitating the connection between the plaintiff and her abuser, not the content of their communications. Prof. Goldman reasonably points out that

there would have been no injury without the communication, so the court's analysis doesn't hold water. The court dismissed the FOSTA claims, however, holding that one was barred by § 230 and did not fall within the FOSTA exception, another relied on a statutory provision passed after the alleged tort that was not retroactive, and the third failed for failure to plead a heightened degree of knowledge.

An Ohio appellate panel added another ruling to the growing set of decisions saying that Section 230 protects retweeting that does not add new content to the original message.

B. Elections & Political Advertising

So, before I get into this next topic, let me make clear: There is no evidence, compelling or otherwise, that Google's Gmail spam filter has been intentionally designed to filter out Republican fundraising emails. To the extent there is a disparate impact between the parties' emails, the most plausible explanation I've seen so far is that Republican fundraising teams are simply using email tactics that are more likely to trip the spam filters than Democratic teams. But pushing a victim narrative is apparently more appealing that becoming a little less liberal with the spam (so to speak), so Senate Republicans have introduced a bill that would ban email services from filtering federal political campaign messaging.

What could possibly go wrong? Well, we'll find out, because Google has proposed a pilot program to whitelist candidate emails, just waiting for FEC clearance (because Republicans have in the past liked to argue that moderation of election-related content is a form of campaign contribution to the moderatee's opponent – yes, I said moderatee). Google users are not impressed with the idea.

C. Content Moderation

Before we get into the latest developments in this section, let's note that June saw the 25th anniversary of *Reno v. ACLU*, in which the Supreme Court ruled that the First Amendment applies with full force to the internet and struck down the bulk of the Communications Decency Act (except for what we now refer to as Section 230). It would be a very different world had the Court reached a different result.

Both NetChoice and Florida's Attorney General have indicated their intent to take the Eleventh Circuit's decision striking down the bulk of Florida's social media moderation law up to the Supreme Court, filing a joint motion to stay issuance of the Court of Appeals' mandate. The parallel case over Texas' law is still awaiting a ruling from the Fifth Circuit, but with the Eleventh Circuit case on the way up it seems likely the Fifth Circuit case will follow. Notwithstanding the Supreme Court's recent intervention suggesting that five justices seemed to think that platforms had the better side of these arguments, there's really no certainty what would

happen on a full appeal; what we do know is that this litigation is costing the states more than a few pretty pennies to fight.

And we'll see more of these fights until the Supreme Court puts its foot down. We've got legislation pending or passed in at least 34 states that would compel social media sites to leave up and/or take down certain content, with the "and/or" largely breaking along the red/blue divide.

Among the latest to make it into law is a New York statute that compels "social media networks" to publish a policy on "hateful conduct" and have a mechanism to take complaints about such "conduct." Quick tip, using the term "conduct" isn't going to fool anyone, and even if sites could technically adopt a policy saying "Hate speech? We luvz it!," the law still unconstitutionally compels platforms to state a position on the issue. Meanwhile, California's got a problematic bill that would compel publication of editorial rules and require platforms to tell the state AG what those rules say about hate speech, racism, extremism, disinformation, and other such vague categories.

And then there's South Carolina, whose brand new anti-abortion bill contains a prohibition on hosting a website or providing "an internet service" with information that is targeted at pregnant South Carolinians and "reasonably likely to be used for an abortion." Can such speech be punished as inciting unlawful activity? Can one state regulate speech in another state in this manner? It's worth noting that the law doesn't only target social media platforms, but other publications as well. At the very least it seems overbroad, inasmuch as it doesn't require that the speech be *intended* to facilitate abortions. (For a recent case raising similar questions in the context of a federal immigration law prohibiting speech that encourages people to remain in the country illegally, see this order denying en banc rehearing from the Ninth Circuit and the accompanying dissents calling on the Supreme Court to take the case.)

And just to mix things up more, we've got Sens. Elizabeth Warren and Amy Klobuchar telling Meta to stop removing posts about abortion that don't violate its community standards and a coalition of GOP attorneys general threatening Google with legal action if it blocks search results for anti-abortion pregnancy centers.

Donald Trump is taking the dismissal of his claim against Twitter over his deplatforming up to the Ninth Circuit, no big surprise there. Meanwhile, the authors and publisher of an anti-vaccine book about COVID-19 are asking the Ninth Circuit to flip a district court decision refusing to order Sen. Warren to retract a complaint letter that she sent to Amazon about the book. That sounds…unlikely to happen, for several reasons.

In N.D. Cal., a judge bounced another account suspension lawsuit, this time against Twitter over a user who tweeted "HANG THEM ALL." Section 230 does the heavy lifting here, but the court

also found for Twitter on the merits of the underlying causes of action. In the same court, Meta filed an anti-SLAPP motion to dismiss claims filed by a putative class of adult performers over the blocking of their social media activity. And in S.D. Fla., a magistrate recommended that Google recover its attorneys' fees in fighting off a meritless RICO lawsuit over its alleged conspiracy to suppress conservative speakers.

Twitter is resisting a request from the January 6 committee for internal communications relating to how the platform moderated user activity relating to the siege at the Capitol, claiming that the request interferes with its First Amendment-protected editorial discretion. Fair enough, really. Meanwhile, U.S. senators are pressing TikTok, Facebook, Twitter, and Telegram on their handling of Russian disinformation about the war in Ukraine.

Texas AG Ken Paxton continues to pursue his vendetta against Twitter, using Elon Musk's complaints about bots on the service as a basis to launch another investigation into the company. He's looking for evidence that will let him argue that Twitter has deceived the public in its reporting on the number of bots. You will of course remember that this isn't Paxton's first attempt to ride an anti-tech narrative to political success.

Meta's Oversight Board issued its first annual report in June, revealing that it received more than one million appeals (mostly challenging the removal of hate speech, violent speech, and bullying) of which it issued decisions in 20 cases and reversed the platform's decision in 14. Meanwhile, Meta has asked the Oversight Board to weigh in on whether it is time to change the company's policies on COVID-19 misinformation.

Finally, I wanted to flag a (relatively) new law review article that just came across our radar discussing the role of amplification of content under the First Amendment. Amplification is at the core of any discussion regarding the effects of social media, and more efforts to think about its role in the constitutional balance are always worthwhile.

D. Terms of Service & Other Contracts

Speaking of new papers, we've got an interesting working paper (technically from the end of May, but presented in June) analyzing policies in video game platforms for user-generated content. As social media begins to merge with the metaverse, the norms of shared video game spaces could begin to take on greater weight – so this is an interesting space to watch.

IV. Other Content Liability

A. Defamation

The Ninth Circuit reversed the dismissal of a defamation claim for lack of personal jurisdiction in the District of Arizona, holding that the plaintiff's residence in Florida did not mean that he

could not be injured in Arizona by emails and other communications allegedly directed at undermining his relationship with an Arizona client.

A YouTuber hit with about $4M in damages in a defamation action brought by rapper Cardi B has filed her primary brief on appeal to the Eleventh Circuit, arguing a lack of actual malice among other issues.

In C.D. Cal., a priest secured a default defamation judgment of $300K plus an injunction requiring the removal articles and statements at issue from the internet and prohibiting the defendant's posting or reposting of any statements about plaintiff and his wife's "marriage or family life, the lives of their children, and the lives of their grandchildren."

A Canadian woman with a truly wild history of defaming people online (and a label as a vexatious litigant in the courts of Ontario) sued the New York Times in S.D.N.Y., along with a wide array of people and entities many of which were vaguely or not at all connected to the Times' reporting about her. The case was, unsurprisingly, dismissed for a bunch of reasons.

Also in S.D.N.Y.: A punitive defamation damages award of $125K arising out of the defendants' social media posts about the plaintiff's ownership of a motion picture was held to be excessive where the jury awarded no compensatory damages. We've also got a new lawsuit over a tweet by a Fox Sports radio host about the conditions under which an MLB player left the plaintiff's management agency.

A judge in W.D. Va. ruled that a plaintiff had stated a claim for defamation based on her allegations that a man whom she briefly dated had sent her government employer false emails accusing her of stalking him.

Here's a perennially tricky one: Can openly homophobic messages accusing a man of trying to "turn his daughter gay" convey a defamatory meaning? An Indiana appellate panel says no.

The Iowa Supreme Court knocked $8 million off a defamation verdict in a libel case filed by an employer over an ex-employee's social media posts; even though the court expressed concern with the speed with which damage to reputation could spread online, the employer's evidence of lost profits was scant.

We've got a bunch of #MeToo/#TheyLied cases for this issue:

- New York's new anti-SLAPP law was responsible for the dismissal of a defamation case in E.D.N.Y. over a post by the moderator of a Facebook group. The court held that the plaintiff failed to plead that the moderator's post, which explained the plaintiff's banning from the group as a result of #MeToo allegations, was made with actual malice.

- A Minnesota appellate court held that a #MeToo allegation on Facebook did not involve a matter of public concern; thus, the plaintiff could claim presumed damages and did not have to show either proof of actual harm or actual malice to recover.

- The Pennsylvania Superior Court held that a college student accused by a third party of raping a girl had stated a defamation claim against the accuser, finding that the complaint adequately alleged recklessness that would overcome a conditional privilege for reports of misconduct.

- A Washington appellate panel reversed the dismissal of a defamation suit filed by a developer of role-playing games against major gaming convention Gen Con over online statements announcing that the developer had been uninvited from the convention over numerous instances of harassment and abuse.

In other bits and pieces: A Facebook rant about the poster's purchase of allegedly diseased bees resulted in a $370K defamation verdict against the poster in a lawsuit brought by the seller in Minnesota state court. And a doctor sued a Houston hospital in Texas state court for tweets alleging that her statements about COVID-19 vaccines and other treatments did not "reflect reliable medical evidence."

Finally, a new Washington state statute allows a judge hearing a petition for a protective order to issue a broad restraint against making libelous communications about the petitioner to third parties – and as Prof. Volokh points out, this could be based on nothing more than the judge's finding that the respondent has defamed the petitioner at least twice before.

B. Commercial & Professional Speech

The Supreme Court denied cert on a constitutional challenge to gag orders built into SEC consent decrees. Meanwhile, Elon Musk has appealed to the Second Circuit from a district court judge's refusal unwind provisions of an SEC consent decree requiring Musk to allow a Tesla lawyer screen his tweets. The decree stemmed from allegedly misleading statements Musk had tweeted regarding an attempt to take Tesla private.

The Fourth Circuit held in a false advertising case that, when determining whether a company is in contempt of an order to remove misleading materials, it has constructive notice of what is on its website and social media accounts. Moreover, "removal" means more than just disabling links to material that is still on the site.

A website that promoted itself as a hub to make donations to various charities while scoring chances to win prizes faced, inter alia, deceptive practices claims in C.D. Cal. over the fact that it kept 85% of the "donations" for itself (a detail relegated to the fine print). The court held that the solicitation of donations was protected speech under the First Amendment and was not, by itself,

deceptive, but particular statements that indicated that substantially all of the money would go to charity could support a claim. In the same court, another judge held that while use of a nondescript pseudonym to post an online review is not by itself literally false, it could be misleading in context if it supported the impression that the poster was a consumer rather than a competitor.

In W.D. Wash., a judge granted the plaintiff partial summary judgment on Lanham Act, defamation, and state unfair trade practices claims in a dispute between providers of online ordination ceremonies. Meanwhile, in Washington state court, Amazon has sued the moderators of more than 10,000 Facebook groups allegedly operating fake product review rackets. (By the way, does anyone know what the record is for the most defendants named in a single lawsuit?)

The FTC has announced that it is planning a comprehensive update to its guidelines as to deceptive practices in digital advertising, to take into account emerging issues such as dark patterns and manipulative user issues. A pair of technologically savvy Congressfolk have also urged the FTC to look into deceptive practices in the Virtual Private Network industry that lead consumers to believe their communications are more secure than they actually are. The lawmakers specifically pointed out that women seeking an abortion might unwittingly expose their activity.

C. Threats, Harassment, and Incitement

In June, the Third Circuit adopted a narrowing construction of the federal cyberstalking statute, 18 U.S.C. § 2261A, that limits speech falling within the "intimidation" and "harassment" proscribed by the statute to that which threatens a victim or puts the victim in fear of death or bodily injury (thereby restricting the proscribed speech to true threats and speech integral to criminal conduct).

The Tenth Circuit held that a district court judge improperly dismissed a public high school student's First Amendment claim over his expulsion for posting a reference to "exterminate[ing] the Jews" on Snapchat. Citing the Supreme Court's decision in *Manahoy*, the Court of Appeals ruled that the school could not reply upon characterizing the post as harassment or hate speech when the post was not a true threat and there was no reasonable expectation of disruption at the school. Meanwhile, a judge in D.N.J. found that a private high school student had stated a contract claim under the school's handbook, after she was allegedly disciplined without the appropriate procedures for a video clip in which she used a racial slur.

In E.D. Cal., Devin Nunes avoided an award of attorneys' fees against him by agreeing to stop pursuing a cyberstalking case that was facing an imminent anti-SLAPP dismissal; the case was against a man alleged to be the spouse of the operator of the satirical "Devin Nunes' Cow" Twitter account.

Remember March 2020? Remember what that was like? Now consider this fellow, who in the earliest days of the pandemic posted a fake warning to Facebook about deputy sheriffs in a Louisiana parish receiving an order to shoot those infected with COVID-19 on sight. He was arrested by less-than-amused law enforcement officers for "terrorizing" (defined as "the intentional communication of information that the commission of a crime of violence is imminent or in progress or that circumstances dangerous to human life exists or is about to exist, with the intent of causing members of the public to be in sustained fear for their safety, or … causing serious disruption to the general public"). The poster subsequently sued for violation of his Fourth Amendment rights, but a district court judge in W.D. La. held there was probable cause for the arrest.

A New Jersey appellate panel ruled that a Snapchat video naming a witness who identified a criminal defendant as a murderer, paired with with a woman's voice saying "[w]ell, people really be tellin', people be tellin'. That is not right, that is not right," was an unprotected true threat. The court affirmed the Snapchat poster's conviction for witness tampering.

In June, the White House launched a task force intended to study online abuse and the connection between online hate and real-world violence.

V. Infrastructure

A. Accessibility

The Ninth Circuit heard argument in July on whether it should reinstate a lawsuit against Facebook alleging the company's housing marketplace discriminated on the bases of race, marital status, and disability in presenting housing ads. Meanwhile, Meta reached a settlement of similar claims brought by the U.S. Department of Justice in S.D.N.Y. alleging violations of the Fair Housing Act.

A new lawsuit in W.D. Pa. alleges that online gambling company DraftKings' services violate the Americans with Disabilities Act because they are inaccessible to the blind.

B. Antitrust

In N.D. Cal.: A developer lawsuit against Google over its 30% cut of Google Play store sales has reached a proposed $90M settlement. Sony secured dismissal of antitrust claims over its operation of the PlayStation Store because the plaintiffs failed to allege anticompetitive conduct as opposed to anticompetitive effects; the plaintiffs were granted leave to amend. And the FTC sued Meta Platforms to stop Meta from acquiring a virtual reality studio.

That last case is particularly interesting (or worrying, depending on your point of view), because the virtual reality market is still nascent and the FTC's intervention appears to mark a shift

towards attempting to prevent antitrust issues in digital markets from emerging rather than waiting to see how things develop. Meanwhile, it looks like the FTC is getting serious about probing Amazon's purchase of MGM Studios.

The Senate passed a bill that would prevent antitrust defendants from moving to transfer cases filed by state AGs from the venue in which they were brought, a measure designed to prevent tech companies from moving cases to friendlier courts. However, the big antitrust bill on the table, the American Innovation and Choice Online Act, is running into trouble. Four Democratic senators called for amendment of the bill to clarify that it does not impose liability for content moderation practices that allegedly impair competition, a significant issue given that at least one Republican senator has said that he supports the bill precisely because it would allow lawsuits over moderation. Whether for that reason or others, Sen. Majority Leader Chuck Schumer has said that he doesn't think the bill currently has the votes to pass.

Finally, there is rumbling that the DOJ is getting ready to file an antitrust suit over Google's ad-tech business, and is expected to reject a settlement offer from the company.

C. Net Neutrality

Time is running out for Gigi Sohn's nomination to the FCC. There are now reports that the White House might try to push through the nomination after the midterms, when lame-duck senators won't have to worry about the fallout from approving her, while simultaneously feeling out other candidates.

Even if the deadlock is broken, any efforts by the FCC to act on net neutrality could well be complicated by the Supreme Court's decision at the end of June in *West Virginia v. EPA*, in which the justices doubled down on the "major questions doctrine." The doctrine states there are "extraordinary cases" in which the "history and the breadth of the authority that [a federal agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority; in such cases, held the Court, an agency must be able to establish "clear congressional authorization" for its actions.

Is promulgating net neutrality rules an "extraordinary case" requiring "clear congressional authorization"? Perhaps, but fortunately for net neutrality proponents Democratic senators are introducing new bills intended to clearly establish that authority. The Net Neutrality and Broadband Justice Act would classify broadband as a telecommunications service subject to heavier regulation by the FCC under Title II of the Communications Act, ending the ping-ponging between Republican and Democratic FCCs that resulted when classification into Title I or Title II was left up to the Commission. Meanwhile, the Uncap America Act would prohibit all

data caps except those tailored for "the purposes of reasonable network management or managing network congestion."

D. Domain Name System

Nothing to report this month.

E. Taxation

Apple and the city of Chicago have settled Apple's challenge to the application of Chicago's municipal amusement tax to streaming services, ending a lawsuit in Illinois state court.

F. Wire & Wireless Deployment

The FCC has issued a notice of inquiry proposing to raise the national broadband standard for speed from 25Mbps down/3Mbps up to 100Mbps down/20Mbps up. The existing standard, states FCC Chair Jessica Rosenworcel, is woefully inadequate for internet users (particularly in light of the pandemic).

G. Artificial Intelligence & Machine Learning

Nothing to report this month.

H. Blockchain, Cryptocurrency, & NFTs

Are cryptocurrencies and NFTs securities? That's the big question, with the DOJ charging a former exec at OpenSea, the largest NFT market, with a scheme to commit insider trading in an indictment in S.D.N.Y., while the SEC explicitly asserts that cryptocoin assets are securities in an insider training complaint in W.D. Wash. against a former Coinbase employee. (A pending bill in the Senate would end the debate by classifying crypto not as a security but as a commodity under the purview of the Commodity Future Trading Commision, while the Treasury has requested public comment as it attempts to develop policy in the area.)

An online business that sold NFTs including the IBM logo to commemorate the 40th anniversary of the first personal computer, at a website with the domain name IMBPC.io, filed suit in D.S.D. against IBM over the latter's sending of a takedown notice to the website hosting service and filing of a WIPO complaint to seize or cancel the plaintiff's domain registration.

The FTC has reported that cryptocurrency scams on social media are a growing scourge, with victims losing more than $1 billion in 2021.

A bizarre turn of events has left the ability of producer/actor Seth Green to produce a television show in jeopardy. Green planned to base the show around his "Bored Ape" NFT, using

commercial exploitation rights that were part of the blockchain license for the NFT itself. But then, the NFT was stolen through a phishing attack and purchased by a person who appears to have been a good faith buyer. So, did the rights to exploit the NFT travel with the blockchain transaction to the current holder?

Confused? Here's another recent primer on the whole NFT rights thing.

A wide variety of companies with an interest in digital virtual spaces came together in June to form the Metaverse Standards Forum, a body that hopes to promote interoperability between systems in the metaverse. There are a few big names with metaverse aspirations that are not yet involved, such as Apple and Roblox.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

So. *Roe v. Wade*. That happened. I've mentioned the fallout from *Dobbs* a few times earlier in this issue, but really from the perspective of digital media law it all boils down to this. State law enforcement will inevitably turn (LATE UPDATE: already has turned) to social media companies and other entities that record digital traces of individuals' lives for evidence that women are seeking or have obtained abortions. That poses an immediate and life-threatening chill on the ability of women to seek and to discuss health care options.

In the first instance, there are some steps that both individuals and platforms can take, but there's only so much that companies can do under current law in the face of valid search warrants and other legal process. That has led Democrats in Congress to focus on shoring up data privacy, including the introduction of bills such as the My Body, My Data Act (restricting the collection and disclosure of personal reproductive health data) and the Health and Location Data Protection Act (prohibiting data brokers from selling or sharing health or location data). Congressfolk, citing *Dobbs*, have also called on the FTC to investigate whether Apple and Google are engaging in unfair and deceptive practices by collecting and selling the data of mobile phone users.

Ultimately, though, if people talk about seeking or facilitating abortions on social media, it's hard to imagine services successfully scrubbing those communications from their systems – and doing so would inevitably trigger an outcry about interference with users' speech. If that information is available, it's tough to see how platforms could resist states' legal demands in the absence of a federal law expressly declaring that information off limits. And even that presumes that the states tell platforms what the information is for so they know to object, which is not a given.

Oh, what else…okay, the Supreme Court denied cert in *Jewel v. NSA*, putting the final nail in the coffin of an attempt to challenge the constitutionality of the NSA's surveillance of American

citizens' internet traffic. Not because the surveillance is, y'know, constitutional or anything, but because it's hard to prove standing when what the government did is confidential.

In the Ninth Circuit, the defendant in *U.S. v. Rosenow* – the case in which the Court of Appeals offhandedly stated that government orders to preserve your online account for later investigation don't implicate the Fourth Amendment – has filed a petition for rehearing.

In W.D. Tex., a U.S. Marshal is being prosecuted for misusing his ability to run searches on a cell location database to run searches for personal reasons. In related news, the Supreme Judicial Court of Massachusetts held that if cops get a warrant and also quickly and permanently get rid of irrelevant data, then there's nothing per se unconstitutional about law enforcement obtaining a data dump from cell towers.

Meanwhile, new documents obtained from the Department of Homeland Security by the ACLU have revealed that the Department has been routinely and pervasively accessing cell location data from two data brokers, who gather data on the order of 15 billion data points from more than 250 million cell phones daily. Other documents obtained by separate groups revealed that Immigration and Customs Enforcement is also running millions of background checks on LexisNexis. Does that kind of thing make you uncomfortable? It did the House Judiciary Committee, which held a hearing on a bill that would stop law enforcement from making end runs around the Fourth Amendment by simply buying data.

Twitter's latest transparency report shows a sharp increase in government demands for data, while the U.S. and the UK have agreed to share cell phone and social media data to fight major crimes and terrorism on a fast track that bypasses normal MLAT processes.

Sigh. This is always the most dystopian section of this article, at least since I stopped doing full write-ups on China. And India. And Russia. And the Philippines. And…you know what, I'm just depressing myself. Moving on.

B. Encryption

Former CIA employee Joshua Schulte was retried and convicted in S.D.N.Y. in his second trial on espionage charges related to his public disclosure of the CIA's ability to bypass the encryption on Apple and Android devices.

In E.D. Tenn., the FBI obtained a search warrant to force a suspect to unlock an encrypted app with his facial biometrics.

Bruce Schneier, who might know more about encryption technology and policy than anyone else alive, has sent up a red flag on pending antitrust bills because they contain provisions that would intentionally or unintentionally make end-to-end encryption impossible.

C. Biometric Tracking

Nothing to report this month.

D. Domain Seizure

The FBI seized four domains hosting the SSNDOB marketplace, an illegal market for the sale and trading of personal information such as social security numbers and dates of birth (SSNs and DOBs, get it?).

I also mentioned some seizures up under Copyright, if you missed that.

E. Content Blocking & Prior Restraints

So, the Sixth and Ninth Circuits have now weighed in on the question of whether a politician can violate the First Amendment by blocking constituents on social media. The Sixth Circuit, distinguishing the Second Circuit's holding in *Knight First Amendment Institute v. Trump* on the basis of the pervasive government involvement in Trump's account, held that a city manager's activity on a Facebook page created as a personal page before he took office did not constitute state action. The Ninth Circuit, in contrast, held that social media pages operated by members of a school district board of trustees were intended for official communication with constituents about public issues and were thus constitutional public fora. In related news, a judge in S.D. Tex. held that political campaign pages for incumbent candidates on Facebook are not public fora, because campaigning for office is different than carrying out the duties of the office.

A judge in D.N.M. enjoined New Mexico state prosecutors from pursuing charges against a conservative-backed website that intends to publish voter registration records from across the United States, calling the state's actions against the site a prior restraint.

A private prison company is tussling in M.D. Tenn. with a lawyer representing a deceased prisoner from one of the company's facilities, with cross-complaints about the lawyer's active tweeting about what he's learned about the company during the case.

A California appellate panel held that a probation condition that prohibited a minor from using "gang symbols" on "social media" did not violate the minor's First Amendment rights.

F. Online Access to Government Information

So, you might have heard that the federal judiciary has decided to make PACER free. It hasn't. What it said is that if and when PACER is replaced, searches will be free in the new system. So, it's just maybe someday, and you'll still have to pay by the page to actually see all but the most basic court records. Because, what, ISPs charge for bandwidth on a per-page basis?

Finally, Maryland's top court held that the presumption of openness and the state's public records law requires the state's Administrative Office of the Courts to disclose the key used to connect district court judges' names with three-character codes used in the Judiciary Court Search database.

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Z. Nigeria

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LL. Uzbekistan

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MM. Zimbabwe

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VIII. Miscellaneous

A social media fraudster pled guilty in S.D.N.Y. to impersonating members of the Trump family online to collect "donations" to a non-existent get-out-the-vote project, and agreed to repay approximately $7,300 he netted from the scheme.

The SEC stepped up its investigation into a special purpose acquisition corporation poised to purchase Donald Trump's social media company, with a new subpoena investigating the SPAC's relationship with other entities and its due diligence of potential acquisition targets other than Trump Media & Technology Group.

Twitter sued Elon Musk in Del. Ch. in July, seeking to force him to complete his purchase of Twitter after he announced that he was backing out of the deal. The complaint also accused Musk of violating securities rules regarding disclosure of his Twitter holdings, raising the potential for the SEC to investigate Musk (yet again). Twitter then sought to expedite the proceedings; Musk opposed an expedited trial, casting the dispute as being about the effect of undisclosed spam accounts on Twitter's market value. The Chancellor sided with Twitter and scheduled a five-day trial in October. Musk filed an answer and counterclaims under seal at the end of July.

A judge in D. Conn. ruled that the First Amendment does not create a categorical bar to introducing rap lyrics posted to social media into evidence in a criminal trial to prove the existence of a conspiracy, but limited the evidence to lyrics specifically related to the alleged crime at issue. A pending bill in Congress, the Restoring Artistic Protection Act (see what they did there?), would amend the Federal Rules of Evidence to create a presumption against the admissibility of an artist's creative or artistic expression against the artist.

We'll end with this head-scratcher from a Missouri appellate court. Former Gov. Eric Greitens uses a self-destructing messaging app for public business. A government accountability project sues Greitens for destroying public records. The appellate court: No, well, see, the messages were automatically destroyed, so they were never kept by the Governor's office, which means they weren't records. Sigh. The court volunteered that it wasn't happy with Greitens's use of the app but said that was the legislature's problem.

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Well, here we are at the end of another issue. Enjoy the last few weeks of sunshine before autumn comes creeping in, and I'll see you in September!