The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone! I'm writing this on a day when the weather in New Jersey dipped into autumn-like temperatures for the first time this season, signaling that we're moving into our fall events season here at the Media Law Resource Center. I'm looking forward to seeing many of you at our three-day Media Law Conference at the start of October – there's still time to register! But before then, we need to finish up the summer.

This month, we've got the Solicitor General finally weighing in on certiorari in the *NetChoice* social media moderation cases before the Supreme Court. With the Biden Administration arguing that the justices should take up the First Amendment challenge to the portions of the Texas and Florida laws compelling social media services to carry third-party content, the chances of the Court intervening to resolve the circuit split are very high – never mind the fact that the Court at least hinted that it might do so back when it blocked the Texas district court injunction from going into effect.

That being the case, I've been thinking quite a bit about how to argue the First Amendment issues in this case to the Supreme Court – especially this Court, which has shown itself to be less deferential to concepts of *stare decisis*. Simply arguing by analogy to pre-digital editorial discretion cases such as *Tornillo* seems like a perilous course, given that the analogy game invites the justices to come up with technology-based distinctions. It also runs the risk of undermining *Tornillo* itself, should the distinction be phrased in such a manner as to carve away helpful language in the earlier ruling. For example, what if the justices embrace the common misreading of *Tornillo* that the result turns on the fact that there is limited space in a newspaper? What would that do to newspaper websites?

I also believe that an argument premised solely on the rights of social media platforms as speakers in their own right is risky. While I agree platforms need to assert forcefully the idea that their selection and moderation of content is First Amendment speech, this line of argument can also be twisted to put a court in the position of balancing the speech rights of users versus the speech rights of the platform, inviting all manner of weirdness. We saw an example recently in an order from the Northern District of California, in which a party sought a TRO to compel YouTube to restore access to videos blocked as vaccine misinformation. The district judge ran through the standard four factors and, on the balancing of the equities, found that both parties had First Amendment rights as speakers but that the user's right to speak edged out the

platform's right. The judge denied the TRO on other grounds, but this piece of the analysis troubled me by suggesting the First Amendment question was a wash.

One can also easily imagine an attack on the rights of platforms as speakers along the lines of the public accommodation and common carrier theories to which Justice Thomas has shown favor. While it is possible to go down the rabbit hole to fight off those theories, I was thinking about whether there might not be a better or alternative approach that heads off that debate.

As those who have read my earlier writing will know, I'm a big fan of returning to first principles in these situations. Stepping back, I believe there's a powerful argument that when platforms moderate content, they are not only speaking in their own right, but defending the First Amendment right of their broader user community to seek information that is relevant and helpful to them. That right has been recognized repeatedly by the Supreme Court (*see, e.g.*, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and its progeny).

Instead of creating an implicit balance between the free speech rights of users and the rights of the platform, this argument would contrast the speech right of particular users to spout nonsense with the First Amendment rights of the entire user base to seek needed information. In fact, the district court decision I mentioned above held that the importance of protecting the public about health misinformation outweighed the plaintiff's First Amendment interest in posting its videos. However, it failed to recognize the public's interest in receiving relevant and reliable health information as deriving from the First Amendment itself. Recognizing the constitutional dimension of the public's interest in their role as recipients of information places the platform's role on a dual First Amendment footing between its own rights and the audience rights that it serves.

Here's a stab at how I see such an argument flowing:

- The First Amendment recognizes and protects the interests of both those who speak and those who have an interest in receiving information, but these interests are not the same.
    - The speaker's interest is a liberty interest grounded in the ability to use their speech to accomplish some particular goal.
        - This interest might depend on the quality of the information that the speaker conveys but does not necessarily do so, because speakers can be motivated to lie or deceive their audiences to achieve their goals or be motivated by non-informational interests such as hatred or bias.
    - The public's interest is a rationality interest in receiving information that will allow them to take a rational approach in making decisions or improving their lives.
        - While speakers might be denied one course of action if their ability to speak is limited, listeners might be deprived of *any* rational course of action if denied the information they need.

        - Unlike the speaker's interest, the public's interest necessarily depends on the information received possessing a degree of information quality and can be harmed by low quality information.
            - Quality can be determined based on issues such as truth, relevance, whether the information is up-to-date, and so forth.
- The most powerful theories of speech in First Amendment jurisprudence focus on the public need for information rather than the liberty interest of the speaker and recognize that the former is more compelling than the latter.
    - Theories of freedom of speech that focus on the needs of the audience justify the strongest protection for speech.
        - The rationality interest that the public has in receiving information is echoed in the Holmesian marketplace of ideas, Meiklejohn's democratic theory, and so forth.
        - These theories protect speech even when it is potentially harmful to countervailing interests such as reputational or economic interests – *see New York Times v. Sullivan*, et cetera.
    - Theories of freedom of speech that focus on the liberty interest of the speaker require that interest to yield in the face of a broader range of countervailing interests.
        - Autonomy and self-realization theories generally recognize a countervailing harm principle that limits a speaker's rights, in the manner that other liberty interests are limited.
        - Note also Meiklejohn's comment on the relative weights of speakers' personal interests versus the public need for information.
        - We see this in the reduced scrutiny for time, place, and manner restrictions that do not foreclose the communication of a particular message, such that the only interest impaired is the interest of the speaker.
- Social media platforms are protected by the First Amendment in their efforts to serve the needs of the public for information quality.
    - Speaker and public interests are at odds when a speaker is conveying low-quality information.
    - Given that the public interest is broader and more urgent than the speaker interest, the First Amendment must protect intermediaries who accept responsibility for which information to amplify to an audience.
        - This is true regardless of whether the intermediary gathers any of that information itself or creates the content embodying that information, because the First Amendment right asserted by platforms to moderate content derives in part from the public's right to receive information.
        - Members of the listening public are not always in a position to distinguish between low and high quality information.

        - While in an ideal world, listeners could be presented with all speakers' information and make judgments, no individual has the capacity to evaluate all of the information submitted to a modern social media platform.
    - Content moderation serves the public interest regardless of the medium of communication and regardless of whether it occurs a priori during an editorial process or a posteriori in response to complaints or post-publication review.
        - In fact, social media companies engage in both a priori and a posteriori content review.
    - Concerns that private platforms are making decisions for the public are ameliorated by economic forces and the availability of competing platforms.
        - There are many different platforms, all of which are moderated independently of one another, to which speakers blocked by one platform can turn.
        - If that competition is deemed inadequate, that concern should be remedied through measures focused on the operation of the economic marketplace rather than through government hijacking of the content moderation process.
        - The fact that most platforms moderate offensive speech that can impair users' experience and lead them to stop using the service is not market failure, but the market working as it should.
- The Texas and Florida laws violate the First Amendment by supplanting platform information quality determinations with the state's own judgment.
    - A complete prohibition on blocking and restriction of either all content or certain categories of content is neither content-neutral nor viewpoint-neutral.
        - Instead, it represents the state's judgment that the specific content disfavored by the platforms in fact has value, overriding the platforms' own judgment.
        - This violates the most fundamental principle of First Amendment jurisprudence, namely, that if anyone is making quality determinations it should not be the government.
    - Even if state law attempts to impose viewpoint-equivalence could be considered viewpoint-neutral, they violate the First Amendment by flipping the hierarchy of speech interests and prioritizing speakers' rights over the public's informational need.
        - By allowing speakers to bypass quality filters, speakers are made the dominant force on a platform.
        - Conversely, by subjecting listeners to an undifferentiated mass of content, the law impairs the public's interest in quality information by complicating or even eliminating their ability to find information they need.

The basic idea here is that of the three parties who could possibly make content judgments – the government, the platform, and the end users – we've never trusted the government to do so and the end users can't because they lack the bandwidth, leaving the platforms in the critical position of defending the public's need for information quality. I'm not suggesting filing a brief that spells all of this out, necessarily, but I do believe that before the Supreme Court it is critical for

the platforms to be able ground the First Amendment rights they are asserting in fundamental theory, and to do so in a manner that is logically stronger than the facile arguments about protecting user speech advanced by the states.

But there are a lot of other developments to cover in this issue, so let's get going!

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I. Privacy

A. Anonymity

A judge in N.D. Cal. rejected a Twitter user's invocation of Japanese privacy rights in an attempt to proceed pseudonymously before the court. In the same court, Reddit persuaded a judge to quash a subpoena from film companies seeking the identities of users who discussed torrenting.

A coalition of media outlets filed an amicus brief before Nevada's Supreme Court in support of protecting the identities of confidential sources named in newsgathering materials contained on murdered journalist Jeff German's digital devices. Meanwhile, the mayor of Durham, North Carolina, directed the city attorney to write to the Wikimedia Foundation in an attempt to discover the identity of pseudonymous Wikipedia editors who added truthful but negative information to city officials' entries.

B. Personal Information

We have a bunch of updates in the website activity tracking cases this month.

In N.D. Cal.: Bleacher Report failed to secure dismissal of a VPPA claim; Disney succeeded in having a state wiretapping claim kicked to arbitration; Google's argument that users had consented to data collection in "private browsing mode" was rejected; a new lawsuit was filed

over the use of a Google tracking pixel on tax preparation websites; Meta got a mixed-bag ruling on its motion to dismiss claims arising out of the use of the Meta Pixel on healthcare online portals, with some claims surviving and others sent back for another try; and the Regents of the University of California lost a motion to dismiss a claim that they had breached contractual promises of confidentiality through use of tracking tools on health sites.

In D. Mass., class counsel's request for fees from a settlement fund in a case over the use of the Meta Pixel on the Boston Glove website was cut by more than 50%. (This is one of the longer decisions that I've seen in a line order on the docket, as opposed to a separate written opinion.) Also in D. Mass., a judge gave preliminary approval to a $2.6 settlement of tracking claims against a sports streaming website. Meanwhile, down in S.D.N.Y., the NBA and NBCUniversal both defeated VPPA tracking claims on the basis that the plaintiffs failed to establish that they were subscribers within the scope of the law. And in W.D. Pa., claims against GameStop over its alleged use of the Session Replay Code recording software to document user interaction with its website were dismissed for failure to plead "sufficiently concrete harm to confer standing."

In other privacy issues, Tile and Amazon are facing a new lawsuit in N.D. Cal. alleging that Tile's location tracking tags fail to provide adequate protection against unauthorized tracking of the devices. In the same court, Meta secured dismissal of claims that it tracked smartphone users via its suite of apps, and Facebook users have voiced their support for a $725 million settlement over the privacy of user profiles.

The constitutional challenge to Montana's TikTok ban drew amicus support this month, with the ACLU, EFF, and CCIA weighing in to support a preliminary injunction blocking enforcement of the law. At the federal level, it appears that the charge to crack down on TikTok over data security issues has stalled in the face of realpolitik.

We have two revenge porn cases out of Texas to report this month, with an appellate panel ruling in one case that the state's privilege for filings in judicial proceedings applies to such claims and a plaintiff's jury award of $1.2 billion with a "b" in the other case.

Turning to regulation and legislation, the Consumer Financial Protection Bureau is working on regulations that would apply Fair Credit Reporting Act rules to data sharing between credit reporting agencies and data brokers. California is making progress with SB 362, a measure that would create a central portal for requests to data brokers to delete personal information and require brokers to comply with those requests – much to the consternation of the brokers, of course. Finally, in Illinois, the governor approved a new law creating a cause of action for doxing, defined as:

> intentionally publish[ing] another person's personally identifiable information without the consent of the person whose information is published and:

> (1) the information is published with the intent that it be used to harm or harass the person whose information is published and with knowledge or reckless disregard that the person whose information is published would be reasonably likely to suffer death, bodily injury, or stalking; and
>
> (2) the publishing of the information:
>
> > (i) causes the person whose information is published to suffer significant economic injury or emotional distress or to fear serious bodily injury or death of the person or a family or household member of the person; or
> >
> > (ii) causes the person whose information is published to suffer a substantial life disruption; and
>
> (3) the person whose information is published is identifiable from the published personally identifiable information itself.

The bill includes a provision allowing courts to enjoin further publication of such information by an individual who has violated the law if the individual "has no lawful or constitutional purpose for continued or further publishing of the personally identifiable information or sensitive personal information."

I've never been particularly comfortable with anti-doxxing statutes, and this one is no exception. I acknowledge that Illinois has done its best to tie liability to actual harm and malicious intent, but I'm just not happy with the idea that the dissemination of truthful and non-private information can be constitutionally suppressed (and let us not forget that *personal* information and *private* information can overlap in the Venn diagram but are not congruent).

This is another of those places where the issue is not privacy but practical obscurity. In most cases, people who might want to harass the target could find the information they need to do so with enough effort; the doxxer just makes it easy for them, removing that barrier to action. Considered in that light, I'm wondering if these laws shouldn't be evaluated under First Amendment standards for solicitation or incitement rather than as privacy matters (not that the Supreme Court has rationally reconciled those two doctrines with each other either).

C. Children's Privacy & Safety

A judge in W.D. Ark. enjoined the enforcement of Arkansas Act 689 on the day before it was supposed to go into effect. The law would have required that social media companies verify the age of all account holders residing in the state; the court held that the law would burden the speech of both minors and adults and was not narrowly tailored.

A VPPA claim against Google in N.D. Cal. arising out of the alleged disclosure of information about a student's viewing of videos as part of a remote learning environment survived a motion to dismiss, but other claims were trimmed. In the same court, major social media companies filed their reply brief on a motion to dismiss consolidated claims arising out of their alleged role in addicting children to their services, invoking the First Amendment and § 230, and a putative class action filed by parents alleges that online gaming platform Roblox facilitates illegal gambling by children.

The Free Speech Coalition filed suit in W.D. Tex. to block the enforcement of Texas HB 1181, which would require websites includes more than 33.3% adult content (whatever that means) to presumptively block access to their content unless they use specific measures to verify user ages, and to display a "TEXAS HEALTH AND HUMAN SERVICES WARNING" about the alleged dangers of pornography. A judge quickly enjoined state AG enforcement of the law (including both the intrusive age-gating and the compelled speech) at the end of August for the obvious reasons. The FSC was not so lucky in a similar challenge in D. Utah to a similar Utah law; the court dismissed the challenge on the basis that the Utah law was enforced by a private right of action and thus the plaintiffs did not have standing unless such a case were actually brought.

Folks, I just finished drafting the outline for the Digital Media Law breakouts at our Virginia conference next month – hope to see you all there! – and catalogued the dozens of bills pending or passed as of Sept. 11 that are intended to protect the privacy and safety of minors online. (At least, I hope I did…there's so much happening that some might have slipped through the cracks.) Many of these are overwrought, with obvious First Amendment and § 230 problems – oh, and if you're curious, I collected the pending federal bills to poke more holes in § 230 as well. Suffice to say that this is an issue with which we're going to be coping for a while.

In the meantime, we are seeing growing resistance to the pending Kids Online Safety Act (commonly known as "KOSA"), the federal bill for which you might have seen TV ads during *Jeopardy!* or *Wheel* if you're of the right demographic. (No judgment, how do you think I know about the ads?) And if KOSA falls away, the EFF would like to warn you that the federal Protecting Kids on Social Media Act is no better.

And as the lawsuits discussed above indicated, the states are long since done waiting for Congress to legislate on these issues. I mean, performative gestures toward protecting children, beating up on tech companies – what's not to like, amirite? So this month, we have Georgia and Wisconsin contemplating new age-gating bills.

D. Rights of Publicity

The Fifth Circuit held that an insurance policy's exclusions were sufficient to avoid coverage for a lawsuit against three strip clubs sued for right of publicity violations arising out of the

unauthorized use of models' images. The parties to a similar lawsuit in E.D.N.C. agreed to drop their case.

In a case over the use of Classmates.com's use of user profiles to create advertising, the Ninth Circuit held that it lacked jurisdiction to consider an interlocutory appeal of the district court's order rejecting a § 230 defense. The Court of Appeals found that the § 230 holding was not part of the reasoning for the district court's simultaneous denial of a motion to compel arbitration, on which interlocutory appeal was available and as to which the Court of Appeals remanded for further proceedings.

A somewhat bizarre lawsuit in C.D. Cal. is no more, after Activision dropped a case seeking a declaratory judgment that it had not infringed the publicity rights of a TikTok user by using the viral "It's enough slices!" sound without permission. Meanwhile, a judge heard argument on a motion to dismiss in another ROP case in C.D. Cal., this one involving an AI-powered app that allows users to swap faces in photos with those of celebrities.

E. Biometrics

Speaking of AI face-altering apps, we have another case involving the creator of a popular app that uses generative AI to create online avatars for users based on their actual faces. The developer obtained an order in N.D. Cal. compelling arbitration of claims that the app violated Illinois' Biometric Information Privacy Act (the infamous "BIPA") by collecting and storing users' biometric data without permission.

F. Manipulated Media

Nothing specific for this section this month, but the AI app cases discussed above could equally appear here.

G. Hacking, Scraping & Data Breach

The Fourth Circuit reversed a district court's certification of a class in a lawsuit over the hack of one of Marriott's guest reservation databases, finding that the lower court's painstaking certification of damages classes was flawed by its failure to consider the impact of a class-action waiver signed by all of the putative class members.

A judge in C.D. Cal. dismissed a putative class action over a data breach at social media app Wishbone, finding the that the name plaintiff's alleged damages were too inchoate to support standing to file suit.

An ex-Wall Street Journal journalist dropped claims in D.D.C. alleging that a law firm worked with Indian hackers to intercept emails with a source, which were later used to prompt the journalist's firing.

A judge in S.D.N.Y. largely denied post-trial motions filed by Joshua Schulte, who was convicted on various charges stemming from his leaking of CIA materials to Wikileaks. The court did, however, reverse Schulte's conviction for obstruction of justice, holding that "making false statements to law enforcement agents who might or might not later testify before a grand jury does not violate Section 1503."

If you're going to conduct a police raid of a newsroom on the basis that one of its reporters violated a computer hacking law, you might want to check that the so-called "hack" was actually illegal. In the case of the now-infamous raid of the Marion County Record in Kansas, the state agency whose database was allegedly improperly accessed has come forward to note that, in fact, the access was not improper. (Not that alleged hacks should be enough to override federal laws against such searches, as the Reporters Committee notes.)

H. Other Privacy Issues

A judge in N.D. W. Va. granted final approval of a $16.9 million settlement of a robocall lawsuit against DirecTV, while the FTC smacked another robocaller with $300 million in fines arising from billions of auto warranty scam calls.

II. Intellectual Property

A. Copyright

The Ninth Circuit heard argument this month on appeal from the dismissal of a choreographer's copyright infringement claim arising out of a dance emote in popular videogame Fortnite. (Is it still popular? I lose track.) The court showed some sympathy toward the plaintiff's arguments. The Court of Appeals also heard argument in an appeal of Pinterest's DMCA win against a photographer on an infringement claim arising out of the site's alleged use of algorithmic advertising next to her images. Finally, the photographers whose challenge to the "server test" was recently shot down by a Ninth Circuit panel have petitioned for rehearing en banc.

The Eleventh Circuit ruled that the Supreme Court's ruling in *Warhol* did not provide a basis for rehearing of a panel decision that a security company's use of virtual iPhone environments for vulnerability testing was a fair use of Apple's software.

In a non-digital but still interesting decision, the D.C. Circuit held that the U.S. Copyright Office's enforcement of the physical deposit requirement under § 407 through threats of fines for non-compliance worked an unconstitutional taking of physical property. The court found that because the deposit of copies of registered works was not a requirement for copyright protection to attach, the deposit requirement could not be justified as an exchange for conferral of a benefit. The Court of Appeals did not reach the question of whether compelled deposit of an electronic copy would raise the same issue.

In a lawsuit over the issuance of a DMCA takedown for digital videogame assets whose ownership was disputed, a judge in N.D. Cal. dismissed one party's § 512(f) claim with leave to amend to try again to plead the requisite bad faith. In C.D. Cal., Amazon filed a lawsuit attempting to seize the domains of websites selling DVDs of pirated Amazon streaming series not yet available on physical media, and a photo agency failed to establish jurisdiction in California over a radio network that allegedly used the plaintiff's images on the social media sites for out-of-state stations.

A much-ballyhooed but really pretty basic decision out of D.D.C. says that if no human is involved in guiding a machine's creation of a pictorial work, no author rights attach to the work. The bigger questions identified by the court, left unanswered, include "how much human input is necessary to qualify the user of an AI system as an 'author' of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more." The Copyright Office sought public comment this month on these types of questions.

A judge in S.D. Fla. adopted a magistrate's recommendation to grant summary judgment in favor of YouTube on claims that the site could be held liable for infringement for failing to use its filtering technology to remove infringing videos similar to videos reported to the company. In N.D. Ga., a news website was sued over its use of a celebrity photo.

In N.D. Ill., we've got a new spat between energy drink manufacturers with one accusing the other of ripping off its photo of Kim Kardashian posing in front of gym equipment. If the complaint is to be believed, it's a pretty blatant copy. However, I could maybe kinda see an argument that the near-identical photo is actually being used to highlight a major difference relevant to the product advertised – namely, the much greater muscularity of the defendant's model. On the other hand, that argument works best when the photos are presented side-by-side (as in the Complaint, ironically enough), in potential contrast to however the allegedly infringing image might have been used in the wild.

In D. Nev., a fellow accused of infringing Bored Ape Yacht Club NFTs was hit with a $194K default judgment.

In S.D.N.Y., Bella and Gigi Hadid have been sued in different cases for their respective posting to Instagram of photographers' pics of them without permission, and another photographer suit was leveled at Nexstar Media over photos allegedly used without permission on its TV station websites. And in the same court, Judge Koeltl entered a Consent Judgment and Permanent Injunction Subject to Reservation of Right of Appeal in the publisher lawsuit against the Internet Archive over its lending of digital books; siding with the Internet Archive on a single disputed issue between the parties, the court limited injunctive relief in the consent judgment to

distribution of "unauthorized reproductions of the Publishers' print books that, like the 127 Works in Suit, are also available for electronic licensing."

But if that sounds like progress toward ending the Internet Archive's copyright woes, they're far from over. The record industry filed a new lawsuit in S.D.N.Y. this month over the Archive's "Great 78 Project," which makes available recordings from old vinyl.

The Register of Copyrights responded to a request for advice from a judge in N.D. Ohio in a dispute over the appearance of a tattoo in the NBA 2K series of videogames, opining on the copyrightability of the tattoo artist's contributions to pre-existing artwork.

SoundExchange sued Sirius XM in E.D. Va. alleging that the latter has been dodging its obligation to pay music royalties under the Copyright Act by allocating revenue to streaming rather than satellite radio to reduce the royalty rate.

Software developer Bungie continues to go after manufacturers of cheat codes for its game "Destiny 2," filing yet another infringement suit in W.D. Wash. against an alleged ring of cheat developers. And in E.D. Wis., the copyright holders in the musical theme for *Space Jam* sued the Wisconsin Timber Rattlers (apparently some kind of "minor league" base and ball team) over the use of the theme in a 2017 Facebook video – which raises some statute of limitations questions, no?

In response to a USPTO (*Jeff checks the source – yep, that's right*) request for comment on measures to address counterfeiting and piracy, major sports leagues have responded that they want "expeditious" removal of content in response to a DMCA notice to be interpreted as requiring "instantaneous or near-instantaneous" removal. So, basically, connecting the notice submission tech directly to the removal tech. For a time when we're talking a lot about the perils of machine decision-making, the idea of pulling human judgment out of the equation entirely seems a little odd, no? I mean, sure, the DMCA contemplates a kill-them-all-and-sort-out-the-bodies-later kind of approach, but shouldn't there be some little space for someone to step in and decide that a DMCA notice is totally bogus on its face?

Finally, we have some rare state law developments touching on copyright issues this month, too. In Conn. Super., a law firm has accused an online photo site of operating a honeytrap extortion scheme, claiming that the site released images to the public for free only to turn around and assert massive copyright infringement claims based on their use. And in North Carolina, the governor signed a bill repealing "Blackbeard's Law," the controversial state law seizing videos and images of North Carolina shipwrecks for the public domain. A lawsuit over the state's allegedly unauthorized use of a photographer's images of the Queen Anne's Revenge continues.

B. Trademark

Atari Interactive has filed a petition for rehearing before the Ninth Circuit in an attempt to revive its trademark claims against online print shop Redbubble over allegedly infringing products created and sold by users.

In N.D. Cal., ChatGPT developer OpenAI has sued a company allegedly squatting on domain name "open.ai" for trademark infringement. Speaking of which, who had "Anguilla" on their bingo card for hottest top-level domain name of the year (if not the decade)?

The long-running fight in S.D. Fla. between an adult streaming service and Amazon.com over the latter's "Fire TV" streaming device appears to have settled, but the plaintiff cautioned the court that the ink wasn't quite dry. A judge in E.D. Ky. denied a preliminary injunction in a keyword advertising case over the term "Nursing CE Central," finding a lack of both likely confusion and irreparable harm. A lack of non-conclusory allegations about likelihood of confusion also doomed a trademark case against Parler over its "P" logo, with a judge in D. Nev. dismissing a twice-amended complaint. In E.D.N.Y., a magistrate recommended dismissing a sports website's TM action against a production company for persistent failures to comply with discovery obligations. And in S.D. Tex., we've got a new case between a baseball training program and Sony Interactive Entertainment over the mark "Future Star Series."

Speaking of videogames, the TTAB ruled that an image of a video game character does not function as a source indicator, affirming an examining attorney's decision not to register the character as a trademark because consumers would associate the character with the game rather than its publisher. One assumes that this would be different for famous characters like Mario or Sonic who transcend their individual games in terms of brand recognition.

C. Patent

Following a July hearing into the fitness of Federal Circuit Judge Pauline Newman, the transcript of which has recently been released, a special committee of the Court of Appeals has recommended that Judge Newman be sanctioned for failing to comply with the committee's order that she undergo medical examinations and produce medical records. It's all quite sad, I'm afraid, and it feels awkward watching these issues play out in a public forum; I considered not covering these developments here, but the potential impact on relevant cases in which Judge Newman is involved tipped the balance in favor of inclusion.

Speaking of which, Judge Newman authored the opinions in decisions affirming the invalidation of patents asserted against Meta (relating to website navigation) and Roku (related to remote control technology); the plaintiff in the Roku case also lost a separate challenge to a Patent Office rejection of two other patent applications. Meanwhile, Apple and Sony also had wins at the Federal Circuit, with the court affirming summary judgment for Apple in a case accusing it

of audio headphone tech and affirming a PTAB ruling for Sony that a competitor's gaming tech was unpatentable.

A company suing Meta Platforms in N.D. Cal. and eHarmony in C.D. Cal. over their alleged infringement of identity verification patents lost both cases, with both judges finding the patents unenforceable and granting motions to dismiss. In N.D. Ga., we have a new lawsuit over streaming on-demand patents. And in W.D. Tex., Amazon and Microsoft obtained dismissal of a patent case over image search tech, but the court found that the plaintiff had sufficiently pleaded claims against Meta.

D. Trade Secrets/Misappropriation/Conversion

An AI company settled with Meta Platforms in D. Mass. over claims that the latter poached the former's employee to gain access to software code. And a vaguely similar dispute between two Korean videogame developers over allegedly stolen source code belongs in Korea, not W.D. Wash., held a district judge.

III. Platform Management

A. Section 230

In a striking decision, the Seventh Circuit reversed a district court ruling and held that major software service provider Salesforce was not protected by § 230 against allegations that it supported sex trafficking via Backpage.com, because the plaintiff's theory of liability did not treat provider as "publisher or speaker" of third-party content. The district court decision below held that the plaintiff failed to plead their way into the prevailing narrow interpretation of the FOSTA exception to § 230, but the Court of Appeals held that Salesforce had not shown that the claims fell within § 230 at all. Salesforce has petitioned for rehearing.

Otherwise, it's all § 230 wins this month, with the Ninth Circuit affirming dismissal of good faith/fair dealing claims over disabling of a Facebook account on the basis of § 230 and holding that § 230 does not create a private right of action, X Corp. defeating an account suspension case in N.D. Cal. from the Twitter era, Meta shutting down claims in C.D. Cal. over its alleged failure to remove defamatory posts, and Meta securing dismissal of claims in D.S.C. that it was responsible for radicalization of racist church shooter Dylann Roof.

Oh, and for fun, here are two law review articles discussing the application of § 230 to those who create, distribute, host, and use generative AI tools.

B. Elections & Political Advertising

This is a § 230 win too, but seemed like it belonged here: A judge in E.D. Cal. ruled that the Republican National Committee had failed to plead bad faith on the part of Google in sweeping

Republican fundraising emails into Gmail spam folders, meaning that Google was protected by § 230(c)(2) for its efforts to filter "objectionable" material. One could hope that's the end of this silly base-baiting lawsuit.

C. Content Moderation

The Solicitor General finally got around to submitting the amicus brief requested by the Supreme Court on whether to grant cert in the Texas and Florida *NetChoice* cases. Unsurprisingly, the Biden Administration took the position that the Court should take *Moody v. NetChoice* and *NetChoice v. Paxton* (also referred to as *NetChoice v. Colmenero* following Texas AG Paxton's impeachment) in order to hold that the laws violated the First Amendment right of platforms to moderate content. Also unsurprisingly, the administration argued that the Court shouldn't take up the issues in *Paxton* and *NetChoice v. Moody* about mandatory transparency around moderation decisions.

The Supreme Court also received a petition for cert from a decision of the Ninth Circuit rejecting First Amendment claims over alleged jawboning by California officials directed at Twitter.

The Fifth Circuit heard expedited argument this month on appeal of that July 4th preliminary injunction barring members of the Biden Administration from communicating with social media companies outside of strict guidelines. (Spoiler alert, as if you hadn't already heard: In September, the Fifth Circuit substantially narrowed the injunction and the parties to which it applied, while still finding that some government actors did cross the line. Which was probably the right result, but more on that next issue.)

Following the decision earlier this year in *Taamneh* and *Gonzalez*, three plaintiffs whose appeals of their dismissal of their claims against social media companies had been stayed by the Ninth Circuit pending the Supreme Court rulings have filed their opening briefs.

The trial of former Backpage.com employees in D. Ariz. on sex trafficking charges was delayed by the suicide of co-defendant and Backpage co-founder James Larkin.

In N.D. Cal., RFK Junior is trying again with censorship claims over his anti-vax content, this time suing Google for allegedly giving in to government pressure and quickly being denied a temporary restraining order. (As I've pointed out before, in the Ninth Circuit even a successful claim like this would be unlikely to produce the result the plaintiff wants anyway – but it seems rare that those filing these cases actually think about the available remedies if they win.) While we're on the subject, Kennedy voluntarily dismissed his pending jawboning lawsuit against Sen. Elizabeth Warren in W.D. Wash., which had failed to get traction.

Kennedy's case was just one of the alleged censorship cases to hit a wall in N.D. Cal. this month, with a case over disabling of an Instagram account, a case alleging racial discrimination by

YouTube's algorithm, and a case over termination of a Google account also being dismissed. A similar case in S.D. Fla. over the termination of a LinkedIn account for sharing COVID misinformation also failed.

A lawsuit in C.D. Cal. raising a First Amendment challenge to California's controversial law mandating transparency around platform enforcement of policies dealing with hate speech and other categories of offensive material was dismissed this month. The plaintiffs were content creators claiming that the law would lead to censorship of their material, but the court held that their fears were too hypothetical to support standing. (Late-breaking development: X Corp. filed another lawsuit challenging the law in September, but this time from the perspective of a service to which the law directly applies.)

In New York state court, witnesses to a racially-motivated shooting have sued social media companies for their alleged role in radicalizing the shooter, leading to their emotional distress. (I expect this case to meet the same fate as the one I mentioned up under § 230 dealing with Dylann Roof, but it's not time to flip it into the other section quite yet.)

If it wasn't enough that the Center for Countering Digital Hate is being sued by X Corp. in a defamation case thinly disguised as a data scraping case, now it's being forced to respond to Rep. Jim Jordan's paranoid hunt for online censorship of conservative thought by private organizations (or, as those who have read the First Amendment call it, the exercise of free speech rights).

It's been a while since I covered an Oversight Board ruling. This month, we've got Meta deciding not to follow a Board recommendation to suspend the account of Cambodia's former prime minister for incitement of violence. Meanwhile, Meta is updating its "dangerous organizations" policy because of a determination that it swept too broadly in blocking nonviolent political content.

Finally, I'll include this article, which attempts to square recent disputes over legal interventions to support the ability of individuals to speak online by identifying five rights of access to the internet itself but not to any specific platform. I'm still pondering the argument, but I like the general idea.

D. Terms of Service & Other Contracts

Eric Goldman brings us a thorough review this month of developments in online contract formation, including decisions from the Seventh and Ninth Circuits on arbitration clauses; rather than break it all down here, I'll just point you to his discussion. And Rebecca Tushnet briefly but effectively calls into question the terms of service for a website operated by the State of Hawaii.

IV. Other Content Liability

A. Defamation

The Fifth Circuit summarily affirmed summary judgment in favor of an ex-deputy who sued members of his sheriff's department for First Amendment retaliation after he was arrested for criminal defamation and strip searched following his criticism of the department via email. The lower court decision is here.

OpenAI filed a brief this month to defend its removal to N.D. Ga. of a talk show host's defamation complaint allegedly arising out of ChatGPT hallucinations, arguing that there is complete diversity among the parties.

A judge in D. Idaho quickly tossed a TikTok psychic's wacky counterclaims against a University of Idaho professor whom she falsely accused of the murder of four students. A lawyer voluntarily dismissed his defamation claim in D. Md. over allegedly defamatory emails sent by Amazon.com.

In a case in D.N.H. arising out of news coverage on the website "churchmilitant.com," the canon law expert for the Diocese of Manchester, New Hampshire, was held to be a limited-purpose public figure. In D.N.J., we have two cases holding that alleged online defamation could be taken as fact because of its context, one involving a "legal edutainer" sued by the founder of a mental health service for celebrities, and the other involving a lawyer operating a YouTube channel who sued a critic. In S.D.N.Y., a libel lawsuit against actor Alec Baldwin over a tweet calling a woman an "insurrectionist" for her role in the January 6 riot was dismissed for failure to plead any false facts or implications of fact. And a judge in E.D. Pa. slashed a $1.4 million defamation verdict down to $71.5 thousand, calling the damages suffered by the plaintiffs in a #TheyLied case arising from the world of Ren Faires "just a flesh wound" – complete with cite to Monty Python.

In state court, a California libel suit filed by a woman who claims to have been falsely accused of posting racist comments to the Facebook page of BLM Sacramento has been resolved with a public apology from the group's founder. A Colorado appellate panel issued a mixed decision on appeal from denial of an anti-SLAPP motion in a defamation claim based on a Twitter impersonation account, affirming the denial as to defamation and misappropriation claims but reversing as to a conspiracy count. In Missouri, a former general manager of St. Louis Public Radio sued the Board of Curators of the University of Missouri (which owns the station) over broadcast and online statements suggesting that he had opted to preserve white supremacy at the station. In Ohio, Oberlin College has sued four insurers seeking coverage for more than $36 million paid to the plaintiffs in the Gibsons Bakery defamation case. A Texas appellate panel, in four separate cases, reversed a district court's implied denial of anti-SLAPP motions filed a doctor's patients in response to his defamation claims over their negative reviews. In Virginia,

we have two new defamation lawsuits, one from a woman who claims she was falsely accused of using the n-word online against by almost 100 social media users, and one from a law professor who does not like how his former student lovers described their relationships with him.

Er.

Look, I don't want to end this section by leaving that as your last thought, so here's a great article from MLRC friend Clay Calvert that sensibly discusses liability for false statements generated by artificial intelligence tools.

B. Commercial Speech

The Second Circuit scuppered a class action settlement in a suit alleging that the New York Times violated California law by failing to provide required disclosures before automatically renewing subscriptions, holding that the district court erred in the standard of fairness that it applied to approving the settlement. In another case, the Second Circuit held that online real estate platform Zillow did not engage in false advertising by allowing free "for sale by owner" ads and then offering the services of real estate agents.

A judge in S.D. Cal. dismissed a bait-and-switch claim against Marriott International over the allegedly inadequate listing of resort fees on its hotel websites, but allowed a nondisclosure claim to proceed. In S.D.N.Y., the SEC reached a consent judgment with singer Austin Mahone over his failure to disclose his receipt of payments to promote allegedly unlawful cryptotokens. In E.D.N.Y., a judge held that advertising of dog waste bags as compostable was plausibly false in light of the fact that no U.S. jurisdiction allows disposal of dog waste in compost bins and it is ill-advised in home composting.

Amazon has filed a lawsuit in Washington Superior Court against the operators of a website that allegedly facilitates bribes to customers to leave 5-star reviews on products. The SEC has fined an investment advisory firm $250K over a scheme to pay hundreds of content creators to promote its offerings without the necessary disclosures. Finally, the FCC has rejected an industry plea to reconsider a pending requirement that internet service providers break out all of their monthly fees.

C. Professional Speech

The Supreme Court of Maryland held that it does not violate the First Amendment to discipline a Maryland attorney for knowing and intentional misrepresentations about the integrity of sitting judges.

A justice of Wisconsin's Supreme Court was caught editing her own Wikipedia article to remove references to critical news coverage. I don't know whether that's an ethical violation, but it's tacky.

D. Threats, Harassment, and Incitement

The Fifth Circuit held that a Louisiana man who made a zombie-themed joke on Facebook about deputies shooting "the infected" on sight at the beginning of the COVID epidemic was protected by the First Amendment, and reversed a finding of qualified immunity for the police officers who arrested him.

A Texas man facing criminal charges in N.D. Ga. based on an offer of $10,000 to Craigslist users to kill Georgia state officials has notified the court that he plans to change his plea to "guilty."

A high school student who was suspended for posting memes taunting the school principal has filed suit in the Eastern District of Tennessee.

A Massachusetts appellate panel held that TikTok posts critical of a business did not constitute acts of harassment sufficient to warrant entry of an anti-harassment order; even if some users did then make threats against the business, the court held that it was too much of a leap to infer that the TikToker was responsible for orchestrating the harassment.

And last but not least, wildly popular Twitch streamer Kai Cenat was arrested this month when he summoned his followers to Union Square in New York City for a promised giveaway of video game gear and other items. Without, y'know, warning anyone in the city government he was going to do it. The thousands of people who showed up turned into an ugly mob at least half an hour before Cenat's promised appearance, throwing garbage at cops and looting nearby stores.

Ah, summertime in New York.

V. Infrastructure

A. Accessibility, Disability & Discrimination

Nothing to report in this section this month.

B. Antitrust

The Supreme Court refused this month to wade into the antitrust battle between Apple and Epic Games, denying a request by Epic to lift a Ninth Circuit stay of an injunction against Apple pending the resolution of Apple's appeal to the Supreme Court.

The Second Circuit temporarily paused a JPML order sending a state AG lawsuit against Google over the digital advertising market to the Eastern District of Texas, in order to allow time for an appellate panel to determine whether the order should be stayed for the duration of the resolution of Google's petition for a writ of mandamus. The forum dispute arises out of a 2022 federal law,

passed after this case had been moved to S.D.N.Y. at Google's request in 2021, giving state AGs the right to pick the court in which an antitrust case is litigated.

The FTC filed its opening brief in a Ninth Circuit appeal of its loss in its attempt to block the Microsoft-Activision merger.

While Google was denied summary judgment on various issues in the sprawling antitrust case in N.D. Cal. over its operation of the Google Play Store, it scored a significant victory with the exclusion of the plaintiffs' expert opinion on how much of Google's developers fees would be passed along to consumers and, more strikingly, the decertification of the consumer class as a result.

Meanwhile, in the D.D.C. case brought by the DOJ and state AGs over Google's dominance of search, a judge trimmed out those theories of anticompetitive effect related to Google's Android Compatibility Commitments and Anti-Fragmentation Agreements, Google Assistant, Internet-of-Things Devices, and the Android Open-Source Project.

In a development that will surprise no one, Louisiana's AG has weighed in as an amicus to oppose dismissal of an antitrust claim brought in W.D. La. by various purveyors of COVID-related information (or mis- or dis-information) against major news organizations over their alleged attempts to suppress the plaintiffs' ideas on social media. I've said it before and I'll say it again: Antitrust law has no place in the marketplace of ideas, because freedom of speech entails no right to an audience.

In S.D.N.Y., a magistrate recommended that major book publishers should be let off the hook in a lawsuit over Amazon's alleged monopolization of the e-book market, but that Amazon itself should stay in the case. The same magistrate recommended the dismissal of all claims in a similar case filed by a putative class of booksellers, which recommendation the district judge adopted.

The FTC met with Amazon this month with a potential antitrust lawsuit hanging in the balance. Meanwhile, the DOJ is turning its attention to individuals who hold board of directors seats at multiple competing social media companies, having already forced two board members at Nextdoor to step down at the beginning of August because of their seats at Pinterest.

C. Net Neutrality & Data Throttling

Nothing to report this month, but watch this space with the FCC deadlock broken at the start of September…

D. Domain Name System
E. Taxation & Compelled Payments

Nothing to report in these sections this month.

F. Wire & Wireless Deployment

The Fifth Circuit held that Pasadena, Texas, cannot invoke aesthetic ordinances to block pole placement, in a case arising out of the larger battle between telecommunications providers that are attempting to expand next-generation wireless services and municipalities that are resisting that expansion.

A new lawsuit in W.D. Pa. accuses Verizon of lying to investors about the dangers of lead in the sheathing of its cables, with negative news coverage causing a stock drop.

A coalition of ISPs who secured government grants to expand broadband networks in rural areas have come back to the FCC wanting either more money or a chance to give back the funding they've received without penalty. A different group of ISPs claims that the first group won the grants by low-balling the FCC and should now be stuck with the consequences of their actions. Presumably Group Two believes that it could have won the grants had Group One's cost estimates been realistic, and so there are some sour grapes at work here, but they've got a point.

G. Artificial Intelligence & Machine Learning

Senate Majority Leader Chuck Schumer has called senior tech execs and other stakeholders to a policy forum in September to discuss generative AI. Meanwhile, the FEC is focused on the use of deepfakes in political advertising, contemplating calling on a ban.

But even the federal government is feeling the lure of the promises of AI technology, with various agencies exploring the use of tech to respond to FOIA requests and the National Archives planning to use AI tools for record management. Meanwhile, the North Las Vegas City Council is experimenting with the use of AI to produce real-time translations of its public meetings.

Of course, the use of generative AI for official purposes raises questions. Apropos of which, we have two new instances of the use of AI in the judicial context producing misleading results. Researchers continue to explore flaws and vulnerabilities in AI systems, with interesting (if not necessarily reassuring) results.

With that it mind, it helps to know if you're looking at content generated by AI. TikTok and Google are working on that issue.

There's the separate issue of where AI systems get the data on which they are trained. Zoom raised hackles this month with a change to its Terms of Service suggesting that it was going to mine users' video calls and presentations to train AI models, but has sworn that it's not doing so. OpenAI's launch of its GPTBot, which crawls the web for content to train its systems, set off a wave of edits to robots.txt files around the world (including on the websites of major news organizations). Meanwhile, others look to develop technological tricks to obstruct AI tools from processing their content.

A different approach is to strike deals for use of content in AI systems, and Google is pursuing that option in negotiations with record labels over AI-generated music. A group of news companies is seeking collective negotiation with AI developers over use of their content, an issue that takes on new dimensions in light of developments like Google Chrome's built-in AI creating summaries of non-paywalled articles. (This is interesting to me from a copyright perspective, thinking about the idea/expression dichotomy…one wonders if we'll see a revival of "hot news" claims that last flared up in the late 2000s/early 2010s.) One news organization taking a hard line on AI scraping is the New York Times, which changed its terms of service to prohibit use of content for training. The Times also dropped out of the effort at collective negotiation described above, contemplated legal action, and forbade staff to put any proprietary information into AI tools.

But just as the government both fears and embraces AI, news organizations are still trying to find ways to implement the technology. Foundry, the owner of Macworld, PCWorld, and other tech outlets, introduced an AI chatbot this month trained on the publications' archives. The Columbus Dispatch launched and then suspended use of an AI sports writing tool after it prompted criticism. Meanwhile, the AP has updated its Stylebook to clarify journalistic standards in stories about artificial intelligence.

We're also seeing AI-written books cropping up on Amazon, sometimes falsely attributed to human authors, sometimes with highly questionable or even dangerous content. Jane Bambauer has a new article exploring the contours of negligence liability arising out of AIs producing information that leads to harm.

With the technology in flux, it's understandable why there were some questions about OpenAI's proposal to use GPT-4 for online content moderation. Where the tech might wind up being hugely useful, however, is in real-time moderation of live online content, such as that being introduced by Activision in its upcoming release of video game "Call of Duty: Modern Warfare III." (Speaking of which, did anyone else see the Norwegian political thriller *Occupied*, where a key plot point revolves around the use of online first-person shooter games for covert communication? Wonder if the AIs will be empowered to detect that kind of thing…)

So, with all of this fear, uncertainty, and doubt, it might be surprising that a new survey suggests that most Americans are taking developments in AI technology in stride. One commentator went so far as to ask whether the "AI boom" is already over, in light of declining public interest. But that didn't stop some Snapchat users from being totally freaked out when an AI chatbot suddenly decided to post a video clip, which it had never done before and refused to explain…

H. Blockchain, Cryptocurrency, & NFTs

An amended complaint in C.D. Cal. adds Sotheby's to allegations that a group of corporations and influencers had deceived buyers of Bored Ape Yacht Club NFTs into believing that the tokens had gone mainstream.

In the SEC's lawsuit against Coinbase in S.D.N.Y. (which is part of the Commission's effort to crack down on the cryptocurrency industry more generally), Coinbase has invoked the Supreme Court's "major questions doctrine" in a motion for judgment on the pleadings. Specifically, the defense is arguing that the SEC's construction of the term "investment contract" in the relevant statute is beyond its authority and oversteps into a question reserved to Congress.

A judge in W.D. Tex. ruled that a decision by the Department of Treasury's Office of Foreign Assets Control to block the Tornado Cash cryptocurrency service did not violate the First Amendment rights of users to donate to particular causes, because there is no right to use any particular financial service.

In what seems to be a first, the SEC settled a case over the sale of FTCs, with media company Impact Theory agreeing to pay a fine of $6 million.

VI. Government Activity

A. Data Surveillance, Collection, Demands, and Seizures

The Fifth Circuit held that an immigration attorney had no constitutional claim against the Department of Homeland Security for the search and seizure of his phone at the border, ruling that the attorney lacked standing as to past events and that, while he had standing to seek an injunction requiring DHS to delete the data that it had seized, his constitutional theories had no merit. Oof.

The D.C. Circuit held that Twitter was properly sanctioned $350,000 for contempt of court for its delay in responding to a warrant in a criminal case seeking information related to Donald Trump's Twitter account; the Court of Appeals rejected Twitter's argument that a nondisclosure order violated the First Amendment. The revelation of the warrant for Trump's Twitter data led a coalition of news organizations to seek access to records from D.D.C. related to the search.

A judge in D.D.C. rejected a First Amendment challenge to a requirement that visa applicants disclose their social media activity, finding that while there might be some chilling effect on the applicants' right to speak anonymously online the requirement was subject only to rational basis review.

The National Security Agency is begging Congress not to cut off its warrantless access to data purchased from data brokers. Yeah, I'd imagine they would. And in a development that echoes Philip K. Dick's *A Scanner Darkly*, an FBI investigation as to who in the government was using spying tools from the infamous NSO Group led to the realization that the culprit was the FBI itself.

The Supreme Court of California declined this month to wade into application of the good faith warrant exception to a geofence warrant. The sheriff's office under fire in connection with the *Marion County Record* raid agreed to destroy digital files that it copied from the *Record*'s seized devices. And Pennsylvania's Supreme Court held that state police were required to disclose their social media monitoring policy under the state's Right-to-Know Law.

B. Encryption

There was a brief kerfuffle in S.D.N.Y. this month with a Chinese cinema mogul ordered to be arrested unless he complied with court orders to provide working passwords to his digital devices in aid of an attempt to collect a nine-figure arbitration award against him. Apparently the threat was enough to get him to cough up the passwords, and the court called off the U.S. Marshals.

C. Biometric Tracking

Nothing to report this month.

D. Domain Seizure

Z-Library, a notorious pirate website hosting e-books, apparently expects its current domain names to be seized (as has happened to its prior domains) and has taken the unusual step of offering browser extensions that will allow users to find the site's future homes.

For those interested in FBI efforts to shut down websites offering DDoS-for-hire services, an FBI agent gave an interview this month talking about prior campaigns to take down these sites.

E. Social Media Blocking

The Solicitor General filed amicus briefs this month in the *Lindke* and *O'Connor-Ratcliff* cases over politicians blocking critics on social media; the government, perhaps predictably, supported the politicians.

F. Prior Restraint

A New Jersey state judge denied a preliminary injunction against Daniel's Law, the state measure that bans the disclosure of non-private but personal information regarding judges, prosecutors, and law enforcement officers on social media. The court deferred, finding that granting the preliminary injunction would result in disclosure of the information at issue and could not be separated from the final relief in the case. Which, true, but also, bullshit – where a First Amendment turns on a straightforward facial challenge to the law, you should just call it judgment on the pleadings or summary judgment and resolve the case.

A Texas appeals court held that tagging someone on Facebook constitutes communication with that person, for the purposes of determining whether the tagger has violated a protective order against contacting the taggee.

G. Online Access to Government Information

The FAA reauthorization bill that recently passed the House includes a provision that would allow private jet owners request that the agency keep their plane registration numbers and other data private.

A California state judge denied a motion to strike a lawsuit filed by the City of Los Angeles in an effort to force a journalist to remove and to return police personnel records that the LAPD mistakenly provided in response to a public records request. The court seems to have been confused by the existence of a settlement agreement between the journalist and the LAPD in which the latter agreed to produce only certain records, but this cannot possibly be interpreted as an agreement by the journalist not to publish other materials the police intentionally or inadvertently provided.

VII. Global

A. International

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- Social media giants urged to tackle data-scraping privacy risks, *TechCrunch*

B. Europe

- Europe is cracking down on Big Tech. This is what will change when you sign on, *Associated Press*
    - Big Tech isn't ready for landmark EU rules that take effect Friday, *Ars Technica*

- In Europe a regulatory vise tightens around big tech, *Columbia Journalism Review*
- The EU wants to cure your teen's smartphone addiction, *Politico*
- Google vows more transparency on ads as new EU rules kick in, *Reuters*
- Coming soon to TikTok in Europe: A 'For You' feed without the TikTok algorithm, *TechCrunch*
- Snap confirms EU users will soon be able to opt out of content 'personalization', *TechCrunch*

- Privacy activist Max Schrems files complaints against Google's Fitbit, *Reuters*
- Meta May Allow Instagram, Facebook Users in Europe to Pay and Avoid Ads, *New York Times*
- Microsoft unbundles Teams from Microsoft Office in Europe to appease regulators, *TechCrunch*

C. Latin America

- Inside Latin America's Fake News Problem, *Foreign Policy*

D. Australia

- New bill to force stronger action on social media disinformation, *SBS News*
  - 'It is an attack on free speech': Peter Dutton slams Labor's misinformation laws as Coalition launches petition to 'bin the bill', *Sky News*
  - Opposition calls on Albanese government to dump it's 'terrible' misinformation bill, *Sky News*
- Labor's counter-terror laws may stifle 'political dissent', Law Council warns, *The Guardian*
- Big tech urges government to go slow on AI rules, *Australian Financial Review*
  - Google says AI systems should be able to mine publishers' work unless companies opt out, *The Guardian*

- Australia will not force adult websites to bring in age verification due to privacy and security concerns, *The Guardian*

- Privacy watchdog 'monitoring' telemarketer after financial information posted to dark web in data breach, *ABC.net.au*

- Senator Linda Reynolds sues Brittany Higgins for defamation over Instagram post, *WA Today*

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- Mark Latham to argue homophobic tweet about Alex Greenwich was 'honest opinion' in defamation defence, *The Guardian*

- Pauline Hanson wins defamation appeal, *ABC*

- Lachlan Murdoch pays Private Media $1.3m costs, ending high-profile defamation saga, *Crikey*

E. Belarus

- Belarusian Businessman Gets Five Years In Prison Over Critical Facebook Posts, *RFE/RFL*

F. Cambodia

- A Global Cyber-Scam Industry Is Booming in Plain Sight in Cambodia, *New York Times*

G. Canada

- Meta begins blocking news access on its platforms in Canada, *CNN*

    - Meta will remove legit news from Facebook and Instagram in Canada — but may leave the bad stuff up, *Nieman Lab*

    - 'Disaster': warning for democracy as experts condemn Meta over Canada news ban, *The Guardian*

    - CBC, media groups ask Competition Bureau to investigate Meta's move to block news, *CBC*

    - It's the media vs. online platforms in the internet's battle of the century, *The Hill*

  - No joke: Satirical websites get caught up in Meta's quest to block news in Canada, *Toronto Star*
  - Blocking of news in Canada by Meta affecting media outlets that don't produce news, *CBC*
  - Wildfire evacuees frustrated by Facebook news ban in Canada, *BBC News*
  - Meta putting profit ahead of safety by blocking wildfire news, says Trudeau, *Reuters*
  - Canadian Media Orgs Said That Meta Linking To News Was Anticompetitive; Now They Say NOT Linking To News Is Anticompetitive, *Techdirt*

- Meta's Canadian news blockade is about more than just money, *The Week*
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H. China

- Generative AI services pulled from Apple App Store in China ahead of new regulations, *TechCrunch*
- China's draft measures demand 'individual consent' for facial recognition use, TechCrunch
- A 'Handsome Daddy Putin' Bug Is Plaguing China's Internet, *Daily Beast*
- Chinese social media filled with anti-black racist content, says watchdog, *The Guardian*

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- Former PM Babiš Ordered to Apologize to Journalist for False Claims, *OCCRP*

J. El Salvador

- As free press withers in El Salvador, pro-government social media influencers grow in power, *Associated Press*

K. Finland

- Christian official faces second 'hate speech' trial over Twitter post quoting the Bible, *Fox News*

L. France

- AFP sues Musk's X for refusing to enter news reuse payment talks, *TechCrunch*
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M. Gabon

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N. Germany

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O. India

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    - India pushes ahead with data privacy bill despite pushback from critics, *TechCrunch*
    - India House Approves Privacy Bill in Boon for Google, Meta, *BNN Bloomberg*
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- Judgment: *Google v. DRS Logistics*

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P. Iraq

- Iraq lifts ban on Telegram after messaging app complies with authorities, *TechCrunch*

- Baghdad advertising boards turned off over porn screening, *BBC*

Q. Jordan

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- Jordan's King Approves Bill That Criminalizes Online Anonymity, Publication Of Police Officers Names/Photos, *Techdirt*

  - Cybercrime law slams free speech as criminal content, *Deutsche Welle*

R. Kenya

- Kenya suspends Worldcoin scans over security, privacy and financial concerns, *TechCrunch*

- Meta and moderators agree to mediation on labor dispute, *TechCrunch*

S. New Zealand

- New Zealand Antitrust Arm Clears Microsoft-Activision Deal, *Law360*

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T. Norway

- Meta breaks privacy rules, regulator tells court, *Reuters*

U. Poland

- ChatGPT-maker OpenAI accused of string of data protection breaches in GDPR complaint filed by privacy researcher, *TechCrunch*

V. Russia

- Russia fines Apple, Wikipedia for leaving up content it doesn't like about Ukraine war, *Politico*
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W. Saudi Arabia

- Saudi man receives death penalty for posts online, latest case in wide-ranging crackdown on dissent, *Associated Press*

X. Senegal

- Senegal Blocks TikTok in Widening Clampdown on Dissent, *Reuters*

Y. Singapore

- Singapore authorities invoke fake news law against prime minister's brother, *Jurist*

Z. Somalia

- Somalia bans TikTok, Telegram over indecent contents, *Radio Nigeria*

AA. South Korea

- South Korea 'puts the brakes' on Google's app store dominance, *The Register*

BB. Sweden

- Sweden Is Not Staying Neutral in Russia's Information War, *New York Times*

CC. Switzerland

- Nile Rodgers asks populist Swiss party to stop using We Are Family 'soundalike', *The Guardian*

DD. Thailand

- Activists Acquitted Of Libel, Decry 'Judicial Harassment', *AFP*

EE. Turkey

- 13 OnlyFans content creators detained after tossing dollar bills around central İstanbul, *Stockholm Center for Freedom*

FF. Ukraine

- Crimeans using social media to help Ukrainian military spot Russian air defenses, *The New Voice of Ukraine*

GG. United Arab Emirates

- A car-rental company is now demanding $10,000 from a Texas influencer who has been detained in Dubai for 3 months, *Insider*

HH. United Kingdom

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- UK's CMA confirms decision to block Microsoft-Activision but opens fresh probe of restructured deal proposal, *TechCrunch*
- Data on Online Hate Directed at BBC Journalists Mirrors Global Trend, *VOA*
- How and Why Two British Teens Hacked Several of the Biggest Tech Companies in the World, *Time*
- Lapsus$: Court finds teenagers carried out hacking spree, *BBC News*
- Actor Laurence Fox scores victory in latest pre-trial stage of libel fight, *PA Media*

II. Vatican City

- Pope warns of AI risks so "violence and discrimination does not take root", *Ars Technica*

JJ. Vietnam

- Vietnam activist 'Onion Bae' loses appeal against 5½ year sentence, *RFA*

VIII. Miscellaneous

We have more reactions to the Supreme Court's decision in *303 Creative*, with the New Jersey Attorney General's Office publishing guidance on interpretation of the decision that sharply limits its application and the Student Press Law Center arguing that the decision provides student journalists with a defense against interference by school or state officials.

Finally, I wanted to point out an interesting article by Kendra Albert examining the history of "community standards" in obscenity law and what it suggests about current issues with online content moderation.

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And that's all from me for this month! I hope you all segue into the fall with tranquility and aplomb, and that I'll see a large percentage of you in Virginia in just a few weeks!