

The MLRC Digital Review

Reporting on developments in digital media law and policy

by Jeff Hermes

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Greetings, everyone!

So, this article doesn't really deal all that much with activity in the physical world, but as I write this section a protest to promote racial equality and against the death of George Floyd is moving through my home town of Hoboken, having started a couple of blocks from my house.

Hoboken is a tiny city, about one square mile, nestled between the Palisades to the west and the Hudson River to the east and bordered, roughly speaking, by the Lincoln Tunnel to the north and the Holland Tunnel to the south. It makes me proud that my neighbors are exercising their First Amendment rights here.

There was considerable concern among businesses in the city about the possibility of vandalism associated with the protest (which, the last time I checked, had drawn a couple of thousand people); some shops along our main drag have boarded up their windows. But it's been mostly quiet, despite protesters breaking up into three groups with two groups diverting down streets that weren't planned; every so often I hear a siren, and shouts and chanting in the distance, but nothing frightening. A local pizza shop across from City Hall downtown is churning out free pizza for the protesters. I just heard claps and cheering.

I'm somewhat ashamed of not getting out there myself. The main reason is fear, really, not of violence but of the pandemic. As I think I've mentioned, I was sick for a couple of weeks in March with a never-diagnosed but very strange illness. It was one of the most terrifying things I've gone through in my life – and I once accidentally drove the Kahekili Highway on Maui, a cliffside road comprised largely of switchbacks and one-lane stretches where white pickup trucks whip around the turns and rocks fall on the road with remarkable frequency. Anyway, if my illness was scary for me, it was worse for my wife, and so I'm avoiding any kind of risk to my health right now. Still, it would be good to be out there.

My respect to everyone who showed up. Now, on with the article.

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I. Privacy

A. Anonymity

Nothing to report this month.

B. Personal Information

May saw the [introduction of two bills](#) from opposite sides of the aisle in Congress intended to protect individual privacy as companies sought ways to leverage technology to fight the COVID-19 pandemic. [Both bills](#) require transparency and consent in the collection of personal data, prohibit the use of that data for other purposes, and require the deletion of such information after the pandemic. However, the Republican bill, the COVID-19 Consumer Data Protection Act, only applies to private companies, while the Democratic bill, the Public Health Emergency Privacy Act, also place limitations on law enforcement and other government use of the data. [Testimony on the issue](#) was taken remotely.

Just a few cases to report on this month:

- In N.D. Cal., a lawsuit against Google alleging that Google Assistant listened in on conversations after being triggered by an incorrect interpretation of ambient speech was [dismissed with leave to amend](#). The court suggested that some of the plaintiffs' legal theories might be valid, but held that they needed to allege that the erroneous eavesdropping occurred in a private setting.
- Amended wiretap claims against Bose in N.D. Ill. over an app's alleged collection of data on users' listening habits [were dismissed](#), because the new allegations did not change the fact that Bose was a party to the communication of audio track information requested through the app.

- A [new lawsuit](#) filed by Arizona's attorney general in the state's superior court accuses Google of gathering location data from smartphone users despite their turning off location services.
- A California appellate panel ruled that the state's anti-SLAPP law did not apply to a claim filed by fitness guru Richard Simmons against Bauer Media over allegations that a private investigator hired by Bauer attached a tracking device to his caretaker's car. Bauer had argued that it had just hired the PI to take photos of Simmons.

C. Children's Privacy

Sen. Ron Wyden is [floating a bill](#) that would dedicate \$5 billion over the next decade to fighting the spread of child sexual abuse material, adding nearly 200 federal law enforcement employees. The bill is seen by some as a [rebutal to the EARN IT Act](#), eschewing that bill's proposed amendment of Section 230 and its potential threat to encryption in favor of increasing law enforcement's capacity to pursue criminals directly.

Privacy and children's groups [filed an FTC complaint](#) against TikTok accusing it of violating a consent decree regarding the deletion of data collected from users under 13 and additional violations of COPPA due to an absence of adequate parental controls. [House Republicans](#) subsequently picked up on those concerns, followed by a [push in the Senate](#) for the FTC to investigate the situation.

D. Biometrics

The [Seventh Circuit held](#) that a lack of informed consent was sufficient injury for Article III standing in a lawsuit under Illinois' Biometric Information Privacy Act against a vending machine manufacturer over the collection of fingerprint data. [TikTok](#) is facing a new BIPA lawsuit in N.D. Cal. over facial information, as is [Clearview AI](#) in Illinois state court; however, a judge in S.D.N.Y. [rejected an attempt by an Illinois plaintiff](#) to intervene in BIPA suits against Clearview in New York. Shutterfly succeeded in [compelling arbitration](#) of a BIPA claim filed by users in N.D. Ill., and the \$550 million settlement of a BIPA claim against Facebook in C.D. Cal. is expected to result in [payments between \\$150 and \\$300 each](#) for members of the plaintiff class.

E. Manipulated Media

Nothing to report this month.

F. Hacking & Data Breach

San Francisco's Saint Paulus Lutheran Church became a victim of Zoombombing when a May 6 bible study meeting was disrupted with child pornography; the church [filed a class action](#) against

Zoom in N.D. Cal. alleging failure to provide promised security and unlawful sharing of user information.

New York's attorney general [announced an agreement with Zoom](#) for tightening of the ubiquitous meeting platform's privacy and security protocols, including a new head of security, encryption, channels to process complaints, and a ban of "hatred against others based on race, religion, ethnicity, national origin, gender, or sexual orientation." That last one made me blink, because while it's not an uncommon provision to find in a platform's terms of service, it's not exactly First Amendment-compliant either and thus shouldn't be forced on a platform under any kind of implicit threat from a governmental agent. We'll just assume Zoom proposed that itself, I suppose...

In other news, a \$7.5 million settlement of a class action in N.D. Cal. relating to a data breach on Google+ [received preliminary approval](#) this month.

G. Other Intrusion

The Supreme Court heard argument on whether [the Telephone Consumer Protection Act's prohibition on robocalls to cellular phones](#) is invalid as a content-based restriction on speech, given that a 2015 amendment to the law exempted collection calls related to debts owed to or backed by the government. The justices seemed to agree that the exemption was content-based, but most seemed inclined to solve the problem by striking the 2015 amendment rather than the whole law. Justice Gorsuch, however, called out the irony that this solution would wind up restricting more speech rather than less under the banner of enforcing the First Amendment.

A [TCPA lawsuit over text messages](#) sent to consumers on the National Do Not Call Registry was booted out of court in W.D. Tex., after a judge ruled that the texts in question were not commercial solicitations.

II. Intellectual Property

A. Copyright

The U.S. Copyright Office dropped [a mammoth report](#) this month following a multi-year project to evaluate how Section 512 of the Digital Millennium Copyright Act is working in practice and whether it is properly serving the interests of all stakeholders. To [make a long story short](#), the report states that online platforms are doing fine under the DMCA while rightsholders report difficulty in ensuring that pirated content does not resurface, and that this disconnect indicates a potential need for retooling of the statute. The report goes on to discuss various options to that Congress could consider to achieve this. (The Senate Committee on the Judiciary [did not wait long](#) before [bringing in Don Henley](#) to testify.)

The [Supreme Court ordered](#) the parties in *Google v. Oracle America*, hearing in which was postponed until next Term, to file supplemental briefs by August 7 to address “the appropriate standard of review for the second question presented [i.e., whether the jury was correct in finding that Google’s use of Oracle’s API was a fair use], including but not limited to the implications of the Seventh Amendment, if any, on that standard.” If I were Oracle, that would make me very, very nervous.

In a battle over ownership and streaming of religious sermon videos, the [Ninth Circuit held](#) that the Copyright Act was invoked by a declaratory judgment action that depends on the existence of a valid copyright and whether it has been infringed, thus giving the district court discretion to award attorneys’ fees under § 505 of the Act.

The [Eleventh Circuit reversed](#) a defense ruling on alleged infringement of a database of insurance rates, holding that that the lower court improperly required the plaintiff to prove that the elements copied were protectable; the burden, said the Court of Appeals, should have been on the defendants to show the opposite. (This case also had an interesting trade secret holding, which I’ll discuss below in the appropriate section.)

In N.D. Cal., tech company Lenovo has been sued for [copying the HTML code](#) of another software company for its online community platform. In C.D. Cal.: Singer-songwriter Jason Mraz settled a claim against Coors over a [song snippet used in an Instagram ad](#); a permanent injunction was issued against [streaming service Nitro TV](#), shutting it down in response to major studios’ copyright claims; and Ubisoft [sued Google and Apple](#) for allegedly selling a rip-off version of popular game title “Tom Clancy’s Rainbow Six: Siege” on their respective app stores.

Thomson Reuters sued ROSS Intelligence in D. Del. for allegedly [scraping content from Westlaw](#) to power its own online legal service. Despite proving that his photo of Willie Nelson was infringed, a photographer was [denied his attorneys’ fees](#) in E.D. Ky. based on his “business model” of making the image freely available under a Creative Commons license and then suing when attribution was insufficient. An attempt to evade the Copyright Act failed in D. Md., with a judge holding that a host of privacy and unfair competition claims over the [reproduction of the plaintiffs’ dance moves](#) in video game “Fortnite” were preempted by the Act; trademark claims also tripped over the boundary with copyright law.

In N.D.N.Y., DISH Network [scored a \\$3.3 million default judgment](#) against a mom-and-son streaming operation selling access to pirated content. In S.D.N.Y., a [DMCA 512\(f\) counterclaim](#) over a takedown notice relating to unicorn images on Amazon was dismissed.

It’s been a rough month for Richard Liebowitz. A magistrate judge in D. Colo. [called Liebowitz](#) a “clear and present danger to the fair and efficient administration of justice,” imposing limitations on his ability to file new cases in the district. [Granting a subsequent motion](#) by Liebowitz to extend time to object, the magistrate noted that in attempting to catalog other

courts' sanctions, "the hits are coming so fast it is hard to keep up." A judge in S.D. Ill. [called Liebowitz](#) a "legal lamprey" in the course of whacking him with \$20,000 in fees and sanctions; however, the court that noted "while Liebowitz may be an example of the worst kind of lawyering," he "represent[s] the fetid backwash of online media providers' own persistent and willful disregard for intellectual property norms."

In S.D.N.Y., a judge [denied reconsideration of sanctions](#) against Liebowitz for continuing to a copyright claim after learning that the copyright in question had never been registered. And in the same court, the Manhattan Institute for Policy Research defeated a Liebowitz copyright claim over its display of a sliver of a photographer's work that was attached to a New York Post article, [winning a 12\(b\)\(6\) ruling](#) that its use was fair. Still, Liebowitz keeps filing. We have [a new case](#) in S.D.N.Y. against Jennifer Hudson for, you guessed it, posting a photographer's image to Instagram without permission.

In other news, Harvard University's copyright advisor [criticized a Copyright Office letter](#) calling for more licensing in response to a request from Sen. Tom Udall for a guidance document to help libraries make resources available to patrons during the pandemic. Meanwhile, WIPO has [launched a new tracker](#) to follow changes to intellectual property policies in member states as a result of the pandemic.

B. Trademark

In the first-ever remote hearing held by the U.S. Supreme Court, the justices heard argument on the [registrability of "booking.com"](#) and other combinations of a generic term with the ".com" suffix. I have an extended write-up of the argument in *USPTO v. Booking.com* in this month's MediaLawLetter; while some commenters have suggested that the Court [selected a minor case](#) to test the new format, I found it to be a fascinating discussion of how to handle the overlap of a legal regime (trademark law) with a technological regime (the domain name system, which has its own rules of exclusivity).

The Eighth Circuit [heard argument](#) this month in a case involving pre-sale confusion arising from advertising appearing with Google search results. And in S.D.N.Y., the operator of website *womenyoushouldknow.net* had its complaint dismissed against the publisher of a series of articles entitled "Women You Should Know," with the court [issuing a 12\(b\)\(6\) ruling](#) that the title was a descriptive fair use.

C. Patent

The Federal Circuit affirmed a ruling that a patent for [streaming events that simulates in-person attendance](#) was invalid for obviousness. In another case, it affirmed a judgment that major video game developers had not infringed a patent for [lip-sync animation technology](#), but vacated a ruling that that the patent was invalid.

In W.D. Tex., a judge [denied a motion](#) by Google to dismiss a patent case based on claim preclusion, finding that another of the plaintiff's streaming patents held to be invalid was different enough from the one at issue in this case for preclusion not to apply.

D. Trade Secrets/Misappropriation/Conversion

In the [Eleventh Circuit case](#) mentioned up in Copyright about a database of insurance-premium information, the Court of Appeals also remanded a ruling that the automated scraping of public-facing data from the subject database could not constitute misappropriation of a trade secret. Held the court, while individual data points might be public, the mass acquisition of that data might give rise to a trade secrets claim.

In D. Mass., a judge [denied an AI company a preliminary injunction](#) against Facebook, ruling that the plaintiff was not likely to succeed in demonstrating that *something* was a trade secret – but what, we may never know, due to [extensive redactions](#) in the opinion.

III. Platform Management

The top story in this section is President Trump's "[Executive Order on Preventing Online Censorship](#)," and I'm leading with it here because it defies easy categorization into one of the subtopics below. It purports to "interpret" Section 230; it was in part [a reaction to Twitter's fact-checking of Trump's statements](#) related to mail-in ballots; it was a way for the president to air long-standing grievances about alleged bias in content moderation; it looks to tie liability to inconsistency between platform practices, terms of service, and other public representations. So really, it relates to all of the issues we deal with in this section.

Broadly speaking, the order takes issue with platform content removal policies, and makes a lot of non-binding (and heavily self-serving) policy statements and suggestions about curbing legal protection for digital companies that moderate content inconsistently with either the White House's ideas about how that should be done or the companies' own representations. It reiterates the *Packingham/Pruneyard* argument for holding social media liable for moderation decisions, which (1) misreads *Packingham* badly (as Trump pick Justice Kavanaugh, the author of [Halleck, could have told him](#)), (2) makes no sense with respect to *Pruneyard* (which dealt with a different type of public forum and also depended on a specific California statute), and (3) has been rejected in every court to come across it.

The order drags the FCC and FTC into the mess by urging them to engage in rulemaking and enforcement, respectively, invitations which neither commission is likely to take up (well, [except for FCC Commissioner Carr, perhaps](#)). It directs the Department of Justice to work on legislation and cooperate with state law enforcement to take on platforms, which the DOJ doesn't need any encouragement to do. It commands federal agencies to report to the DOJ on their ad spends on social media and directs the DOJ to evaluate whether there are problems with agencies using

particular sites because of their moderation practices, which is (1) an invitation to open First Amendment violations through [viewpoint discrimination under the unconstitutional conditions doctrine](#) and (2) self-destructive because federal agencies and officials can't afford not to be using the big platforms. It's anyone's guess whether the executive order supersedes [earlier rumblings about forming a White House panel](#) to review complaints of online bias.

[Plenty](#) of [experts](#) are [happy](#) to [explain why](#) the [executive order](#) is a [steaming pile](#). I had the good fortune to be able to [interview our friend Prof. Eric Goldman](#) on this topic, as well as [NetChoice VP & General Counsel Carl Szabo](#), during one of the MLRC's lunchtime calls. Eric's [review of the executive order](#) is lengthy and unsparing, calling it political theater. And our friend Daphne Keller, who directs the Program on Platform Regulation at Stanford's Cyber Policy Center, wished to convey the following message to the MLRC:

I'd love to deliver this specific message for an audience of media lawyers. ... The message is this: What the EO has kicked off is not a fight about 230. This isn't a redux of SESTA/FOSTA or EARN IT. It is a fight about the president acting outside the law to set rules for speech and punish those who disagree with him. In that sense this is closely related to his attacks on press institutions like CNN, the NY Times, or the Washington Post. (It also has a tragic commonality in encouraging real world violence against reporters and against individual platform personnel.) Whatever disagreements "tech" and "media" have about 230, what's going on now is bigger than that. People on all sides of the 230 debate should see how their interests are aligned.

So while it is important for this session to explain the EO, and that requires talking about 230, I hope the conversation can then shift to the bigger picture. Ratholing on 230 (and the inevitable passions and controversy that stirs up) serves the EO's larger agenda of using 230 as a political lever to coerce platforms, and distracting from 100,000 Americans dead in a mismanaged plague, police killing black people, military being dispatched to American cities, etc. [MLRC members] are uniquely situated to see that bigger picture, get out of the 230 trenches for a while, and help their media clients decide how to respond.

The Center for Democracy & Technology was the first out of the gate with a [First Amendent lawsuit challenging the executive order](#) filed at the beginning of June, but now I'm technically getting ahead of myself. More next month, I'm sure.

A. [Section 230](#)

Well, the White House may be wading in, but the Supreme Court continued to decline invitations to take up the meaning of Section 230 as it [denied cert](#) in two 230 cases, [Force v. Facebook](#) from the 2nd Circuit and [Dryoff v. Ultimate Software Group](#) from the 9th Circuit.

In Mass. Super., firearms marketplace Armslist [successfully invoked Section 230](#) to defeat a claim over the shooting of a police officer with a gun purchased through the site. In Vt. Super., Clearview AI has [moved to dismiss](#) a privacy lawsuit brought by the state of Vermont, arguing that Section 230 protects its scraping and distribution of facial recognition information. That argument becomes a little clearer when you remember that Clearview describes its service as a search engine for photographs; it compares its scraping of photos to Google's scraping of content to populate its search database.

For those concerned about the appearance of bipartisan momentum toward restructuring or repeal of Section 230 in Congress, President Trump's new executive order actually sparked a tiny bit of hope -- perhaps the nakedly partisan line that Trump drew in the sand would make it hard for Democrats to reach consensus with Republicans on how to proceed with reform. Well, Senator Biden [still wants to repeal Section 230](#), though he's stated that he believes that the First Amendment doesn't require platforms to tolerate threats of retaliation if they decide not to amplify the president's lies.

B. Elections & Political Advertising

As discussed above, the event that triggered the White House's executive order was [Twitter's decision to fact-check Trump tweets](#) regarding mail-in ballots. Trump was infuriated when Twitter attached a link saying "Get the facts about mail-in ballots" to his tweets claiming that such ballots were a major source of election fraud; Trump quickly lashed back that Twitter was "stifling FREE SPEECH" (against all legal precedent and common sense). Twitter CEO Jack Dorsey [explained](#) that the company attached the link because the tweets were potentially misleading.

Incidentally, it would be a mistake to believe that the president's executive order was issued solely because Twitter had the temerity to question his facts; many the ideas in the order had been floating around for a while, though there was also evidence of last-minute editing ([see this redline](#) of the final order prepared by Prof. Goldman).

A [new bill](#) to curb microtargeting of political advertisements was introduced by Rep. Anna Eshoo in the House this month; [another bill on the topic](#) is expected from Rep. David Cicilline.

C. Content Moderation

Once Twitter decided that it would apply its content guidelines to the president, it didn't stop with a fact check. [It went on to determine](#) that a Trump tweet stating that "when the looting starts, the shooting starts" with respect to the Minnesota protests violated its policies against "glorifying violence" and required users to click through a warning to view the tweet. The platform [made a similar ruling](#) with respect to a tweet by Rep. Matt Gaetz with respect to hunting down members of the antifa activist group.

Sen. Ted Cruz has called on the DOJ and Treasury Department to [investigate whether Twitter](#) is violating sanctions against Iran by allowing Iranian leaders to have Twitter accounts. The timing of this demand, which happened the same day as the blocking of Trump’s “looting” tweet, is I’m sure coincidental – although Cruz did raise similar concerns with Twitter back in February.

The Supreme Court [denied cert](#) in *Williby v. Zuckerberg*, a case in which the Ninth Circuit rejected a pro se conservative censorship claim against Facebook. The [D.C. Circuit](#) likewise rejected a First Amendment claim brought by conservative group Freedom Watch against Google, Facebook, Twitter, and Apple. Finally, a judge in the Southern District of West Virginia [dismissed a First Amendment claim](#) brought by a Twitter user whose account was suspended for spreading hate speech (other claims failed when they ran smack into Section 230).

Facebook [announced the first members](#) of the don’t-call-it-the-Supreme-Court-of-Facebook oversight board, which will include a former U.S. federal circuit judge, a former Danish Prime Minister, a Nobel Peace Prize Laureate, a former editor-in-chief of the Guardian, a former ECHR judge, and more notables. Facebook also [received questions this month from U.S. senators](#) on whether it would reconsider its policies on disinformation and hate speech in light of the pandemic and the upcoming election.

Among its other headaches, Twitter is also fighting an [outbreak of disinformation from China](#) with respect to the pandemic, although the company [disagreed with claims from the State Department](#) that the Chinese government had coordinated the activity of more than 5,000 accounts. Twitter has also introduced [new warnings and labeling](#) for COVID-19 misinformation.

D. Terms of Service & Other Contracts

A judge in the Western District of Pennsylvania [enforced an arbitration clause](#) in an end-user license agreement, because not every legal issue this month deals with the collapse of civilization.

IV. Other Content Liability

A. Defamation

As a media lawyer, I was raised to be anxious any time a defamation case looks to be making its way to the Supreme Court. So, I report with a sigh of relief that the Court [denied cert](#) in *K.G.S. v. Facebook*, a case from the Supreme Court of Alabama on the issue of personal jurisdiction over Facebook for a claim based on allegedly defamatory posts.

In N.D. Cal., an investor in Tesla [filed a lawsuit against Elon Musk](#) and another man alleged to be “an attack dog and ferocious online propogandist for ... Tesla and Musk” for defamation via false tweets accusing the plaintiff of, inter alia, possessing child pornography. In N.D. Ga., the

[former owner of oenophile website wines.com sued the new owner](#) for allegedly defaming her by posting poorly written and graphic articles about porn stars and their drinking habits using her name.

A family counselor who sued over an [allegedly defamatory Yelp review](#) failed to flip a trial court judgment for the defendant, with a California appellate panel ruling that he could not prove the falsity of an allegation that letters he wrote to a family court cost a former client custody of his child.

B. Commercial Speech

A judge in the Northern District of California [dismissed false advertising claims](#) against Google and YouTube arising out of YouTube's removal of the plaintiff's antifeminist videos, holding that statements by the defendants about their commitment to free speech were puffery. That's reason #632 why the executive order's attempt to leverage unfair trade practices laws against digital platforms is going nowhere.

Amazon is facing a [new lawsuit](#) in E.D. Cal. over advertising movies accessible through its Prime Video service as "purchases," when there is allegedly no ownership interest conveyed and Amazon can revoke access at will.

The National Advertising Review Board [rejected an appeal filed by AT&T](#) over a ruling from the National Advertising Division that AT&T's use of the term "5G Evolution" in its ads could mislead consumers to believe that the company is offering non-existent 5G service.

C. Threats, Harassment, and Incitement

An appellate panel of Pennsylvania's Commonwealth Court affirmed a ruling that a high school student [did not make a "terroristic threat" justifying expulsion](#) by exchanging a meme depicting a peer as a school shooter in a private Snapchat conversation.

We have a new paper from our friend Prof. Clay Calvert on [vicarious tort liability for encouragement of actions by others](#), particularly in circumstances where the encouragement does not arise to the level of incitement or true threats.

V. Infrastructure

A. Accessibility

A bill proposed by Sens. Jeff Merkley, Bernie Sanders, and Ron Wyden would [prohibit termination of internet and phone service](#) during the pandemic.

B. Antitrust

The [House Antitrust Committee](#) wants Jeff Bezos to appear to explain an apparent disconnect over Amazon's representations as to whether it uses data from third-party vendors to advance its own competing products. The company [wrote back](#) that it will "make the appropriate Amazon executive available," but didn't say that Bezos himself is that executive.

The Wall Street Journal reports that [antitrust lawsuits from the DOJ and state AGs](#) against Google over its ad services could drop as early as this summer. Meanwhile, a guided tour business, an herbal remedy company, and a law firm [sued Google](#) in N.D. Cal., alleging that it had illegally dominated the digital advertising space and extracted monopoly rents for its services.

C. Net Neutrality

A judge in S.D.N.Y. [granted summary judgment](#) in favor of The New York Times in a FOIA lawsuit to gain access to the IP addresses and user-agent headers for comments posted during the open comment period for the FCC's Restoring Internet Freedom order.

D. Domain Name System

Nothing to report this month.

E. Taxation

Invoking the specter of increased taxes and fees during the pandemic, Gov. Larry Hogan of Maryland [vetoed a new tax on digital advertising](#) for companies with digital ad revenues greater than \$100 million. The veto can be overridden with a three-fifths vote by the legislature, however, and when passed in March the tax was supported by votes well in excess of that threshold.

F. Wire & Wireless Deployment

Broadcasters are [fighting a proposed requirement](#) to include prominent notices regarding certain applications filed with the FCC on their apps, arguing that the notices would clutter the mobile experience and put them at a competitive disadvantage with online-only streaming services.

The FCC [found itself at odds with the U.S. military](#) this month, with the Department of Defense arguing that the rollout of a proposed 5G network approved by the FCC could interfere with global positioning systems. FCC Chair Ajit Pai called the concerns "baseless fear-mongering."

- G. [Artificial Intelligence & Machine Learning](#)
- H. [Blockchain & Cryptocurrency](#)

Nothing to report in these sections this month.

VI. [Government Activity](#)

A. [Data Collection, Demands, and Seizures](#)

The Supreme Court [denied cert](#) in *Facebook v. Superior Court*, a Ninth Circuit decision on whether the constitutional rights of a criminal defendant override the Stored Communications Act with respect to a subpoena to Facebook for a user's communication history. However, the California Supreme Court [heard arguments](#) on precisely the same issue this month.

The Ninth Circuit held that the [driver of a rental car](#) had no Fourth Amendment privacy interest in data in an automated license plate reader database, after he failed to return the car at the expiration of the rental contract.

Twitter, Reddit and the Internet Association [filed an amicus brief](#) this month in a case in D.D.C. challenging the State Department's requirement that visa applicants disclose their social media handles and other identifiers, citing a chilling effect on freedom of expression.

In W.D. Wash., a judge ruled on a Fourth Amendment motion to suppress evidence gathered through the FBI's [viewing of the lock screen](#) of a robbery suspect's phone, without attempting to unlock it. Agents powered up the phone and took a picture of the lock screen, which displayed the name "Streezy"; what relevance this name has to the crime in question is unclear from the court's order, but what is clear is that the feds conducted a search and needed either a warrant or a valid exception to the warrant requirement.

The coronavirus tracing apps are upon us, and this article from the MIT Technology Review will help you [keep track of the trackers](#). Quis custodiet, et cetera, et cetera. Those who were expecting tracing apps to be a cure-all (in the face of all advisories to the contrary) might be disappointed at [how things turned out in Iceland](#), which had a remarkable 40% penetration for a tracing app. Meanwhile, the much-discussed [Apple/Google API is now available](#) to public health authorities to use as the basis for exposure notification apps; some states have adopted the model, but others have not, and it doesn't look like there is any nationwide plan to do so.

A [surveillance reauthorization bill](#) was passed by the Senate without an amendment that would have prevented secret and warrantless NSA surveillance of U.S. citizens' internet browsing and search histories. Gallingly, the amendment failed by a single vote due to the absence of senators who supported the measure. The bill then [moved to the House](#), where there was another attempt to add a warrant requirement – but then Rep. Schiff [made public statements](#) that the amendment was intended to be particularly narrow, and Sen. Ron Wyden (who was unsurprisingly behind the

failed Senate amendment) pulled his support in response. And then [Trump interjected himself](#) into the mess: Still obsessed with his belief that the FBI should not have investigated people associated with the Trump campaign in 2016, he called on Republicans in the House to vote no on *any* reauthorization.

Not that statutory privacy protections necessarily make a lot of difference, as the Office of the Director of National Intelligence's new 2019 statistical transparency report on the use of national security authorities [makes clear](#); last year, the FBI routinely failed to follow data minimization procedures regarding national security data collected about Americans. In connection with the debate on the bill discussed above, Sen. Wyden has [sought similar information from ODNI](#) on how often intelligence agencies and the FBI have conducted warrantless searches of Americans' browsing and search habits.

B. Encryption

After the FBI [successfully unlocked two phones](#) (one damaged by a bullet) that were used by the Saudi military officer who attacked the Pensacola Naval Air Station last December, it decried the fact that encryption had delayed access to the contents and accused Apple of being no help.

C. Biometric Tracking

D. Domain Seizure

Nothing to report in these sections.

E. Content Blocking & Prior Restraints

As I [predicted last month](#), the ACLU has filed a First Amendment lawsuit challenging a Puerto Rico law that was amended in the wake of the pandemic to suppress misinformation during states of emergency, disaster, or curfew. The ACLU's memo of law in support of a preliminary injunction [is here](#).

A judge in the District of Idaho [granted a permanent injunction](#) on a default judgment in a libel case, limiting it to statements that are actually defamatory but still including catch-all language not specifying the particular allegations enjoined. On the other hand, appellate courts in [Florida](#), [Massachusetts](#), and [Michigan](#) all reversed injunctions against speech this month, and a Superior Court judge in North Carolina [held](#) that plaintiffs in a business dispute had not overcome the presumptive unconstitutionality of a preliminary injunction against speech.

Sen. John Cornyn of Texas was [sued in E.D. Tex.](#) for blocking a critic on Twitter; Cornyn immediately unblocked the man.

F. Online Access to Government Information

Michigan's Supreme Court has introduced a "[Virtual Courtroom Directory](#)," which helps members of the public to find where virtual hearings are being held. I love it.

Pennsylvania's Supreme Court has posted its oral arguments to YouTube, but [prohibits media outlets](#) from using the footage. I don't love that. I don't even see how it's remotely constitutional. Are they invoking copyright? If so, how do they get around the blatantly obvious fair use argument? Do they realize they enabled embedding by posting to YouTube? Incidentally, this gives me an excuse to link to one of my favorite cases, [Commonwealth v. Barnes](#).

Still, that's better than Tennessee, where the public has [no access to any courtrooms, virtual or physical](#), until at least July 4th. Something tells me they won't have access on the 4th, either. Compare a [recent ruling](#) from the District of New Hampshire holding that the public can be excluded from in-person hearings for the purpose of stopping the spread of COVID-19 if they can watch via video.

Finally, valid concerns about the fact that pretty soon we'll need to get back to holding jury trials has led to a remarkable experiment in Texas – the [first jury trial via Zoom](#). It's a summary jury trial with a non-binding verdict, but still, wow.

VII. Global

A. Europe

The European Data Protection Board [published updated guidelines](#) this month on obtaining online consent for the processing of personal data. Notably, the guidelines say that (1) you can't block access to your site pending a visitor's agreement to allow you to use cookies, and (2) scrolling on a website or swiping on a mobile app – for example, to get around a cookie notice or such – can't be interpreted as consent.

A study prepared for the European Commission [recommends](#) that the current self-regulatory regime for removal of "fake news" on social media be replaced with government enforcement authority and sanctions. Because that will work. Along similar lines, Thierry Breton, European Commissioner for Internal Market, [told Mark Zuckerberg](#) during an online event that as CEO of Facebook he would be held responsible for failures to increase efforts to remove misinformation.

B. Africa

Following a pattern that we have seen around the world in recent months, there are reports that a number of countries in Africa have been leveraging measures to stop the spread of COVID-19 misinformation [to suppress online criticism of government](#).

C. Australia

It's been another active month in Australian libel law!

The Australian Public Service Commission drew criticism at the end of April when it sent a letter to a government transparency website hosting public records obtained under freedom of information laws, [warning it about defamation liability](#). The warning related to the publication of a third party's correspondence with the Commission over an FOI request; the Commission later denied any intent to threaten the site.

A woman sued by a Nationals MP for defamation was preliminarily enjoined by a Federal Court judge from posting ["vile" material about the plaintiff on social media](#). A Perth resident sued three people for defamation over [comments made in a Slack channel](#); the channel was a forum for industry figures and fans of electric vehicles to discuss non-EV related topics. A Liberal Party senator sued a former Geelong councillor over [two tweets from an anonymous Twitter account](#).

And last but not least disturbing, an appellate court in New South Wales upheld a ruling that media companies [can be held liable if third parties post defamatory comments](#) in response to news stories that they post to social media.

D. Austria

A [new complaint](#) filed in Austria by a privacy nonprofit alleges that Google's Android operating system violates the GDPR by assigning an advertising ID tracking code to each device. The code, claims the group, can only be reset but not disabled – meaning that users can restart the tracking but not turn it off.

E. Bangladesh

Twenty or more journalists were [arrested or charged in April and May](#) with violations of Bangladesh's Digital Security Act based on social media posts critical of government responses to the pandemic.

F. Cambodia

And [at least thirty people](#) have been arrested on similar charges in Cambodia.

G. Canada

Facebook, without admitting to wrongdoing, has [reached a C\\$9 million settlement](#) with the country's Competition Bureau over allegations relating to the sharing of Canadians' personal information with third parties.

H. China

China too [continues to prosecute citizens](#) who criticize their government's pandemic response online.

A [ruling from Hong Kong](#) in March (only recently noticed here, sorry) holds that operators of data storage warehouses cannot deny their landlords entry into their premises, posing data security risks for any such venture.

I. Egypt

At least 37 journalists have been [detained recently in Egypt](#) for "spreading false news" or "misusing social media."

J. Finland

Finland's [first data protection authority ruling on GDPR link deletion requests](#) held that Google needed to remove links for four people, but rejected five other requests.

K. France

France's Conseil d'Etat ruled that Paris [can no longer use drones](#) to track violations of social-distancing orders, citing privacy and data protection concerns.

France [passed a new law this month](#) entitled "Lutte contre la haine sur internet," which my Francophone wife tells me translates as "Fighting against hate on the internet," which requires statements that are discriminatory or sexually abusive to be taken down within 24 hours after they are flagged by users. That time frame drops to a single hour if the content relates to terrorism or child pornography, and failures to remove content within these windows triggers fines of up to €1.25 million. The law is very similar to a German law that took effect in 2018, and its vague boundaries and harsh penalties drew similar concerns from groups concerned about freedom of expression.

A French government website entitled "Desinfox," which claimed to be correcting false information about the pandemic being spread by French media outlets, was [taken down after a legal challenge](#) by the nation's journalist union asserting that the page was interfering with freedom of the press. Wow...I'm just thinking about how that would play out in the United States.

Amazon's warehouses in France are reopening after reaching a deal with workers' unions, [resolving a court battle](#) that resulted in an order to shut down the warehouses in mid-April.

Comedian Dieudonné M'bala M'bala, who has been jailed and fined in the past over anti-Semitic comments, is [facing a new lawsuit](#) from a Jewish group over an allegedly anti-Semitic video.

L. Germany

The Constitutional Court [held this month](#) that the country's foreign intelligence service violates the constitutional press freedom and privacy rights of non-Germans by surveilling their internet traffic abroad. Meanwhile, the Federal Court held that [opt-out consent for the use of cookies](#) is invalid under German law.

M. Hungary

And in Hungary, police said they've [opened 87 investigations](#) into "scaremongering" on social media and elsewhere under an emergency law enacted in March in response to the pandemic. For an example, check out [this story](#) of the dawn seizure of a 64-year-old for a Facebook post.

N. India

The United States has [warned India](#) that it could face reprisals for its 6% tax on online advertising revenues earned by foreign platforms such as Google, Facebook, and Netflix.

O. Ireland

Speaking of 6% taxes, Ireland's National Union of Journalists wants to [slap tech companies with a 6% "windfall tax"](#) to offset losses to the journalism industry as a result of declining ad revenues during the pandemic. (If that sounds familiar, the UK branch of the NUJ proposed the same thing last month.) Prime Minister Leo Varadkar suggested that Ireland [adopt the Australian model](#) for compensating news outlets, requiring platforms to share ad revenue with local media.

Ireland's Data Protection Commission is [under pressure to issue major rulings](#) involving GDPR complaints against Facebook and Twitter, among others. The DPC reported that a [draft decision regarding Twitter](#) has been circulated to its peers in other EU member states for review, while a "preliminary draft decision" in another case was provided to WhatsApp for comment.

P. Israel

Prime Minister Benjamin Netanyahu's eldest son Yair is facing a defamation claim from a TV anchor and her network after a [series of tweets](#) suggesting that she didn't get her job due to her intelligence, which Yair's followers interpreted as a suggestion that she slept her way into the position.

Q. Japan

Japan is [considering new legislation](#) to respond to cyberbullying following the apparent suicide of a 22-year-old pro wrestler and Netflix reality TV star.

R. Latvia

Latvia is [planning to launch](#) an exposure notification app based on the Google/Apple model. We'll see how its experience compares to Iceland's, mentioned earlier in this article.

S. Myanmar

Myanmar [is using coronavirus misinformation](#) as a basis for assaults on the press and blocking of websites.

T. Netherlands

A grandmother in the Netherlands was hit with a GDPR complaint by her daughter after she posted photos of her grandchildren to social media without permission. The complaint went to court, where grandma was [ordered to remove the photos and pay her daughter €50](#) for every day that the photos remained online (capped at €1,000). Clearly there's deeper family drama at work here.

U. New Zealand

New [online censorship legislation](#) in New Zealand appears to have been delayed by the pandemic. The bill, first proposed in December but not introduced as expected in March, would empower the government to demand the takedown of online content, impose internet filtering, and penalize the livestreaming of objectionable content with penalties of up to 14 years in prison.

V. Philippines

Referring to President Rodrigo Duterte on Facebook [as "crazy" and an "asshole"](#) was sufficient to land a 41-year-old from Butuan City in prison this month.

W. Russia

Roskomnadzor [has ordered Google](#) to block a news article from a Russian site that discusses a Financial Times story questioning the accuracy of Russia's official pandemic death toll.

X. United Kingdom

The UK is investigating whether it is feasible to [switch its planned coronavirus tracing](#) app over to the Google/Apple API, eschewing the centralized data associated with its original plan. The pandemic has also [resulted in a pause](#) in an investigation by the UK's data protection agency of privacy violations by online advertisers.

A [new hate crimes bill](#) under consideration in the Scottish Parliament would criminalize hateful or discriminatory language if it is intended to provoke hatred or is merely likely to do so.

Tech website (and not-infrequent source for the MediaLawDaily) The Register [won a libel judgment](#) against the CEO of a Manchester-based hardware retailer. The case involved a Google ad purchased by the CEO to run against search results related to a Register article reporting on his company's involvement in a tax fraud scheme. There were apparently some "unsavoury cartoons" as well.

Finally, is Craig Wright the mysterious developer of Bitcoin, the pseudonymous Satoshi Nakamoto? This [court ruling](#) explicitly doesn't attempt to answer that question, but does hold that a libel suit over a YouTube video challenging Wright's claim to be Nakamoto belongs in a U.S. court rather than the UK.

Y. Vietnam

And sadly, we'll end with one last report of [pandemic disinformation laws](#) being used for censorious purposes, this time relating to a law passed in Vietnam in April.

VIII. Miscellaneous

Bits and pieces:

- Ohio's Supreme Court [heard argument](#) on whether Amazon could be held liable under the state's product liability statute for the death of a teen killed by the ingestion of caffeine powder purchased from a third-party seller via the site.
- We have [an interesting opinion](#) from D. Ariz. holding that a statute mandating interoperability of data management systems for car dealers does not unconstitutionally compel the dealers to speak, either by sharing information or by requiring the production of speech in the form of the software code necessary to access its database.
- Finally, the conspiracy theory linking the rollout of 5G networks with COVID-19 is the most ridiculous piece of nonsense I've heard yet regarding the pandemic, but for some

reason it makes enough sense to some fragment of the public that attacks on cellular towers [have started in the United States](#) after originating in Europe.

Look, we all enjoyed *The X-Files* – heck, I’m married *because* my wife is an X-Phile – but if you find yourself starting to believe any theory that could have been a plot of the show [it’s time to dial back the binge watching](#).

* * *

And that’s a wrap for May. It will be summer the next time I write to you, and I hope we’ll all be able to enjoy some of it. Till then, be well.