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“HOT TOPICS IN SOCIAL MEDIA”

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I. INTRODUCTION

Social media has transformed the society in which we live and practice. Inhabitants of this planet spend more than 10 billion hours using social media on a daily basis. There are 4.74 billion social media users globally, equivalent to more than 59% of the total population. There are 2.934 billion people on Facebook, 2.5 billion on YouTube, 2 billion on WhatsApp, 1.4 billion on Instagram, 849 million on LinkedIn, one billion on TikTok, 576 million on Snapchat, and 544 million on Twitter. Consider, for example, what takes place during a typical minute on social media. There are 293,000 status updates on Facebook alone, over half a billion photos and videos shared to Instagram, 360,000 tweets processed by Twitter, and more than 400 hours of footage uploaded to YouTube in that minute. Social media platforms added 110 million new users over the last year, and the typical social media user spends close to 2.5 hours a day on them.

All of these stats add up to a very different practice environment, even during the last year, for attorneys and those we represent. On a daily basis, lawyers are dealing with procedural issues involving social media—such as using these platforms as a vehicle for accomplishing service of process. We’re also dealing with evidentiary issues such as whether the memes and emoji contained within a party’s or witness’s social media post can themselves be considered as evidence. And with so many people posting online about their attorneys, just where are the ethical boundary lines drawn for lawyers who wish to venture online and respond to negative comments or criticism. The U.S. Supreme Court is currently weighing critical questions that could help determine the future of the internet: should social media platforms be civilly liable for the content that their users post? And is the “content moderation” on platforms like Facebook and Twitter subject to statutes like those passed in Florida and Texas? This article on “hot topics in social media” will provide helpful background on all of these issues.

II. PENDING BEFORE THE U.S. SUPREME COURT . . .

During this past year, lawyers have taken two cases involving social media platforms to this nation’s highest court. In the first case, *Twitter, Inc. v. Taamneh*, an appeal from the 9th Circuit, litigants asked the question, can a social media platform be civilly liable under the Anti-Terrorism Act¹ such that U.S. citizens who are victims of terrorism may hold it accountable for the actions of those who committed an act of international terrorism? Is a social media platform liable for “aiding and abetting” a terrorist attack merely because it failed to adequately block content valorizing terrorism, even where the platform has policies barring terrorist content? Expanding platforms’ legal risk could lead to significant changes at these sites, one reason why the case spawned considerable attention, as well as amicus briefs from such strange bedfellows as the U.S. Chamber of Commerce and the American Civil Liberties Union. Although an opinion has yet to be issued, during late February’s oral arguments, the Court’s justices appeared more open to Twitter’s arguments that it is not liable.

Another subject of great interest to the Court and the public dealt with the internet and First Amendment issues. The companion cases of *NetChoice, LLC v. Paxton* and *NetChoice, LLC v. Moody* involve the question of a Texas statute and a Florida law, respectively, and whether the First Amendment prohibits viewpoint-, content-, or speaker-based laws restricting certain social media platforms from engaging in editorial choices about whether—and how—to publish and disseminate speech. Although in 2021–2022, a majority of U.S. states considered enacting laws to regulate social media platforms, the first two laws to be passed (including Texas’ House Bill 20) in Florida and Texas were immediately met with legal challenges. In May 2022, the Eleventh Circuit struck down the part of the Florida law that limits the power of social media platforms to

¹ 18 U.S.C. § 2333.

moderate and curate content (while upholding the law’s disclosure provisions). In contrast, on September 16, 2022, the more conservative Fifth Circuit upheld Texas’ law in its entirety. As a result, the cases are set for a legal showdown at the Supreme Court.

Critics have argued that the Texas law’s key provision (which prohibits social media platforms from removing or labelling user posts) violates the First Amendment, and that its provisions requiring social media companies to disclose information about how content is moderated and user content is curated should be evaluated with deference. As of May 31, 2022, the U.S. Supreme Court has reinstated a stay of Texas’ law while it considers both legal challenges.

Whether or not a social media platform’s content moderation policies constitute speech protected by the First Amendment carries serious implications for the future of Section 230 and, indeed, for the future of online discourse itself. It remains to be seen how the Supreme Court will rule. In the meantime, the war over free speech is being waged on a more local level as well. In the wake of the May 2022 mass shooting by a white supremacist in Buffalo, New York, the state’s governor, Kathy Hochul, launched attacks on social media companies. As a result, in December 2022, New York’s “Hateful Conduct Law” (seeking to regulate the use of social media companies’ alleged “incitement” of “hateful speech” directed toward individuals or groups based on race, color, religion, etc.) went into effect. In *Volokh v. James*, however, the U.S. District Court for the Southern District of New York enjoined the “Hateful Conduct Law” as unconstitutional.

Social media remains a battleground in the war over First Amendment rights.

III. YOU’VE BEEN . . . AIRDROPPED? SERVICE OF PROCESS USING SOCIAL MEDIA AND NFTS

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