

## EDITOR'S NOTE

Welcome to the second Issue of Volume 73 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). This Issue showcases the breadth of scholarship in telecommunications and technology law, spanning from broadband regulation to information privacy to the regulation of e-commerce.

This Issue begins with an article authored by Jonathan E. Nuechterlein and Howard Shelanski examining proposed broadband regulation, ultimately cautioning that the proposals fail to identify real market failures and are too costly. Nuechterlein and Shelanski argue that the government can address real market problems, such as digital divides by expanding targeted subsidy mechanisms.

This Issue also features four student Notes. In the first Note, Hunter Iannucci illustrates the inability of current legal mechanisms to protect the informational privacy rights of transgender public figures. Iannucci argues that the European Union's right to be forgotten law can be constitutionally replicated in the U.S. to allow transgender public figures to remove online information about themselves inconsistent with their gender identities. In the second Note, Olivia T. Creser addresses consumer harm online and the now common call to break up Big Tech. Creser provides a counterproposal, that Section 5 of the Federal Trade Commission Act can be amended to protect consumers. In the third Note, Brooke Rink discusses the online mugshot industry. Rink argues that Congress may act to limit the release of such images and that exploitative websites may be further regulated through a modification to Section 230. In the final Note, Shuyu Wang describes the challenge of regulating counterfeit merchandise sold through Chinese social media platforms. Wang proposes that those social media platforms with in-app shopping features fall under the regulation of e-commerce platforms to allow better trademark enforcement in China, a model that could shed light on the recent U.S. proposal seeking to combat online counterfeits: the SHOP SAFE Act.

We thank the FCBA and The George Washington University Law School for their continued support. This Issue marks one year into the COVID-19 pandemic which posed unique challenges for the *Journal*, including the cancellation of our 3rd Annual Spring Symposium in 2020, but brought new opportunities, like our partnership with the Berkeley Center for Law & Technology for our joint virtual Spring Symposium in 2021. We thank our all our contributors for their work during this remarkable year.

The *Journal* is committed to providing its readership with rigorous academic scholarship and thought leadership in relevant topics in communications and information technology law. Please send submissions to be considered for publication to [fcljarticles@law.gwu.edu](mailto:fcljarticles@law.gwu.edu). All other questions or comments may be directed to [fclj@law.gwu.edu](mailto:fclj@law.gwu.edu). This Issue and our archive are available at [www.fclj.org](http://www.fclj.org).

Elissa C. Jeffers  
*Editor-in-Chief*



## ***Federal Communications Law Journal***

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association (FCBA) and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the FCBA, the *Journal* is distributed to over 2,000 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at [www.fclj.org](http://www.fclj.org).

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

## ***Federal Communications Bar Association***

The FCBA (d/b/a FCBA – The Tech Bar) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the technology, media, and telecommunications industries. That's why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, DC area, the FCBA has 11 active regional chapters, including: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Southern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

***FCBA Officers and Executive Committee Members  
2020-2021***

Natalie G. Roisman, *President*  
Megan Anne Stull, *President-Elect*  
Anna Gomez, *Treasurer*  
Diane Griffin Holland, *Assistant Treasurer*  
Krista L. Witanowski, *Secretary*  
Barry J. Ohlson, *Assistant Secretary*  
Dennis P. Corbett, *Delegate to the ABA*  
Jacqueline McCarthy, *Chapter Representative*  
Daniel Waggoner, *Chapter Representative*  
Thomas Parisi, *Young Lawyers Representative*

Paula H. Boyd  
John B. Branscome  
Rudy N. Brioché  
Matthew S. DelNero  
Darah S. Franklin  
Mia Guizzetti Hayes  
Kathleen A. Kirby  
Joshua S. Turner  
Johanna R. Thomas  
Stephanie S. Weiner

***FCBA Staff***

Kerry K. Loughney, *Executive Director*  
Janeen T. Wynn, *Senior Manager, Programs and Special Projects*  
Wendy Jo Parish, *Bookkeeper*  
Elizabeth G. Hagerty, *Membership Services Administrator/Receptionist*

***FCBA Editorial Advisory Board***

Lawrence J. Spiwak	Jeffrey S. Lanning
Emily Harrison	Jeremy Berkowitz

***The George Washington University Law School***

Established in 1865, The George Washington University Law School (GW Law) is the oldest law school in Washington, DC. The Law School is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. GW Law has one of the largest curricula of any law school in the nation with more than 275 elective courses covering every aspect of legal study.

GW Law's home institution, The George Washington University is a private institution founded in 1821 by charter of Congress. The Law School is located on the University's campus in the downtown neighborhood familiarly known as Foggy Bottom.

The *Federal Communications Law Journal* is published by The George Washington University Law School and the FCBA three times per year. Offices are located at 2028 G Street NW, Suite LL-020, Washington, DC 20052. The *Journal* can be reached at [fc lj@law.gwu.edu](mailto:fc lj@law.gwu.edu), and any submissions for publication consideration may be directed to [fc ljarticles@law.gwu.edu](mailto:fc ljarticles@law.gwu.edu). Address all correspondence with the FCBA to FCBA, 1020 19th Street NW, Suite 325, Washington, DC 20036-6101.

**Subscriptions:** Subscriptions are \$30 per year (domestic), \$40 per year (Canada and Mexico), and \$50 per year (international). Subscriptions are to be paid in US dollars, and are only accepted on a per-volume basis, starting with the first issue. All subscriptions will be automatically renewed unless the subscriber provides timely notice of cancellation. Address changes must be made at least one month before publication date, and please provide the old address or an old mailing label. Please direct all requests for address changes or other subscription-related questions to the journal via email at [fc lj@law.gwu.edu](mailto:fc lj@law.gwu.edu).

**Single and Back Issues:** Each issue of the current volume can be purchased for \$15 (domestic, Canada and Mexico) or \$20 (international), paid in U.S. dollars. Please send all requests for single or back issues to [fc lj@law.gwu.edu](mailto:fc lj@law.gwu.edu).

**Manuscripts:** The *Journal* invites the submission of unsolicited articles, comments, essays, and book reviews mailed to the office or emailed to [fc ljarticles@law.gwu.edu](mailto:fc ljarticles@law.gwu.edu). Manuscripts cannot be returned unless a self-addressed, postage-paid envelope is submitted with the manuscript.

**Copyright:** Copyright © 2021 Federal Communications Bar Association. Except as otherwise provided, the author of each article in this issue has granted permission for copies of the article to be made for classroom use, provided that 1) copies are distributed at or below cost, 2) the author and the *Journal* are identified, 3) proper notice of copyright is attached to each copy, and 4) the *Journal* is notified of the use.

**Production:** The citations in the *Journal* conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 21st ed., 2020). Variations exist for purposes of clarity and at the editors' discretion. The *Journal* is printed by Joe Christensen, Inc.

**Citation:** Please cite this issue as 73 FED. COMM. L.J. 219 (2021).

The views expressed in the articles and notes printed herein are not to be regarded as those of the *Journal*, the editors, faculty advisors, The George Washington University Law School, or the FCBA.

# FEDERAL COMMUNICATIONS LAW JOURNAL

**GW** | LAW

VOLUME 73

ISSUE 2

**FCBA**  
FEDERAL COMMUNICATIONS  
BAR ASSOCIATION

FEBRUARY 2021

## ARTICLE

### **Building on What Works: An Analysis of U.S. Broadband Policy**

By Jonathan E. Nuechterlein & Howard Shelanski .....219

Issued ten years ago, the FCC’s National Broadband Plan was in many respects a case study in regulatory humility. It recognized that broadband progress was “[f]ueled primarily by private sector investment and innovation”; that “government cannot predict the future”; that “the role of government is and should remain limited”; and that policymakers should thus focus not on imposing price controls or behavioral restrictions, but on “encourag[ing] more private innovation and investment.” This advice, which the FCC has generally followed, has fared well under the test of time. Ten years and hundreds of billions of investment dollars later, the broadband marketplace now offers consumers more choices and exponentially faster speeds than it did then.

Against that backdrop, this paper analyzes the asserted need for, and likely consequences of, four types of broadband regulation proposals in recent circulation: (1) facilities-sharing obligations; (2) retail price controls; (3) internet interconnection obligations; and (4) amorphous and open-ended ISP conduct rules like those the FCC imposed in 2015. For the most part, we see little merit to any of these proposals under current market conditions. None of them is needed to address any identifiable market failure, and each would impose significant costs, including the investment-chilling prospect of regulatory creep.

That said, government retains a critical role to play in the broadband marketplace. Market forces are unmatched in their power to bring the greatest benefit to the greatest number. But market forces by themselves will not help America close two stubborn and unacceptable digital divides: between rich and poor, and between urban and rural. These are real, universally acknowledged problems that call for real solutions. In particular, they call for expanded subsidy mechanisms—one directed to low-income subscribers and the other to broadband providers that commit to new infrastructure deployment in rural and other high-cost areas. But the challenge of closing these digital divides does not even logically support a call for more intrusive regulation of the broadband industry. To the contrary, such regulation would, if anything, make the underlying problems worse by placing a thumb on the scale against additional broadband investment.

NOTES

Erasing Transgender Public Figures’ Former Identity with the Right to Be Forgotten

By Hunter Iannucci .....259

The law in the United States does not adequately protect privacy rights for transgender public figures. In light of the stigma and violence perpetuated against transgender individuals, as well as their dignity interests in actualizing their gender identities, transgender persons have unique privacy interests in maintaining confidentiality of their personal information, such as their birth names and assigned sex at birth. Transgender people might seek to protect this personal information through the tort of public disclosure, which punishes publication of this private, personal information. But the public disclosure tort only goes so far in protecting information privacy due to the newsworthiness test and public figure limitations, which pose a problem for transgender public figures in particular, who are most susceptible to these limitations. This Note argues transgender public figures need a mechanism not only to sanction the revelation of their personal information, but to allow them to “delete” this information from online articles to enable them to legitimize their true gender identities and repudiate their former selves. It proposes importing the EU’s right to be forgotten to create such a mechanism, and concludes by arguing that speech and press freedoms—though believed to be the cornerstone of American democracy—should yield to this weighty privacy interest to both honor transgender individuals’ gender identities and safeguard them from stigma, discrimination, and violence.

In Antitrust We Trust?: Big Tech Is Not the Problem—It’s Weak Data Privacy Protections

By Olivia T. Creser .....289

“Break Them Up” has become a rallying cry for politicians, policymakers, and academics alike who are fed up with the power of Big Tech. They believe that too much power in the hands of too few has caused much of the discontent online today, particularly as a result of consumer exploitation, manipulation, and privacy violations, and so, the movement aims to take back the spoils of what Louis Brandeis called the “curse of bigness.”

However, the movement to break up Big Tech misidentifies the cause of consumer harm online. It is not because Big Tech is too big, rather it is because data privacy protections are too weak. This is the result of decades worth of Internet growth with little to no concern for consumer protections. Consumers are worse off because the government fails to balance economic growth with consumer protection. This Note will propose a path forward for the Congress to begin finding that balance.

By amending Section 5 of the Federal Trade Commission Act to make illegal practices that are unfair and deceptive according to the reasonable expectations of an ordinary consumer, Congress will empower the FTC to bring more enforcement actions that are in the public interest. The FTC is already the leading enforcement agency for consumer privacy, and this amendment will give it much needed support for addressing harms online that often shock the

public because the practices are not what people generally expect. This amendment will also allow the Internet ecosystem to continue to self-regulate. While this amendment will not fix all the problems arising online, it is a jump-start to rectifying lack of balance, that today is misconstrued as a “curse of bigness.”

**If a Picture Is Worth a Thousand Words, Your Mugshot Will Cost You Much More: An Argument for Federal Regulation of Mugshots**

By Brooke Rink.....317

This Note develops arguments for congressional regulation of mugshots in light of the online mugshot extortion industry. At the federal level, the disclosure of mugshots is already considered an unwarranted invasion of privacy. Further, caselaw dating back to the beginning of the 20th century recognizes the privacy interests in mugshots, especially for those who are not ultimately convicted of a crime. Although Congress may not have been able to regulate the release of mugshots by state agencies thirty years ago, the Internet and companies like Mugshots.com created the hook necessary for congressional regulation. This Note proposes (1) limiting the release of mugshots until after a person’s successful criminal conviction, and (2) modifying Section 230 of the Communications Act so courts can order search engines to remove links to websites with exploitative removal practices.

**A Chinese Lesson in Combatting Online Counterfeits: The Need to Place Greater Obligations on Social Media as They Transform to E-Commerce Platforms**

By Shuyu Wang .....339

Social media have become important outlets for luxury brands to promote brand visibility and reputation. While brands enjoy the convenience of real-time interaction with a large base of social media users, counterfeiters also take advantage of social media platforms to facilitate sales of fake products. Preventing counterfeit sales on social media is now a major challenge to brands, and this problem is exacerbated in the Chinese market due to the great difference between China’s and U.S.’ social media ecosystems. Many Chinese social media platforms implement in-app shopping malls and welcome third-party merchants to settle in the market. By embedding an in-app checkout feature on their platforms, Chinese social media create a closed-up environment for business transactions, which increases the difficulty for brands to monitor their trademarks online. China has been experimenting with the cyber-courts and the E-Commerce Law to better regulate the e-commerce field, but at present, both efforts fall short to address the counterfeit problem on social media. This Note proposes an amendment to China’s E-Commerce Law to include social media platforms with in-app shopping features in the scope of e-commerce platforms, and thus place more obligations on social media platforms to assist with online trademark enforcement. Because combatting online counterfeits is a global issue, this Note also suggests that China’s legal reform in the e-commerce field may provide some foresight for such practice in the United States.