

Foreword

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The two-day November 2021 conference titled “The Internet and the Law: Legal Challenges in the New Digital Age,” hosted by UC Hastings Law, brought together prominent academic and practitioners to discuss and debate some of today’s most pressing issues. The conference tied together the themes of access to justice, AI influences in civil litigation, products liability of tech products, data collection, and the regulation of social-media content.

The first panel, with presentations by Professor Josh Davis and Professor Harry Surden and commentary from Professor David Engstrom, Mr. Bradford Newman, Esq., and Professor Rick Marcus, set the stage for exploration of the frontiers of litigation and tech by tackling the murky issues of the use of artificial intelligence in litigation. Professor Davis argued that artificial intelligence was already playing an increasingly prominent and important role in civil litigation, and that it had the potential to do far more, including by formulating arguments in legal briefs and even deciding issues in the role of adjudicator. Professor Davis pointed out that the latter might be less desirable at present because the judicial role often involves purposive reasoning that we may well wish to reserve for human application. In contrast, Professor Surden emphasized that even predictive analytics are more art than science and only as good as their programming. The panel both recognized the glitter of promise and called for caution and deliberation in incorporating artificial intelligence into litigation practice.

In a related vein, Professor Eugene Volokh’s lunchtime keynote addressed the Internet’s implications for pseudonymous litigation. Courts have long had authority to maintain confidentiality of certain court records, including even the identity of parties—such as when parties are minors, are victims of sexual assault, or have certain medical conditions. But the private interests in pseudonymity create tension with the public interest in open court records. Further, the digitization of court filings and court records has made the content of those filings and records widely available on the Internet, making pseudonymity difficult to maintain. When should pseudonymity be permitted and how can it be maintained in the digital age? Professor Volokh offered some answers.

The second panel, with presentations by Professor Catherine Sharkey and Mr. Robert Peck, Esq. and commentary from Mr. Donald Slavik, Esq., Professor Rick Marcus, and Dr. Gerson H. Smoger, Esq., moved the conversation from procedure to the applicability of the substantive law of products liability to online sellers and marketplaces. Professor Sharkey highlighted and interrogated the trend of courts holding online-marketplace platforms liable for the products they sell, because they are the cheapest cost avoiders. Mr. Peck argued that traditional doctrines of proof and

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proximate cause must adapt to the online world. Both attended to the game-changing online milieu as impelling a new vision of tort liability.

But once liability has been recognized, how do these virtual relationships affect attempts by plaintiffs to obtain digital information in discovery and use it as evidence at trial? The third panel, with presentations by Professor Alexa Koenig and Professor Neil Richards and commentary from Professor Rebecca Wexler, Mr. Behram Parekh, Esq., Mr. Brian Lewis, Esq., and Dr. Gerson H. Smoger, Esq., addressed those questions. Professor Koenig detailed the advances and difficulties in digital proof presentation before a judge and jury, while Professor Richards documented defense-side stonewalling on grounds that foreign law prevents litigation discovery of certain digital information. This panel shed light on the challenges that the digital age presents in pretrial and trial practice today.

The flip side of litigation disclosure is data privacy. How can the law ensure that tech companies protect user data appropriately? These questions were explored by the fourth panel in presentations by Professor Bryan Choi and Professor Eric Goldman and commentary from Mr. David Berger, Esq., Professor Zahra Takhshid, and Professor Scott Dodson. Professor Choi argued that software safety standards should not be expected to keep up with software complexity, and that therefore the law should favor an information-forcing approach that develops legal expertise in software design and capacities. Professor Goldman attacked the public-regulatory model of digital companies, arguing that mandatory disclosure reports were both unconstitutional and unwise as a policy matter. The presenters and commentators on this panel explored the difficulties of regulating and holding online companies and platforms accountable for safeguarding user data.

Regulation of tech companies then led to the fifth panel's consideration of how to deal with social-media content and freedom of speech. Remarks were presented by Professor Anuj Desai and Professor Dawn Nunziato, with commentary from Mr. Angelo Carusone, Esq., Ms. Nancy Willard, Esq., and Dr. Gerson H. Smoger, Esq. Professor Desai zoomed out to ask broadly what role social media should play in the ecosystem of public speech, arguing both that the proper framework for viewing social-media platforms is on a speaker-conduit continuum and that protected status should depend primarily upon their value to the public as audience rather than to the speaker as a forum-seeker. Professor Nunziato evaluated various legislative attempts to control or monitor social-media content, finding that legislation furthering principles of nondiscrimination and due process to be on the surest footing. The presenters and commentators concluded that conversations surrounding the regulation of social-media content will no doubt continue to be on the forefront of popular conversations. At the same time, the panel offered some insights for nuanced and modest steps toward appropriate regulation.

Five panels and a keynote address cannot do the magnitude and importance of litigation and technology justice, but, in my view, they have made an appreciable dent. The discussions have invited further study, conversation, and hope for both understanding and improvement in our civil-justice system.