



# AdTech & Digital Media Newsletter

August 2022

Welcome to the first in a series of newsletters prepared by Arnold & Porter's AdTech and Digital Media group. These newsletters will cover legal developments relevant to the adtech and digital media industries, the state of M&A and investment activity in the industries, and updates regarding Arnold & Porter's activity in the space.

## General

***FTC Explores Rules Targeting Commercial Surveillance and Lax Data Security:*** On August 22, 2022, the FTC published an [Advance Notice of Proposed Rulemaking](#) (ANPR) to address commercial surveillance and data security. In the ANPR, the FTC defines "commercial surveillance" as the collection, analysis and monetization of information about "consumers," and includes not only individuals in the definition of "consumer" but also businesses—a much broader definition than is commonly used in privacy and consumer protection regulations. The ANPR explains that the FTC is seeking to combat, among other things, lax data security, harm to children, coercion of consumers to consent to sharing of information, the practical inability of consumers to prevent expanding scopes of surveillance, algorithmic bias and inaccuracies, surveillance practice bias and discrimination, and dark patterns to influence or coerce consumer choice. Rules along the lines suggested in the ANPR would potentially have a significant impact on the adtech industry. The FTC has solicited public comment in response to 95 specific questions posed in the ANPR, with comments due by October 21, 2022. The FTC has also scheduled a public virtual forum to discuss the initiative on September 8, 2022.

***CFPB Warns Digital Marketing Providers They Are Potential Targets of Actions Against "Digital Redlining":*** On August 10, 2022, the Consumer Financial Protection Bureau (CFPB) issued new interpretive guidance clarifying that certain digital marketing providers fall within the CFPB's jurisdiction to prevent unfair, deceptive, or abusive acts or practices, including discrimination against legally protected classes. The interpretive guidance explains that although the term "service provider" expressly excludes an entity that is "solely" involved in offering or providing "time or space for an advertisement for a consumer financial product or service," digital marketing providers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer engagement, including purchase or adoption

behavior,” will generally be deemed by the CFPB to be service providers. The new guidance signals that the CFPB may soon ramp up its enforcement of “digital redlining,” a phrase used to describe technology-based discrimination, to reach beyond financial services companies to discipline the digital marketing providers that work with them. Adtech industry participants whose services are used in connection with marketing of consumer financial products or services should take note. For more details, please see our [Advisory](#) on the CFPB guidance.

## Healthcare Related

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### ***FTC Focuses on Commercialization of Geolocation Data That Can Be Used to Reveal Sensitive***

***Consumer Health Information:*** On August 12, 2022, Kochava Inc., an Idaho-based digital marketing and analytics company, [sued the FTC](#), alleging that the FTC had improperly threatened to sue Kochava for alleged violation of Section 5(a) of the Federal Trade Commission Act in connection with Kochava's sale of geolocation data. The FTC's threat was based on assertions that the data collected by Kochava could be used to identify consumers and track their visits to sensitive locations such as therapists' offices, addiction recovery centers, medical facilities, and women's reproductive health clinics. In its complaint, Kochava claims the FTC mischaracterized Kochava's business and its practices. The FTC's allegations against Kochava underscore the [Commission's concern](#) about misuse of geolocation data, particularly data at the intersection of location and health. Companies that market consumer geolocation data should take note.

***Meta Facing Class Action Lawsuit for Use of Pixel Tracking With Respect to Healthcare Data:*** On June 17, 2022, a [class action lawsuit](#) was filed against Meta Platforms, Inc. alleging that Facebook's Pixel tracking tool was being used on hospital and medical provider websites to redirect patient information to Facebook, without required patient consent under HIPAA, in violation of various laws, including the federal Electronic Communications Privacy Act, California common law and statutory law, and the California constitution, as well as Facebook's own data policy and cookies policy. The case is pending in federal court in the Northern District of California.

## Antitrust

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***FTC Challenges Meta's Acquisition of Virtual Reality Fitness App:*** On July 27, 2022, the [FTC sued Meta](#) to challenge the company's proposed acquisition of Within Limited and its virtual reality fitness app, Supernatural. Supernatural offers a variety of high-quality workouts set to music, including from popular artists like Katy Perry, Imagine Dragons, Lady Gaga, and Coldplay, with visuals based on exotic locales in the real world, like the Galapagos Islands. “Instead of competing on the merits, Meta is trying to buy its way to the top,” said FTC Bureau of Competition Deputy Director John Newman. “Meta already owns a best-selling virtual reality fitness app, and it had the capabilities to compete even more closely with Within's popular Supernatural app. But Meta chose to buy market position instead of earning it on the merits. This is an illegal acquisition, and we will pursue all appropriate relief.” A federal court complaint and request for preliminary relief has been filed in the US District Court for the Northern District of California to [halt the transaction](#).

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## Developments in Europe

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***France, Italy and Spain Say Big Tech Should Shoulder Network Costs:*** According to a [joint paper](#) reported by Reuters, the governments of France, Italy, and Spain urged European telecom networks and large online content providers to [pay fair shares of network costs](#), citing that the six largest content providers (including Google, Meta, and Netflix) accounted for 55% of internet traffic. Two Italian government officials confirmed details of the document. In a preemptive response to concerns that making Big Tech pay for infrastructure could threaten EU net neutrality rules, the joint document says that any proposal should “ensure fairness between users in accordance with the net neutrality rules, which is a core principle we absolutely need to preserve.”

***UK Proposes Amendment to Online Safety Bill Granting Ofcom (UK's Regulatory Authority for Telecommunication) Greater Authority to Ensure Tech Companies Tackle Child Abuse Content Online:***

On July 5, 2022, the UK introduced an [amendment](#) granting Ofcom additional powers to ensure technology companies [take action](#) concerning child sexual abuse and exploitation content. The proposed amendment grants Ofcom the explicit power to require companies to make proportionate changes to enable them to use accredited technology to prevent harmful child sexual abuse and exploration content. The new powers enable Ofcom to impose fines of up to £18 million or 10% of a non-complying company's global annual turnover, depending on which is higher.

***French Adtech Firm Criteo Facing \$65.4 Million Sanction in Connection With Allegations of Non-compliance With GDPR:*** As reported on a Form 8-K/A filed by Criteo S.A. on August 5, 2022, a report has been issued by France's Commission Nationale de l'Informatique et des Libertés (CNIL) (France's data privacy body) proposing a fine of \$65.4 million against Criteo for alleged breaches of the GDPR. Criteo has the right to respond in writing and a formal hearing process. A final decision on resolution and potential financial penalties would likely not occur until mid-2023.

## Case law development

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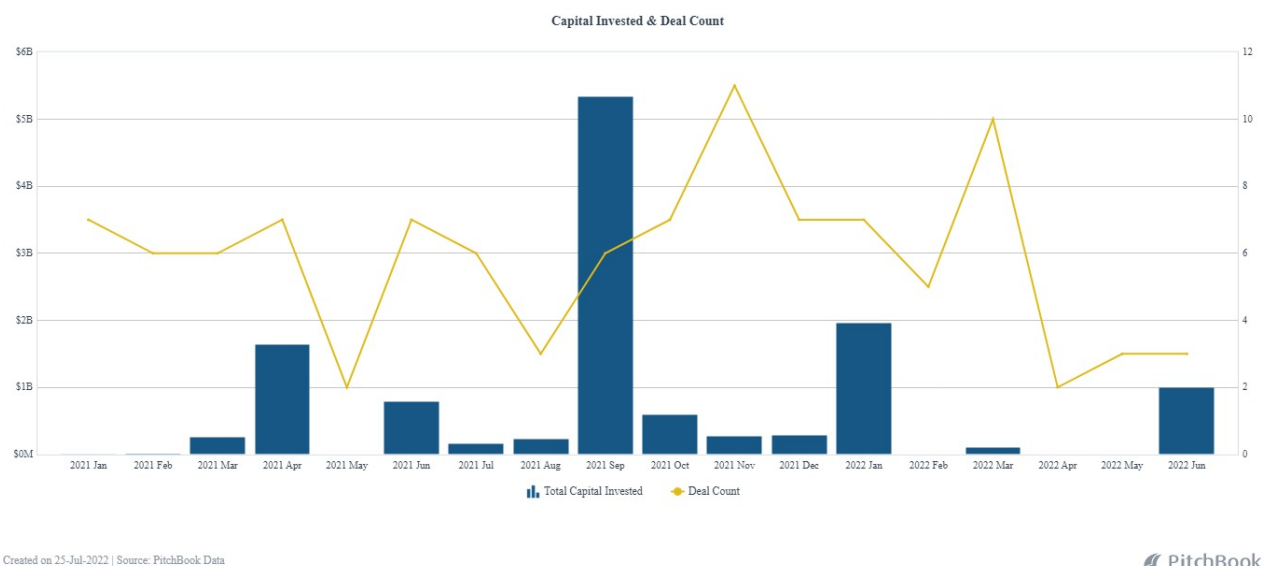
***Advertiser Liability for Social Media Influencer Copyright Violations:*** In a July 11th summary judgment ruling, a federal court in the Southern District of Florida considered whether an advertiser who used social media influencers in its campaigns could be held liable for copyright infringement by the influencers. The case related in part to whether Bang Energy, an energy drink and sports nutrition supplement company that used social media influencers to market its products on social media platforms like TikTok, was vicariously liable for copyright infringement stemming from the influencers' use of copyrighted music in their videos. While the court denied plaintiffs' motion for failure to present the requisite evidence regarding financial benefit to Bang Energy (which would typically not be difficult to show), the court held that the plaintiffs had met the burden of showing the requisite control by Bang Energy over the influencers. The decision sends a clear message—advertisers need to be aware of the copyright risk when engaging social media influencers in their campaigns!

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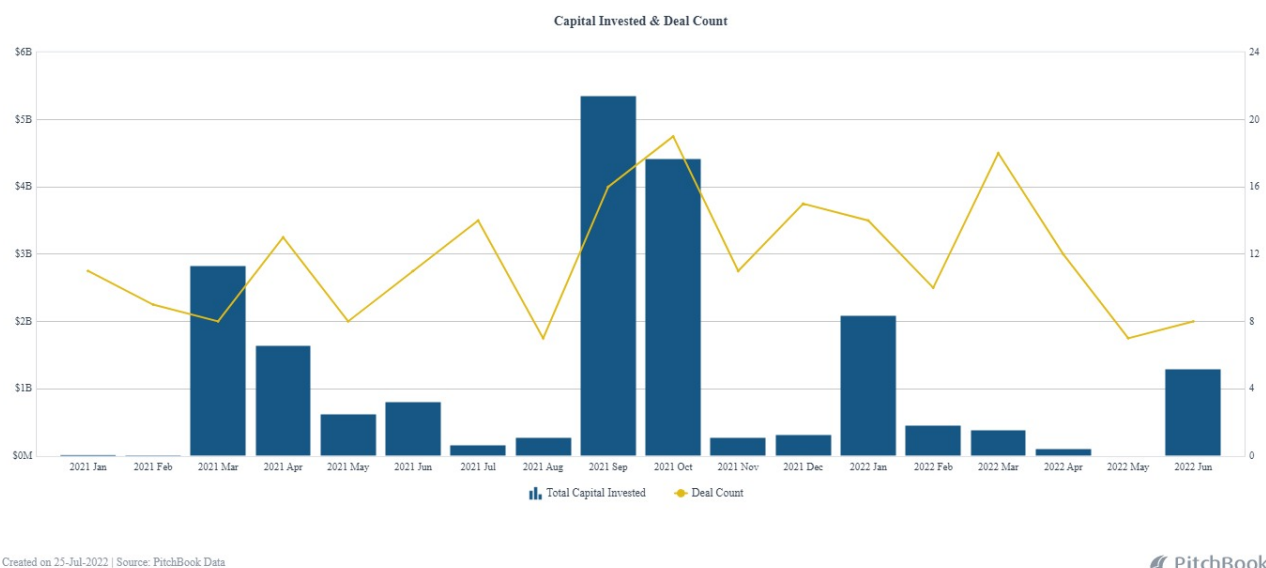
## Markets

Based on data provided by PitchBook, AdTech M&A in (a) the US (see Figure 1 below) and (b) the US, EU, and Asia, combined (see Figure 2 below), measured both by dollar volume and deal count, is down in Jan.-Jul. of CY2022 over the same period of CY2021. Annex A includes data for (1) AdTech M&A transaction volume in the US from January 1, 2021 through July 31, 2022 and (2) AdTech M&A transaction volume in the U.S., EU, and Asia, combined, for the same period.

### Annex A



### Annex B





## Arnold & Porter Updates

**Embracer Group Enters Into Agreement to Acquire IP Rights to *The Lord of the Rings* and *The Hobbit Literary Works* by J.R.R Tolkien:** Arnold & Porter advised longtime client The Saul Zaentz Company on an [agreement to sell Middle-earth Enterprises](#) to Freemode Iconic Holding Inc., a subsidiary of the Swedish gaming company Embracer Group. The sale includes the intellectual property catalog and worldwide film, stage, and merchandising rights in *The Hobbit* and *The Lord of the Rings* by J.R.R. Tolkien. Freemode will also acquire the matching rights to other Middle-earth-related literary works authorized by the Tolkien Estate, which have yet to be explored.

**Partner Jami Vibbert Quoted in Adweek article, “Bill Could Threaten Californians’: States Retaliate as the Federal Privacy Bill Advances”:** Arnold & Porter partner Jami Vibbert was recently [quoted in Adweek](#) regarding the American Data Privacy and Protection Act (ADPPA). The article discusses the advancement of the bipartisan ADPPA and ADPPA’s potential impact on advertisers and marketers, states’ concerns, and other hurdles the bill faces before passage.

**Partner Raqiyyah Pippins Will Be Hosting a Panel at [NAD 2022](#) Held in Washington, DC on September 19-20:** The panel will discuss emerging issues faced by brands when using influencers, consumer review and other promotional strategies attracting scrutiny from regulators. Registration details are available [here](#).

**Please see Arnold & Porter’s [AdTech and Digital Media webpage](#) for additional publications summarizing developments in adtech and digital media.**

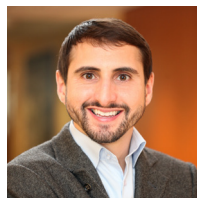
## Questions/Comments?

Contact a member of our Editorial Committee



**Nicholas O’Keefe**

Partner  
Silicon Valley



**Tom A. Magnani**

Partner  
San Francisco



**Jami Vibbert**

Partner  
New York



**Nancy L. Perkins**

Counsel  
Washington, DC



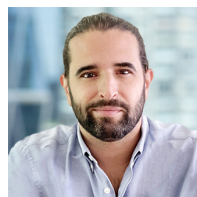
**Isaac Chao**

Senior Associate  
San Francisco



**Francesco DeProspero**

Senior Associate  
Silicon Valley



**Joshua Blank**

Senior Attorney  
New York