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17 IN THE UNITED STATES DISTRICT COURT
18 THE NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION

20
21 NETCHOICE, LLC d/b/a NetChoice,

22 Plaintiff,

23 v.

24 ROB BONTA, ATTORNEY GENERAL OF
25 THE STATE OF CALIFORNIA, in his official
capacity,

26 Defendant.
27

Case No. 5:22-cv-08861-BLF

**DECLARATION OF MICHAEL
MASNICK IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Date: June 22, 2023
Time: 9:00 A.M.
Dept.: Courtroom 3 – 5th Floor

Action Filed: December 14, 2022

1 I, Michael Masnick, declare:

2 1. **Identity of Declarant.** I am the founder and CEO of Floor64, Inc., a California
3 small business that operates a widely-read blog at Techdirt.com (Techdirt), which for over 25 years
4 has been chronicling developments in technology law and policy and their convergence with civil
5 liberties. I am also the founder and editor of Techdirt. I make this declaration from personal
6 knowledge and a review of Techdirt's and Floor64's records kept in the ordinary course of
7 business.

8 2. **Techdirt's Expression.** Since our founding in 1997, we have published more than
9 70,000 articles on Techdirt regarding subjects such as freedom of expression and platform liability,
10 as well as copyright, trademark, patents, privacy, innovation policy, and more. The Techdirt site
11 often receives more than a million page views per month. We also publish a daily newsletter
12 emailed to subscribing readers, and under Techdirt's editorial auspices, we produce an original
13 podcast linked from its website that reacts to cutting-edge technology issues in greater depth.

14 3. Techdirt's expressive content is authored primarily by a team of employees,
15 freelance writers, and other contributors. Its own content is also augmented by the contributions
16 of readers, who have posted nearly two million comments on Techdirt articles since the site
17 launched. (Readers posted approximately 62,000 comments on 2,056 articles in 2022 alone).
18 These comments, as well as the additional discussions happening in other online forums hosted
19 for Techdirt readers, are themselves expression that advances discovery and discussion, and we
20 regularly highlight those comments that convey particular insight or humor. *See* Leigh Beadon,
21 "Funniest/Most Insightful Comments Of 2022 At Techdirt," TECHDIRT (Jan. 1, 2023),
22 <https://www.techdirt.com/2023/01/01/funniest-most-insightful-comments-of-2022-at-techdirt/>
23 (last visited Feb. 16, 2023).

24 4. With Techdirt, my company, Floor64, and I are able to be a key contributor to
25 online conversations around technology law and policy issues, not just as a central source for
26 related news and information, but also as the host of a community of readers who feel equally
27 empowered to participate in the dialogue. My personal goal, and our business goal, is to keep
28 expanding Techdirt's online influence, audience, and community, as well as ensure that the public

1 has a platform available to debate and discuss the latest technological news of the day, in order to
2 positively affect the policy issues at the heart of this discourse.

3 5. ***Engaging with Techdirt’s Expression.*** The majority of Techdirt’s expression is
4 free and publicly available to anyone on the internet anywhere in the world. No accounts are
5 needed to read articles, listen to podcasts, or submit user comments. Although Techdirt asks
6 readers for their names and email addresses before they comment, Techdirt does not require this
7 information, and, accordingly, many users leave anonymous comments. We consider user-
8 generated comments—both anonymous and non-anonymous—to be an essential and vibrant part
9 of the online discourse we seek to foster in furtherance of our own expressive interests.

10 6. Although Techdirt does not require visitors to create an account to access articles
11 or leave comments, users may do so if they wish to create a public profile on the site. With that
12 account, they can more easily track all the comments they have made. Techdirt also offers several
13 subscription tiers to “Techdirt Insiders,” who are readers who financially support the site, to
14 provide them with additional perks in exchange for their support. Tiers currently include the
15 “Crystal Ball” tier, which gives subscribers early access to unpublished posts, and the
16 “Watercooler” tier, which enables subscribers to contribute to Techdirt’s Discord, an online forum
17 for Techdirt readers to chat with Techdirt staff and contributors. Accounts are needed to be able
18 to benefit from these additional features.

19 7. ***Techdirt’s Readership.*** Techdirt is a website aimed generally at the public. It does
20 not, however, deliberately invite the attention of readers younger than 13, and in its privacy notice,
21 it forbids users under 13 from registering for a Techdirt account or submitting any personally
22 identifiable information.

23 8. Techdirt has, however, historically welcomed readers between the ages of 13 and
24 18 and allowed them to register for accounts. We anticipate that teenagers may read our articles
25 and potentially want to respond via comments because we know from past experience that many
26 areas of Techdirt’s coverage are relevant to them. For example, Techdirt’s reporting on issues like
27 online harassment, teenagers’ use of social media, and schools’ attempts to restrict social media—
28 or, indeed, this very law—are likely of significant interest to teenage users whose lives are directly

1 affected by these issues firsthand. In fact, over the years, Techdirt has been contacted by high
2 school students about its articles because they were aware of, and concerned by, how the subject
3 matter bore on their own interests and speech rights. In our experience, the 13-18 audience is often
4 just as conversant in Techdirt's core areas of coverage as any other demographic and just as
5 interested in looking to Techdirt for breaking technological news and related issue advocacy
6 because they understand how it so directly affects them.

7 9. ***Supporting Techdirt's Expressive Activities.*** In order to ensure that Techdirt's
8 expression can remain available to the public at large, and for free as much as possible, its
9 expressive activities need to be underwritten via other methods. These methods include the
10 aforementioned subscriptions, donations collected via Patreon (a service that enables creators who
11 provide content to obtain financial support from audiences), third-party partnerships, and
12 merchandise and services sold through <http://deals.techdirt.com>. At times, Techdirt has also
13 depended on advertising, although no ads are currently displayed (except for those advertising
14 products and services sold on the Techdirt website). All of these methods require Techdirt, or the
15 third parties they depend on, to be able to have the operational infrastructure needed to underpin
16 them.

17 10. ***Data Collection and Sharing.*** We believe we foster a better relationship with our
18 readers when we minimize the amount of data we collect from them. However, to operate,
19 maintain, and provide Techdirt's features and services, Techdirt does collect limited user data,
20 such as any information provided when making a purchase through Techdirt's store and
21 information like IP addresses and website visitation details. Techdirt also collects information
22 connected to accounts when supplied by readers. In limited circumstances, Techdirt shares this
23 information with third parties for them to perform various tasks associated with the operation and
24 maintenance of the site and providing its features and services.

25 11. ***Age Verification.*** Techdirt does not track or collect data confirming the age of its
26 readers, nor does Techdirt require readers to verify their ages before accessing content on the site.
27 By not collecting such information in the first place, there is no risk of such sensitive information
28 inadvertently ending up in the wrong hands. Mandating readers provide such information would

1 also interfere with our expressive desire, and practice, of facilitating discourse among anonymous
2 discussants.

3 12. Techdirt lacks the technology needed to change that practice in order to verify the
4 ages of all of its readers, nor does it have the resources to put such technology in place. Such a
5 change would require fundamentally redesigning Techdirt's publication to be one that requires the
6 public to sign up—and in the process submit sensitive personal information—in order to read it,
7 instead of the generally accessible publication that it is today. Reconfiguring Techdirt's interface
8 to accommodate the submission, collection, and secure storage of sensitive personal information
9 would be extremely difficult and expensive to implement. Techdirt could not absorb the cost of
10 fundamentally rearchitecting its data management practices without a devastating economic
11 impact on the site and its ability to convey expression.

12 13. Redesigning our publication to verify the ages of our readers would also
13 compromise our deliberate practice to minimize how much data we collect and retain about our
14 readers to both limit our obligations that would arise from the handling of such data as well as
15 preserve trust with our readers and undermine our relationship with our readers of any age,
16 including teenagers, by subjecting them to technologies that are at best, unreliable, and at worst,
17 highly privacy-intrusive (such as facial recognition). Moreover, because a sizeable portion of
18 Techdirt's readership consists of casual readers who access the site for information and news, any
19 requirement that forces users to submit extensive personal information simply to access Techdirt's
20 content risks driving away these readers and shrinking Techdirt's audience.

21 14. ***Impact of AB 2273 on Techdirt's Expression.*** Techdirt understands that AB 2273
22 will require covered businesses to evaluate and mitigate the risk that "potentially harmful content"
23 will reach children, with children defined to equally cover every age from 0 to 18 despite the
24 substantial differences in developmental readiness and ability to engage in the world around them
25 throughout that nearly two-decade age range. This entire endeavor results in the State directly
26 interfering with my company's and my expressive rights by limiting to whom and how we can
27 communicate to others. I publish Techdirt with the deliberate intention to share my views (and
28 those of other authors) with the public. This law will inhibit my ability to do so in concrete and

1 measurable ways.

2 15. In addition to its overreaching impact, the law’s prohibitions also create chilling
3 ambiguity, such as in its use of the word “harm.” In the context of the issues that Techdirt covers
4 on a daily basis, there is no feasible way that Techdirt can determine whether any number of its
5 articles could, in one way or another, expose a child to “potentially harmful” content, however the
6 State defines that phrase according to the political climate of the moment. For example, Techdirt
7 covers a broad array of hot-button topics, including reporting on combating police brutality
8 (sometimes with accompanying images and videos), online child sexual abuse, bullying, digital
9 sexual harassment, and law enforcement interrogations of minors—all of which could theoretically
10 be deemed by the State to be “potentially harmful” to children. Moreover, Techdirt’s articles are
11 known for their irreverent and snarky tone, and frequently use curse words in their content and
12 taglines. It would be impossible to know whether this choice of language constitutes “potentially
13 harmful content” given the absence of any clear definition of the term in AB 2273. Screening
14 Techdirt’s forum for “potentially harmful” content—and requiring Techdirt to self-report the ways
15 its content and operations could hypothetically “harm” children—will thus cause Techdirt to avoid
16 publishing or hosting content that could even remotely invite controversy, undermining Techdirt’s
17 ability to foster lively and uninhibited debate on a wide range of topics of its choosing. Moreover,
18 not only would Techdirt’s prospective expression be chilled, but the retroactive application of AB
19 2273 would result in Techdirt needing to censor its previous expression, and to an enormous
20 degree. The sheer number of posts and comments published on Techdirt makes the self-assessment
21 needed to comply with the law’s ill-defined rules functionally impossible, requiring an enormous
22 allocation of resources that Techdirt is unable to dedicate.

23 16. It is further unclear whether AB 2273 was written to apply only to California users,
24 but even if it is so limited, Techdirt cannot feasibly customize or limit its expressive offerings to
25 readers in a single state. Creating a completely separate service just for California users (or just
26 for those California users under age 18) would be expensive and impractical. In addition, Techdirt
27 is not aware of any reliable technology capable of ensuring that a California user could not evade
28 any geographic blocking. If Techdirt must adjust its services to comply with AB 2273, it would

1 need to do so globally—meaning it could be potentially forced to remove a broad array of
2 information from the site for its entire audience worldwide.

3 17. The burdens of AB 2273’s demands on expression are substantial. For example,
4 AB 2273 appears to require a mandatory harm analysis for every existing Techdirt feature that will
5 remain available in July 2024, as well as for any new feature Techdirt might want to launch
6 between now and then, or after that date. If this is what AB 2273 requires, Techdirt would have
7 to create a separate Data Protection Impact Assessment (DPIA) for every individual website
8 feature—like Techdirt’s comment system, comment voting, comment promotion, posts, newsletter
9 subscription, and podcast, just to name a few. This obligation would impose an enormous
10 logistical and resource burden on Techdirt’s team and would likely significantly impact Techdirt’s
11 capacity to continue publishing at its current rate, as well as constrain its ability to launch any new
12 editorial features.

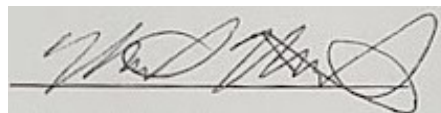
13 18. Ultimately the demands of AB 2273 inflict on Techdirt far more than business-
14 altering technical burdens and economic costs. They fundamentally threaten Techdirt’s expressive
15 ability, inhibiting its ability to publish content of its choosing, exercise editorial autonomy over
16 that content, build ties to readers, and foster the online conversations that define Techdirt’s identity
17 as an expressive outlet. They also will limit Techdirt’s ability to explore new editorial-related
18 partnerships with third-party services that would benefit Techdirt’s reader community. Taken
19 separately and together, the demands of this law, including the requirement that Techdirt identify
20 and mitigate the “risks” of its content and potentially disclose them to the California Attorney
21 General, will force Techdirt to police its own audience and self-censor its own expression, which
22 impinges on Techdirt’s own expressive rights, as well as the expressive rights of its readers.

23 19. *Preparing for AB 2273.* Although Techdirt understands that AB 2273’s effective
24 date is July 2024, it is not possible to delay complying with a law with an impact of this magnitude.
25 Techdirt is already starting to spend significant time and resources preparing for potential changes
26 to its services in order to comply with the law. Techdirt must now decide whether it can develop
27 and implement the kind of software necessary to verify users’ ages (which would take months to
28 develop, if even feasible), determine what makes content “potentially harmful,” and implement

1 technical guardrails to keep that content from reaching young users. Alternatively, Techdirt must
2 consider whether it should simply remove all posts of potential interest to adolescent readers in
3 the hopes that those readers will simply stop reading the website. Of course, given that Techdirt
4 is a widely read informational and news site that covers topics of significant public interest, the
5 only way such an approach would work is if adolescent readers suddenly stopped caring about the
6 world around them. Given how unlikely they are to do so, Techdirt must instead prepare for the
7 law to go into effect, which will require the expenditure of significant technical, personnel, and
8 resource costs, and in all events impinge on its expression.

9 I declare under penalty of perjury that the foregoing is true and correct to the best of my
10 knowledge.

11 Executed this 15th day of February, 2023, in Redwood City, CA.

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13
14 Michael Masnick

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