What Happens When You Condense a Month of the MediaLawDaily into a Single Article?

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

No poetry this month, I’m afraid, except in a metaphorical sense as we once more observe the elegant ballet of constitutional principles that is First Amendment law. Who am I kidding, it’s usually more like watching a monster truck rally. And yet we still can’t look away.

Me, I’m just back from my usual vacation in California following Legal Frontiers in Digital Media. As always, it was great to see so many of you at the conference. It took a while to clear off my desk and get up to speed, which is why this article is running a little behind, but I figured it was better to get this out the door than risk another verse apocalypse.

Onward.

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Supreme Court

Decisions

So, we have Masterpiece Cakeshop. But that was decided on June 4, so we’ll get into that more in the next issue.

For now, we’ve got Murphy v. NCAA, in which the Court struck down, under the Tenth Amendment, a federal statute that compelled states to maintain state laws banning sports gambling if they had not legalized betting before 1993. The Court also decided Epic Systems v. Lewis, ruling that companies can short-circuit class actions by employees through arbitration clauses in individual employment contracts. Neither is particularly deeply connected to media law issues, true, but the cases clearly could impact the media industry. Think interactive betting platforms in the first case, and the controversy over arbitration clauses in the #metoo era in the second, and you’ll get the idea.

Petitions

Katherine McKee has petitioned for cert from the First Circuit’s affirmance of a loss on her defamation claim against Bill Cosby. The Court of Appeals had bounced her claim over a letter written by Marty Singer, ruling that in some respects it was a statement of opinion based on disclosed facts and in other respects was not of and concerning McKee at all. However, the key issue on which McKee seeks review is a ruling that she was a limited-purpose public figure with respect to her accusations against Cosby; the ruling was relevant to the Court of Appeals’ finding that the Singer letter did not reflect actual malice when it accurately quoted McKee with a hyperlink to a source article that established the context of the quotations. Frankly, I don’t see the fault standard making a huge difference here, nor do I see the Supreme Court taking the case.

AT&T flirted with the idea of a petition for cert from the Ninth Circuit’s ruling that the Federal Trade Commission has jurisdiction over non-common-carriage services provided by common carriers (such as data plans provided by cellular companies). However, it has since decided it wants to settle the issue (we’ll get to that later when we discuss net neutrality developments).
No new media law cases were granted cert this month, but in denials we have *Contest Promotions v. San Francisco* (9th Cir., affirming dismissal of First Amendment challenge to distinction between commercial and noncommercial signage in planning code); *Personal Audio v. EFF* (Fed. Cir., affirming PTAB ruling that podcast patent is invalid); and *Rothschild Digital Media v. Sony Interactive* (Fed. Cir., affirming PTAB ruling partially invalidating computer network patent). Meanwhile, the justices denied rehearing in *Caraccioli v. Facebook* (9th Cir., sec. 230 dismissal of claims based on failure to remove private images posted by third party) and *Schum v. FCC* (D.C. Cir., dismissal of petition for review of FCC decision approving transfer of radio license).

**Reporters’ Privilege**

Republican fundraiser Elliot Brody has subpoenaed the Associated Press in the course of a lawsuit that he filed against the government of Qatar. He’s looking for the confidential source(s) who supplied his stolen e-mails to the AP, in the belief that agents of Qatar were behind the theft. The AP is opposing the subpoena.

**Defamation**

**New Cases**

The murder of DNC staffer Seth Rich, which sparked the imaginations of alt-right conspiracy theorists, has spun out yet another defamation claim. This time, it’s PR consultant Brad Bauman (who volunteered to handle press for the Rich family) *suing members of the tinfoil hat club* in D.D.C. over allegations that he was a DNC cleaner sent in to cover up the truth of the crime.

Apropos of nothing, I watched some old episodes of “The X-Files” recently. The monster-of-the-week episodes were still entertaining, but when Mulder goes into one of his shadow government/deep state rants in the mythology episodes, the writing is just plain painful. I guess it was easier to take when I assumed everyone realized it was science fiction.
Anyway...the former executive director of Newport News/Williamsburg International Airport has shifted venues after his defamation claim over reports allegedly implicating him in wrongdoing in connection with a state audit was dismissed by a Virginia court with leave to amend. Rather than beef up his pleadings in state court, the plaintiff moved to Maryland and refiled in E.D. Va., naming the Daily Press and various airport-related entities as defendants.

Alex Jones is facing another defamation lawsuit from the families of Sandy Hook victims (as well as from an FBI agent who responded to the scene) over his claim that the tragedy was a hoax. Earlier suits were filed in Texas; this new lawsuit was filed in Connecticut state court. (Photo: Michael Zimmerman, CC BY-SA 4.0)

In California, the former creative chief of ad agency CP+B is suing the Diet Madison Avenue Instagram account and the anonymous parties behind it over allegations that he is a serial predator and harasser of women. In Florida, a toxicology lab sued CBS over a report based on a recording received from an anonymous source that allegedly accused the lab of illegal activity. And in Michigan, we’ve got a duel between radio hosts over a blog post in which one host allegedly accused the other of having designs on the first host’s 17-year-old daughter (and if that doesn’t sound stupid enough, there’s a demand for a TRO in the mix, because of course there is).

Two new cases from New York: First, a former prosecutor with the Brooklyn District Attorney’s Special Victims Unit has sued a Daily News reporter who filed sexual assault charges against him as well as the paper itself over its coverage of the accusations. Next, the Pussycat Dolls and their manager sued the Daily Mail over its reporting on tweets by a former member accusing the band of being a prostitution ring for entertainment execs. (Photo: Joel Telling, CC BY 2.0)

Plaintiff Wins

A couple of settlements to report this month. The New York Times reached a non-monetary settlement in a libel suit in E.D. La. brought by a Loyola University professor. The prof claimed the Times omitted context that would have clarified that a statement apparently defending slavery was in fact condemning it.
Meanwhile, former Notre Dame coach Lou Holtz settled a claim against The Daily Beast, which reported that Holtz had called immigrants “deadbeats invading the U.S.” at the Republican National Convention. The terms of the settlement are confidential, but The Daily Beast publicly acknowledged that Holtz had not called immigrants “deadbeats.” It apparently stood by its claim that he called them “invaders,” however.

Summer Zervos also notched a procedural win against Donald Trump in the appellate courts of New York, with a ruling that discovery should not be stayed during Trump’s term in office. He has, naturally, appealed again.

A Texas appellate panel slashed the fees awarded to a defendant under the Texas Citizens Participation Act and vacated nonmonetary sanctions, holding that the former were excessive and the latter not provided for under the TCPA.

*Defense Wins*

BuzzFeed racked up a couple of interlocutory wins this month. First, a judge in D.D.C. found a lack of factual support for a claim based on a report of an ICE investigation into a bail bonding company (though leave to amend was granted). Second, a state judge in New York held that the fair report privilege could apply to BuzzFeed’s reporting on the Trump Dossier, which was involved in a government investigation even if not created by government agents.

Google and YouTube locked down a long-anticipated win in N.D. Cal. on a claim that they defamed a video creator by stating that the video was removed for Terms of Service violations, with the district court holding that the statement was not actionably defamatory. PBS won its anti-SLAPP motion in D.C. Super. against former TV host Tavis Smiley; the court found that the latter’s tortious interference claims over PBS’ statements that he was terminated for credible allegations of sexual misconduct were libel claims in disguise. In Iowa, a former cop’s defamation claim over a newspaper article regarding his interactions with teenage girls failed after a judge found the report to be comprised of true statements and opinion. And in New York, a landlord’s complaint that faulty methodology led to his inclusion on a “100 worst landlords” list cratered after a judge found the list to be opinion based on disclosed fact.
On appeal, the Seventh Circuit held, in a libel suit brought by a doctor prescribing opioids against pharmacy giant CVS, that knowledge held by the latter’s corporate office could not be imputed to local employees and that CVS was entitled to tell the jury about complaints and discipline leveled at the doctor. Accordingly, the Court of Appeals granted CVS judgment notwithstanding the verdict as to certain statements and remanded for retrial on a single statement.

A Florida appellate court reversed a trial court ruling and held the state’s judiciary should not get involved in a dispute between a priest and his diocese about sexual misconduct allegations. The Minnesota Court of Appeals held that reports by the St. Cloud Times and KARE-11 on an arrest following the murder of a police officer were protected by the fair report privilege.

The New Jersey Supreme Court issued a ruling with a pair of interesting holdings in a case about a report on employer-ranking website eBossWatch.com. First, it held that the single publication rule applies to online publications, but that the statute of limitations can be restarted by significant changes after publication. Second, it held that failing to report that a dispute has been settled does not vitiate the fair report privilege for reports accurately describing events in litigation. The Court found that the plaintiff’s lawsuit over the defendant’s publication was not untimely under the first point, but fell flat on its merits under the second.

An apartment complex bearing the Trump name suing for libel over critical comments took a hit in N.Y. App. Div., with a ruling that certain allegedly defamatory statements supposedly intended to drive the complex into bankruptcy were – to the extent that they were comprehensible at all – statements of opinion.

In Tennessee, an appellate panel affirmed a defamation win for a school official on the basis that the plaintiff did not actually plead that the defendant made the allegedly defamatory statements. The plaintiff was suggesting that the defendant was somehow behind statements made in a news report, but the dots were never connected; moreover, the court held plaintiff was relying on unreasonable implications from admittedly true statements.
Speaking of implications, we had a valuable opinion from the Texas Supreme Court distinguishing between actionable implications of fact and audience opinions based on a media report. The Texas court held that the Dallas Morning News could not be held liable for any negative impression that the audience formed from a report regarding parents who claimed that their teen, who committed suicide, died as a result of a car accident.

Finally, the West Virginia Supreme Court let the City of Kenova off the hook for its police department’s posting of daily arrests to its Facebook page, holding that an error in reporting that the plaintiff was arrested for possession of cocaine (rather than hydrocodone) was not libelous.

**New & Pending Appeals**

The New York Times has filed its brief at the Second Circuit in support of its win below in Sarah Palin’s lawsuit. The Times has argued that the limited discovery hearing held by the court below satisfied Palin’s procedural rights even if the district court had considered matters beyond the parties’ pleadings.

A media coalition filed an amicus brief at the Tennessee Supreme Court arguing that the fair report privilege cannot constitutionally be overcome by a showing of mere ill will. It also argues that invoking the fair report privilege should not waive protection for confidential sources because the defense does not depend on the identity of the source (as opposed to the fact that the information at issue relates to government activity).

**Privacy**

**Rights of Publicity**

Olivia de Havilland has petitioned for review at the California Supreme Court of her loss against FX over “Feud: Bette and Joan.” Meanwhile, Chuck Yeager defeated an anti-SLAPP motion in the state’s Courts of Appeal on his claim that a law firm misappropriated his identity by using it on the firm’s website. And for a California senior citizen trifecta, comics legend Stan Lee filed a lawsuit against POW! Entertainment in Cal. Super. alleging that the
company, which he co-founded, took advantage of his macular degeneration and grief at his wife’s illness to trick him into granting the company an exclusive license to the use of his name, likeness, and identity. (Photo: Gage Skidmore, CC BY-SA 3.0)

Fantasy sports are the subject of a pending ROP case before the Indiana Supreme Court, with FanDuel and DraftKings arguing that they don’t need permission to use college athletes’ names, likenesses, and statistics. The player associations for the major leagues have weighed in with an amicus brief in support of NCAA athletes’ contrary position in the case.

We had a salacious twist on the tattoo cases this month with a judge in C.D. Cal. hearing argument on a motion to dismiss a case brought against rapper Cardi B over an album cover. The cover depicts a man, whose face is not shown but with a full-back tattoo, with his head between Cardi B’s legs. The plaintiff claimed that he is the only person with that tattoo, and that the cover thus misappropriates his identity and casts him in a false light. The rapper was shocked (shocked!) that anyone would interpret the image as depicting sexual behavior, and claimed that the man depicted was a male model with the same tattoo. The judge questioned whether the plaintiff had met the amount-in-controversy requirement for diversity jurisdiction, and ordered discovery on that issue.

A magistrate judge in N.D. Cal. said she wanted a more developed record before deciding whether to kick out Muhammad Ali Enterprises’ lawsuit against Fox over a promotional video featuring Ali before the Super Bowl, recommending that Fox’s motion to dismiss be denied. And in S.D.N.Y., a judge held that rapper Drake had presented sufficient evidence to overcome summary judgment on his claim that his name and likeness were misappropriated for a management company’s website.

**Disclosure of Private Facts**

Texas has asked an appellate court to rehear a case on the constitutionality of its new revenge porn law, arguing that the court erred when it recently held that the statute’s thin scienter standards were a problem.

**Intrusion**

The D.C. Circuit held that an informal letter issued by the FTC suggesting that it might impose fines of $1 million per month for robocallers using soundboards was not a final agency
action subject to judicial challenge. (In this context, a soundboard is a tool allowing a live operator to respond to a consumer with pre-recorded audio clips while also allowing the operator to communicate with the consumer directly.) Meanwhile, a Miami man responsible for almost 100 million robocalls is on the receiving end of some quite definitely final agency action, with the FCC smacking him with $120 million in fines.

And in a case of actual trespassing, Corey Lewandowski has sent a demand letter to New York Magazine after one of its reporters wandered into his unlocked D.C. home and took a photo of the interior. Sigh. (Photo: City Club of Cleveland, CC BY 3.0)

**Wiretapping/Eavesdropping**

We saw a rough anti-SLAPP ruling from the Ninth Circuit this month in the ongoing controversy over the Center for Medical Progress’ sting videos, with the court holding that the discovery stay under California’s anti-SLAPP law is inconsistent with Rule 56 in cases where the moving party relies on facts outside the pleadings.

Former Fox News anchor Andrea Tantaros’ claim against Fox over allegations of electronic surveillance were dismissed in S.D.N.Y., with the court finding her allegations to be based on speculation and conjecture rather than facts sufficient under Iqbal and Twombly. Meanwhile, a California appellate panel exercised its power to summarily dismiss a frivolous pro se action alleging that various celebrities were controlling the plaintiff’s mind via nanotechnology.

It’s tempting to make a joke about any case in which Danny DeVito is alleged to be probing the plaintiff’s mind, but it also saddens me that there’s probably no way to ensure that plaintiffs exhibiting these kinds of symptoms are referred to the help they need. Filing a suit like this is pretty clearly an attempt to seek help, even if the plaintiff’s illness confuses him into thinking that he should seek the assistance of judges rather than doctors.

**Infliction of Emotional Distress**

A federal magistrate in D. Montana recommended denying a motion to dismiss filed by Andrew Anglin, publisher of neo-Nazi site Daily Stormer, in a case accusing him of inciting his readers to target a Jewish woman with abuse and harassment.
Miscellaneous

It’s been a while, but we’ve got a new mugshot racket case. This time, California Attorney General Xavier Becerra is charging the operator of a mugshot website with extortion and money laundering over its fee-based removal system.

Money laundering? Well, I guess it worked for them against Backpage.com, but that’s an allegation worth keeping an eye on.

Access/FOIA

New Cases

A new suit in D.D.C. is seeking to force the disclosure of the FBI February-March 2018 “climate survey,” which evaluates worker morale at the agency.

Track Palin (son of Sarah Palin) is attempting to shut down media access to proceedings in Alaska’s Veterans Court on charges that he assaulted his father. Convicted murderer Jodi Arias is seeking to have her opening brief in the Arizona Court of Appeals impounded. Voice of San Diego has headed to court in California seeking an order blocking the San Diego Unified School District’s email destruction policy. The Lexington Herald-Leader sued the state’s Legislative Research Commission for access to records relating to a sexual harassment complaint against a state representative. And in Nevada, the Center for Investigative Reporting sued the Las Vegas Metropolitan PD for records related to Tupac Shakur’s murder in 1996.

Access Granted

By now my regular readers will have noticed that the “Access Granted” title is a bit figurative; I include all kinds of FOIA/access wins here, whether they involve orders to turn over documents, fee awards, statutory interpretation that broadens rights of access, or procedural wins. This next one from the Ninth Circuit is a good example: The Court of Appeals held that the district court erroneously got caught up in technicalities rather than applying old-fashioned common sense in determining whether a party who filed a FOIA suit against the Department of Energy was the same party who initially requested the documents. The Ninth Circuit held that any ambiguity could have been resolved by the DOE and wasn’t a reason to kick out the claim.
After three years, the University of Washington Center for Human Rights has settled a suit in W.D. Wash. against the CIA over records of abuses by troops supported by the U.S. in El Salvador.

The Illinois Supreme Court put the brakes on the circuit judge supervising the murder trial of Chicago PD officer Jason Van Dyke, ruling that the judge’s blanket seal of all the documents in the case violated the law. Meanwhile, another Illinois circuit judge ruled that Mayor Rahm Emanuel violated state law by withholding almost 18 months’ worth of emails from his personal accounts on city business. Speaking of mayoral issues, NYC’s Mayor de Blasio was smacked by a New York appellate panel for withholding emails with outside advisers.

A New Jersey appellate court held that the state’s public records law did not limit its benefits to New Jersey residents. What, I didn’t need to move to Hoboken to score public records in Jersey? Why did I move here then? Oh, that’s right – great living conditions at a price that’s reasonable (at least, compared to the other side of the Hudson, or even the other side of the East River).

The New York Daily News succeeded in a bid to unseal the transcript of a suppression hearing in the “Jeweler to the Stars” murder case in N.Y. state court, but a videotaped confession remains impounded. Police bodcam and dashcam video of a Raleigh man’s beating was released in North Carolina, however.

After an extended struggle with the judge, the media succeeded in obtaining the names of jurors in Bill Cosby’s criminal trial a mere three weeks after the entertainer’s conviction. There was a similar result in Rhode Island, where the Providence Journal leveraged a suit against the judge in a high-profile murder trial to obtain the names of the jurors in the case. Other issues in the case lingered, however.

Access Denied

Blanket sealing orders seem to be cropping up more often recently. In Florida, a judge in Miami has impounded the entire case file in a defamation case that followed on from the
dropping of a child abuse case against the plaintiff. A similar order appears to be in place in Tennessee in the case of an 18-year-old college student accused of sex crimes.

In Missouri, a judge has blocked video cameras from the invasion of privacy trial of former Gov. Eric Greitens. In New York, the NYPD obtained a stay pending appeal of an order compelling it to release bodycam footage. In South Carolina, the Supreme Court held that chambers of commerce are nonprofit organizations, not government entities, and are not subject to the state’s FOIA.

Pending Cases & Appeals

The Trump administration has appealed to the Second Circuit on an order from a judge in S.D.N.Y. that would allegedly result in the release of confidential information about targeted drone strikes in foreign countries. Meanwhile, in the D.C. Circuit the Department of Justice has appealed a district court order to disclose grand jury records from the independent counsel investigation of Bill Clinton’s relationship with Monica Lewinsky.

In Georgia’s Court of Appeals, the dispute over whether the records of Northside Hospital are subject to the state’s public records law continues. In Illinois’s Supreme Court, Illinois media outlets are appealing an order to seal pretrial motions in the Zimmerman murder case.

Legislation

A New York City Councilman has proposed a measure to expedite the handling records requests from journalists to the City Council and mayoral agencies.

Meanwhile, the U.S. Defense Department is attempting for a fourth time to convince Congress to create a broad FOIA exemption for unclassified military tactics, techniques, and procedures.

California’s Judicial Council has shut down an attempt to allow disclosure of taxpayer-funded settlements of misconduct claims against judges. And in Colorado, a bill exempting youth autopsies from the state’s public records law went to the governor’s desk. [Late-breaking update: Gov. John Hickenlooper vetoed the bill.]
Miscellaneous

The D.C. Circuit has expanded live audio streaming of its hearings, no longer requiring a vote by the sitting judges. The Seventh Circuit is lagging behind but still on the right track, with a new policy allowing requests for video recording of hearings.

Newsgathering

Good news: Journalist Emilio Gutierrez Soto and his son have been granted a new asylum hearing after outrage from the media community at their threatened deportation. Bad news: After covering protests of the detention of undocumented immigrants in Memphis, reporter Manuel Duran himself faces deportation.

The federal government has dropped six more prosecutions in D.C. Super. arising from the protests around Donald Trump’s inauguration after admitting that it failed to turn over exculpatory evidence.

In D.D.C., the Electronic Privacy Information Center has sued the Department of Homeland Security after it called for proposals for tools to monitor news coverage and journalists themselves.

The Trump administration’s quixotic quest to shut down leaks continues, with Trump raving about “traitors and cowards” as anti-leaking investigators prowl the West Wing with devices to scan for the presence of unauthorized communications devices. A plan to oust some mid-level and junior staffers to stop leaks promptly leaked. Meanwhile, a judge in D.D.C. has opined that Robert Mueller’s office wasn’t the source of leaks of grand jury information about Michael Flynn.

The leak frenzy took a truly bizarre turn when Trump lashed out at the New York Times for relying upon “phony sources” in a story about the moving target that is the North Korea summit. Turns out the “senior White House official” to which the Times cited was someone who gave a White House-sanctioned formal background briefing to the press, and whose comments were widely reported. But you do you, Don.

Actually, don’t. Please don’t.
Meanwhile, a judge in S.D.N.Y. has declared that Trump violated citizens’ First Amendment rights by blocking them from the @realDonaldTrump Twitter account. The judge’s careful analysis indicated that Trump, by selecting Twitter with its particular mechanics for his pronouncements, designated a public forum on Twitter for citizens’ replies to his tweets. However, the court opined that Trump could still mute others, which would allow them to reply for the public to see but prevent the Orange Snowflake from being exposed to anything that might put him off his McDonald’s.

The opinion is an interesting read. There’s been commentary that the ruling disregards Twitter’s own First Amendment rights, the argument being that if Trump is found to have created a public forum then Twitter is deprived of the right to block others’ access. I don’t agree – I think Twitter still has (indeed, must have) the right to block people in the exercise of its own discretion. But if Twitter does so, that reveals a deeper constitutional violation by Trump, not Twitter, for failing to ensure that the designated public forum was actually open to the public. It’s comparable to a city council holding a meeting required to be open in a privately-owned building to which only tenants have access – the government’s selection of the venue is inconsistent with its obligations.

Oh, and because there’s no horse that is dead enough for Trump to stop beating, he’s started muttering about taking away press credentials from the “Fake News.” (It’s an amazing horse. Truly fantastic, you’ll love it. It won the race – other reports are FAKE NEWS! If it didn’t win it’s because DEMS rigged the race. Sad!) Meanwhile, the EPA actually did block journalists from CNN, Politico, and the AP from a summit on contaminants; the agency claimed that at least portions of the summit were not required to be public.

Lawsuits

We started this section with good news, so let’s end with some: A cameraman obtained a settlement of $41,000 from Colorado Springs, Colorado, after he was detained for taking pictures outside of a police substation.
Prior Restraint

The Fourth Circuit held that the city of Rocky Mount stepped over the line into unconstitutional prior restraint with a licensing scheme that gave its chief of police the unbridled discretion to deny licenses for any adult business that the chief believes will fail to comply with “all applicable laws.” Also in the Fourth Circuit, 20 media organizations have filed an amicus brief supporting the Baltimore Brew’s challenge to the practice of requiring those who obtain settlements in police misconduct cases to sign non-disclosure agreements.

In E.D. Mich., a teachers’ union has sought a TRO to block the release of a video of union personnel that was allegedly recorded illegally by an undercover investigator from Project Veritas.

There was an unsettling series of events in Arkansas this month as a Washington County circuit judge issued an order prohibiting media outlets running a negative (and allegedly defamatory) political ad against state Supreme Court Justice Courtney Goodson. The circuit judge subsequently recused himself when it came out that he had received income through his wife from the law firm of the Justice’s husband; then, all of the circuit judges in that circuit recused themselves. Nevertheless, the prior restraint, which by that point had been challenged by local media, remained in place pending a special appointment of a judge. Three days after the initial order, the new judge vacated the prior restraint – but not before a different judge in Pulaski County (the state’s largest media market) ordered other media outlets to stop running the ad. Argh.

Prof. Volokh also brings us a pair of prior restraints in anti-harassment cases: one in Cal. Super., where the respondent was ordered “not [to] post photographs videos, or information about [the petitioner] to any internet site”; and one in Minn. Dist., where the respondent was forbidden from distributing any “information by which a reader may contact, identify or locate Petitioner.” The petitioner in the latter case was an anonymous Twitter poster, and the order was apparently intended to prevent the respondent from revealing her identity.
Information Infrastructure

Net Neutrality

The FCC’s repeal of the 2015 Open Internet Order will finally take effect on June 11th. The Senate voted this month to block the repeal under the Congressional Review Act, but the House and especially Trump present bigger issues.

Meanwhile, California’s Senate has passed a strict net neutrality bill that prohibits blocking, throttling, paid prioritization and paid data-cap exemptions. New York is considering a similar measure.

Finally, AT&T has apparently decided to drop its challenge to the Federal Trade Commission’s authority to regulate data services provided by companies that also operate as common carriers. As I’ve discussed before, no one but AT&T wanted this case to succeed – even FCC Chair Ajit Pai and other ISPs were depending on the FTC having jurisdiction, as that was a primary selling point for their move to slash FCC net neutrality rules. Following a 9th Circuit ruling against it, AT&T has apparently dropped the idea of petitioning for cert and is instead seeking a negotiated resolution with the FTC.

Federal Communications Commission

Battles over the FCC’s deregulatory agenda continue. At oral argument in the D.C. Circuit, the FCC and a coalition of broadcasters challenged the standing of Free Press to bring suit to block the reinstatement of the UHF discount; the parties disputed whether Free Press had established sufficient harm to its members. Meanwhile, local broadcasters are urging the FCC to dump the UHF discount but adopt a higher 50% national reach threshold; cable channel operator Newsmax pushed back on both points. And USTelecom urged the FCC to dump rules requiring wireline companies to open their networks to competitors at capped rates.

Meanwhile, Commissioner Michael O’Rielly’s proposal to open the C-band spectrum for use in 5G networks sparked concern at National Public Radio, which depends on that spectrum for satellite distribution.
Mergers & Antitrust

The AT&T-Time Warner trial is over in D.D.C., and the post-trial briefs are in; the Justice Department wants divestment in Turner or DirecTV if the merger is allowed to go forward. A group of smaller cable companies intervened to suggest that the merger might be conditioned on adoption of an arbitration scheme to resolve disputes over carriage of Time Warner content, but the idea quickly drew criticism from Disney, Fox and CBS. And just for fun, there was some foot-in-mouth activity from Rudy Giuliani about Trump’s involvement in the case.

The FCC has reopened public comments on the Sinclair-Tribune merger as the companies continue to work their way through ownership caps and restrictions. Sinclair’s CEO seemed uncertain whether the FCC would okay the deal before it expired.

In Delaware Chancery Court, Les Moonves and Shari Redstone are dueling over a potential CBS merger with Viacom. At issue are alleged moves to tinker with CBS’s board to ensure the merger proposal goes through.

Digital Content

Disinformation, Manipulation, and Problematic Content

Democrats on the House Intelligence Committee publicly released more than 3,500 ads posted to Facebook by Russian sources. Facebook continues to institute new measures in its ongoing efforts to get problematic content under control and to halt its slide in public opinion, including: ranking news organizations by trust; explaining its use of artificial intelligence to find and remove abusive content; reporting the removal of more than 865 million posts and 583 million fake accounts in Q1 2018; requiring a Social Security number in order to purchase political advertising; attaching “Paid for by” notices to all ads featuring political content, including those promoting political news coverage; and releasing its archive of U.S. political ads. We also learned that Facebook has taken special measures to control appearances of Pepe the Frog.
Other companies are also taking new action to clean up offensive or misleading content. Instagram has created a filter to block harassing comments on its site. Google is requiring purchasers of U.S. political advertising to prove that they are citizens or green card holders, and has started deindexing web pages based on FDA administrative rulings on issues involving consumer safety (as opposed to requiring a court order). GoDaddy shut down the website of white nationalist Richard Spencer. Twitter is trying some new techniques to hide comments that disrupt conversations, is imposing rule changes for eligibility to run political ads and for operation of campaign accounts, and will identify political candidates with a special badge.

However, the Internet Association – while not fighting the general idea of transparency in political ads – is arguing that the government should not require disclosures on the face of an ad. Rather, it wants platforms to have the ability to provide a link to the disclosure.

**Section 230**

The Second Circuit will consider whether Grindr should be held liable for failing to prevent or remove a fake profile posted by a member’s ex-boyfriend, following the plaintiff’s Section 230 loss in the district court. Meanwhile, Grindr’s attempt to remove another Section 230 case to federal court in W.D. Tex. ran aground, with the court ruling that a 230 defense doesn’t provide a basis for removal; the court also awarded the plaintiff his attorneys’ fees in contesting removal.

**Miscellaneous**

The bits and pieces:

- A proposed class of advertisers has sued Facebook in N.D. Cal. for allegedly inflating its click rates by having its employees click on ads.
- After the decision in Trump’s Twitter case, discussed above, a judge in S.D. Cal. held that plaintiffs had stated a claim against school board members who blocked comments on their social media accounts.
- The man who triggered an epileptic seizure in Kurt Eichenwald by sending him a flashing tweet will face trial on charges of battery after a judge in D. Md. denied his motion to dismiss.
• The Satanic Temple has filed a complaint against Twitter with the Massachusetts Commission Against Discrimination over its refusal to discipline a user who called for burning down the Temple’s headquarters while suspending the accounts of the Temple and its co-founder.

• The New York Assembly passed a bill along the lines of the federal Consumer Review Fairness Act to bar companies from using non-disparagement clauses to stifle negative reviews.

• Mary Meeker’s 2018 internet trends report is out. You can muddle through all 294 slides if you’re a glutton for detail; alternatively, TechCrunch pulled together a list of 20 highlights.

Digital Privacy

CFAA/Hacking

The hack of Yahoo! that resulted in the leak of 500 million users’ information has netted a Canadian hacker a sentence of 5 years in prison and a $250,000 fine from the Northern District of California.

Georgia Gov. Nathan Deal vetoed a bill that would have criminalized unauthorized computer access without even the safeguards and limitations contained in the federal Computer Fraud and Abuse Act. The bill, even more controversially, would have allowed companies to “hack back” against intruders – because digital security isn’t a tough enough problem without letting companies take matters into their own hands.

Control of Personal Information

The biometric privacy case in N.D. Cal. over Facebook’s face-scanning practices saw plenty of activity this month. The district judge denied summary judgment in the case, holding that there were disputed facts as to whether Facebook’s technology was based on facial geometry as covered by the Illinois statute at issue and rejecting the company’s dormant Commerce Clause and damages arguments. The judge further ordered that Facebook provide notice to all 6 million members of the allegedly affected class within nine days, speeding toward a July 9 trial date. But
then the whole thing was brought to a crashing halt when the Ninth Circuit granted interlocutory review of the class certification decision and stayed the case.

We’ve seen a few cases in recent years against periodical publishers who allegedly sold subscribers’ data to third parties in violation of a Michigan privacy statute. This time the case has been brought in S.D.N.Y. against Dow Jones, which allegedly sold personal information to data miners.

Interpreting the federal Stored Communications Act, the California Supreme Court ruled that criminal defendants might have a right to access user content from Facebook that is relevant to their defense – but only if that content was configured to be public when requested. A new case in California Superior Court alleges that Facebook unlawfully used tracking tools to gather data about both users of the service and their friends (who in some cases were not Facebook users at all).

Speaking of which, Vermont has passed a new law cracking down on data brokers who gather information about people with whom they have no direct relationship, mandating annual registration with the state and requiring disclosures about their practices and opt-out procedures.

In other news, Facebook now allows users to opt out of having the service track their browsing history; Apple is pulling apps from its App Store that transmit location data to third parties without explicit consent; and Verizon has withdrawn its opposition to proposed online privacy rules in California.

Encryption

A new bill in Congress, the Secure Data Act, would prevent the government from forcing companies to build backdoors into their encryption for law enforcement access. Meanwhile, it has been learned that, in comments to Congress and the public, the FBI inflated the numbers of encrypted devices that it claimed it could not crack by a factor of possibly more than seven – the real number was perhaps in the range of one to two thousand, while the FBI’s reported number approached 7,800.
Internet Surveillance

We have a split between federal circuits this month. The Fourth Circuit ruled that searches of electronic devices at the border must be based on at least reasonable suspicion (if not probable cause) and that border search warrant exception only applies if the search relates to the underlying justification of blocking the transport of contraband. On the other hand, the Eleventh Circuit held that no suspicion is necessary to search electronic devices at the border. With the other electronic privacy cases considered (and currently under consideration) at the Supreme Court, these cases could make for a very interesting cert petition.

In other news, the Massachusetts Supreme Judicial Court has granted review in a case involving whether a man’s secret use of a GPS device to track the movements of a couple’s vehicle was illegal.

Transatlantic Privacy

Possibly the biggest news in media and tech this month was that the European Union’s General Data Privacy Regulation finally took effect on May 25. Congratulations to those of you who survived the compliance process – I know it hasn’t been easy, especially for our members in Silicon Valley.

The issue with the GDPR is that it is phrased in reasonable-sounding generalities that hide the tremendous technological complexities of compliance in a world in which data structures are deeply interconnected across international borders. Many companies have simply opted to block users in the EU, a disturbing but very understandable step towards balkanization. Then there are the second-tier problems where publishers are dependent on third-party platforms and technology to carry their content, and for whose data practices publishers may be held responsible.
Facebook, Instagram, WhatsApp and Google have already been hit with lawsuits by Max Schrems complaining about the companies’ new requirement of affirmative consent to a broad range of data processing before their services may be used. He’s complaining that the companies are asking for consent to uses beyond that strictly necessary for the services provided, claiming that the GDPR does not allow companies to withhold services based on a refusal to grant consent for unnecessary processing. Such conditioning of access, Schrems argues, violates the users’ rights of “free choice.”

Meanwhile, the tech community is already looking forward to the next battle in Europe over the proposed ePrivacy Regulation on communications privacy. And here in the United States, U.S. Rep. Ro Khanna has been heard to ponder if we might not need a measure akin to the GDPR but not as extreme…a GDPR-lite, if you will.

**Intellectual Property**

*Copyright – New Cases*

This month’s new copyright cases include:

- **C.D. Cal.:** Director Robin Bain has sued an actress from her film *Nowhereland* for using clips from the film on her demo reel. Seems like there’s a decent transformative use argument there.

- **C.D. Cal.:** Michael Jackson’s estate has sued Disney and ABC over the use of songs and clips from estate-owned films in a documentary about the end of the King of Pop’s life. (Photo: Keir Whitaker, CC BY 2.0)

- **S.D. Fla.:** Photo syndication outfit Lickerish has claimed that the operators of WorldLifeStyle.com infringed its exclusive rights in photos of the scantily clad Melania Trump.

- **E.D Mo.:** In one of several similar copyright lawsuits filed by photographer Larry Philpot in the last month, he alleges that the St. Louis Post-Dispatch exceeded the terms of the Creative Commons license under which he published a photo of Ted Nugent by using the photo without attribution.
• D. Or.: A California software firm has sued Nike for copyright infringement for its alleged *use of its software products using pirated access keys*.

• D.P.R.: This is the third lawsuit we’ve seen recently from the composer of “Yo Soy Boricua Pa’ Que tú lo Sepas,” this time alleging *unauthorized use of the song* by Sony.

• S.D.N.Y.: A pro se plaintiff who claimed that Jerry Seinfeld infringed his *pilot for “Comedians in Cars Getting Coffee”* has filed an amended complaint, this time with the aid of counsel.

• Cal. Super.: A past winner of the X Factor faces a state-law copyright claim from UK band The Script, alleging that a single released in 2016 infringes the band’s “The Man Who Can’t Be Moved.”

### Copyright – Plaintiffs’ Victories

A songwriter dodged an award of attorneys’ fees to defendant Sony and related companies at the First Circuit, after his claim that Ricky Martin’s “Livin’ La Vida Loca” infringed a *song he submitted to a Sony-sponsored contest* was sent to arbitration.

A long-running duel in N.D. Cal. over control of *ze rightz to ze ztory of Zorro* haz taken zome ztrange zigz and zagz. Zo, for a long time ZPI controlled ze copyrightz azzociated with ze legendary zwazhbuckler, before he departed for ze public domain. Neverzelezz, ZPI zued anozer company attempting to produze a Zorro muzical uzing public domain material. Ze diztrict court granted zummary judgment to ze muzical’z produzer – but ze produzer alzo counterclaimed against ZPI, which waz alzo produzing a muzical, claiming it waz infringing ze producer’z own rightz by copying itz particular arrangement of ze public domain elementz. Ze diztrict court denied zummary judgment to ZPI, and ze counterclaim will prozeed to trial.

A pair of companies behind those annoying ticket-purchasing bots that snag good seats before regular humans get a chance to buy them was sued by Ticketmaster for copyright infringement in the Central District of California. The district court found that Ticketmaster had stated a claim for the *unauthorized use of its copyrighted code* in the creation of the bots.
In the same court, a fine distinction between a condition and a covenant in a licensing agreement led a coffee shop to be held liable for copyright infringement. The shop sold “Grumppuccinos” and other Grumpy Cat-related merch using the image of the scowling feline, but the license agreement limited use of the image to the sale of iced coffee.

An infringement suit will proceed against hip-hop duo “Macklemore and Ryan Lewis” in E.D. La. over the alleged copying of a jazz musician’s work for their hit “Thrift Shop” and other songs, after the court found that the plaintiff had pleaded substantial similarity sufficiently to survive dismissal.

Copyright – Defense Victories

In the Ninth Circuit, Jay-Z defeated a copyright claim brought by an Egyptian composer alleging that “Big Pimpin’” infringed his work, with the Court of Appeals holding that the composer had previously transferred his economic right in derivative works and that the moral rights he retained were not enforceable in a U.S. court.

A judge in D.D.C. bounced a copyright claim against Disney over the anthropomorphized emotions of Inside Out; the court ruled that the plaintiff’s characters from an obscure TV pilot did not warrant standalone protection.

Flaws in evidence of access to the original work and a failure to establish substantial similarity led to the dismissal in N.D. Ill. of a screenwriter’s claim that hit book and film Gone Girl infringed her screenplay.

In S.D.N.Y., Spotify won approval of a $112.5 million settlement of a class action over its distribution of musical works. Also in S.D.N.Y., HBO succeeded in obtaining dismissal of a graffiti artist’s claim over the fleeting appearance of a spray-painted one-line phrase in its TV show “Vinyl,” with the court holding the use de minimis.

Copyright – Appellate Activity

At the Sixth Circuit, songwriter Homer Banks’ widow is attempting to revive a claim that Steve Winwood hit “Gimme Some Lovin’” infringed Banks’ “Ain’t That a Lot of Love.”
Some judge of the Ninth Circuit has apparently requested rehearing en banc in the monkey selfie case. I imagine this was the reaction of the judge’s fellow jurists.

A pair of self-published authors are fighting in the Eleventh Circuit for another shot at copyright claims against Tyler Perry, Oprah, and Lions Gate over two Perry movies.

Finally, the D.C. Circuit heard argument on Public.Resource.Org’s appeal on the issue of whether it has the right to publicly distribute privately owned building and safety codes that are incorporated by reference into public law.

Copyright – Miscellaneous

With a trial looming in June, the parties who fought in two federal districts over whether an Aaron Sorkin adaptation of “To Kill a Mockingbird” for Broadway diverges too greatly from Harper Lee’s novel have resolved their differences.

Is a small claims procedure for copyright infringement a good idea? That’s the thinking behind the pending Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2017 in the House. Critics argue that when it comes to copyright, shortcutting procedures and legal defenses can have direct implications for First Amendment rights.

Idea Theft

We have an eyebrow-raising case in N.Y. Sup., where a man who claims to be the great-grandson of Moe Howard of Three Stooges fame has accused two industry execs of raping him, and one of the two of stealing his pitch for a TV show.

Commercial Speech

Trademark

Another month, another squabble over who gets to use a band’s name as members of the lineup come and go. This time, it’s members of 1970s band Player suing one another in the Central District of California.
A dispute over control of trademarks associated with Frida Kahlo has led to the escalation of an intrafamilial dispute among the artist’s heirs and representatives in S.D. Fla., with various members of her family and related corporate entities claiming exclusive rights to license the Kahlo name.

With the Kentucky Derby just around the next turn, a Louisville bakery claiming rights in the trademark “Derby-Pie” sued the Courier-Journal in W.D. Ky. over articles using the term to describe non-authorized instances of a pie shell with a chocolate-walnut-bourbon filling. The rumbling you hear is just my stomach.

The founder of the PIZZABOYZZZ artists’ collective in Los Angeles (and you thought I’d used up all the Z’s on the Zorro case!) has sued DJ Daniel Chetrit, Kendal Jenner, and Apple, Inc. in S.D.N.Y. over the defendants’ PIZZABOYS internet radio show.

The decidedly R-rated Brian Henson puppet film The Happytime Murders (it got a red band trailer, people) used the tagline “All Sesame. No Street.” in a trailer and promptly drew a trademark lawsuit from the team behind “Sesame Street.” A judge in S.D.N.Y. quickly shut down the suit, ruling that the tagline was a “humorous, pithy way” of distinguishing the film from the legendary children’s series, and not a source of confusion.

I will admit that I am actually a little torn on this one. I’ve seen the trailer; the puppets are distinctly Jim Henson-style puppets, and an explicit reference to the director having directed various Muppet movies gets a viewer of a certain age thinking of Sesame Street. In context, I’m not sure the tagline reads as a brand disclaimer as opposed to an indication that this is a very different kind of product that might be from the same company. But Sesame Workshop has made its point by filing suit, I suppose.

The Fifth Circuit held that Viacom had trademark rights in the name of a fictional restaurant appearing in “SpongeBob SquarePants,” and affirmed its trademark win against a real-world restaurateur wanting to use the name.
MGM Studios defeated a trademark claim over a fleeting use of a mocked-up cover of *The Sporting Times* magazine in a film, but a judge in W.D. Ky. held that the action wasn’t frivolous and denied a motion for attorneys’ fees.

A magistrate judge in S.D.N.Y. issued a head-scratcher of an opinion denying ABC’s motion to dismiss a pro se trademark complaint from an app owner’s displeasure at seeing his logo in a news story about his and other apps. It seems that the decision is a blend of deference to a pro se plaintiff, an inexplicable refusal to consider material necessarily implicated in the complaint (such as the news story in question), and the Second Circuit’s awkward handling of nominative uses of a trademark.

Twitter had better luck in fighting off a trademark claim in N.D. Cal. from online show “This Week in Tech,” a/k/a TWiT. The claim was dismissed with leave to amend for failure to adequately identify infringing conduct.

Fox’s win against record company Empire Distribution at the 9th Circuit in a dispute over hit show *Empire* revitalized the *Rogers v. Grimaldi* test as applied to titles of works. Or at least, so held a judge in S.D. Cal. in granting judgment on the pleadings to the creator of *Star Trek/Dr. Seuss* mash-up “Oh, The Places You’ll Boldly Go!” on a trademark claim from Dr. Seuss Enterprises. The judge had previously denied a motion to dismiss based on the law as it existed pre-*Empire*. Now all that remains in the case are the copyright claims, and a fair use defense seems strong.

Another competitive keyword advertising lawsuit was dismissed in S.D.N.Y. for lack of confusion. Yawn.

And finally, what do rap and gynecology have in common? *Not nearly enough*, says the TTAB, rejecting legendary rapper Dr. Dre’s effort to block OB-GYN and media personality Draion M. Burch from registering a trademark in his moniker “Dr. Drai.”

**Compelled Commercial Speech**

In D.D.C., the FDA successfully defended new warning label requirements for cigars against a First Amendment challenge.
Meanwhile, California’s Supreme Court held that the state free speech rights of premium grape growers were not violated by special assessments used by the California Table Grape Commission to subsidize generic advertising for table grapes. The court rejected the premium growers’ objection to being associated with what they considered an inferior product, finding that the generic advertising would be seen as originating from the Commission and not any particular grower.

**False Advertising**

A Queens man has filed suit in E.D.N.Y., claiming he was misled into purchasing Halo Top low-calorie ice cream by its misleading packaging. Frankly, anyone who expects a pint that contains only 240 calories to taste like Ben & Jerry’s deserves what they get. I’ve tried two types of Halo Top myself; to paraphrase the great Douglas Adams, it’s a substance that is almost, but not quite, entirely unlike ice cream.

Trademark service provider TM411 was not falsely promising its consumers legal advice with puffery such as “Why Pay More?” and “America’s #1 Trademark System,” found a judge in N.D. Cal. while dismissing a false advertising claim brought by competitor LegalForce. A judge in S.D.N.Y. excluded an expert report in a false advertising case involving car sales because the expert presumed that all of the defendants’ sales were the result of the alleged falsity. And in E.D. Pa., a judge held that the Lanham Act did not apply to a review website operator that was affiliated with an exercise company but did not sell products competing with those it reviewed (such as those of the plaintiff).

**Miscellaneous**

**Academia**

Speech First, a new nonprofit focused on free speech on campus, filed suit in E.D. Mich. challenging the constitutionality of the harassment and bullying provisions of the University of Michigan’s student conduct code.
A federal judge in the District of Oregon issued a temporary restraining order preventing Liberty High School in Hillsboro from barring a high school senior from wearing a pro-border wall t-shirt to school for the balance of the school year.

**Threats & Incitement**

The Fourth Circuit will consider whether a university can be held liable for failing to respond to complaints regarding anonymous online threats against its students.

The Supreme Court of Vermont held that KKK flyers left at the homes of two black women did not constitute an “imminent threat of harm.” Elsewhere in New England, the Massachusetts Appeals Court held that in an abuse prevention case a Facebook “like” could be construed as a threat in the context of “years of escalating emotional, verbal, and physical abuse.”

**The True Miscellany**

The Sixth Circuit held that requiring the inclusion of the motto “In God We Trust” on U.S. currency does not constitute compelled speech in violation of the First Amendment rights of those who disagree with its message. Holding that “[t]he key analysis is whether the private parties are closely linked with the expression in a way that makes them appear to endorse the government message,” the court held that literally carrying government speech in one’s pocket does not mean that anyone would assume the carrier is adopting that speech.

Finally, a district court judge in E.D. Pa. has held that a Philadelphia ban on employers asking prospective employees to disclose their salary history violates the First Amendment, though the city may prohibit using that information to discriminate against employees.

**Conclusion**

Enough. It’s just about summer and I’m headed outside. See you next month!