What Happens When You Condense a Month (or Two) of the MediaLawDaily into a Single Article?

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

So, as some of you know I’ve been away a bit recently, out in California for our tenth annual Legal Frontiers in Digital Media conference. It was great having a chance to catch up with folks, and it was a terrific program this year. My sincere thanks and congratulations to all involved: planners, moderators, speakers and attendees.

My travels did, of course, result in my setting myself up for a double-header in this issue of the Monthly Daily, and as I started poring over two months of the MediaLawDaily—and reports on activity at the White House in particular—I found myself recalling this passage from the late, great, and much missed Sir Terry Pratchett:

People get exactly the wrong idea about belief. They think it works back to front. They think the sequence is, first object, then belief. In fact, it works the other way.

Belief sloshes around in the firmament like lumps of clay spiralling into a potter's wheel. That's how gods get created, for example. They clearly must be created by their own believers, because a brief résumé of the lives of most gods suggests that their origins certainly couldn't be divine. They tend to do exactly the things people would do if only they could, especially when it comes to nymphs, golden showers, and the smiting of your enemies.

Reaper Man, ch. 7.

Remind you of anyone? Not to imbue the United States’ chief executive with any sort of divinity (perish the thought), but he does seem to have keyed into some deep need in his followers to have their impulses expressed by a larger-than-life figure in a way that both insulates and validates them. It doesn’t matter how awful he is, because on some level that’s exactly what they want. He needs to be beyond criticism, or else they might be held accountable for their own malice. But like any tin-pot god, when Trump topples—and he’s already precessing like a sideswiped tenpin—he’ll leave bitter disillusionment and self-loathing in his wake.

Okay. Onward.
Supreme Court

It’s not like you don’t all know this by now, but I’d still feel odd omitting it: We’ve got a new Supreme Court justice. With Republican senators demolishing the filibuster to pave his way to the Court, Neil Gorsuch has taken the seat of the late Antonin Scalia. Gorsuch was 49 years old as of his confirmation; precedent suggests he’ll be with us for another sixteen years.

Lately, though, eyes have been turning toward Anthony Kennedy’s seat. Sen. Chuck Grassley (R-IA) floated rumors of a justice stepping down in the near future, and folks have been doing a little back-of-the-napkin math and coming up with Kennedy as the most senior associate justice. Cum grano salis, naturally.

Opinions

Two more patent decisions this time, as the justices kick the Federal Circuit around some more.

The town of Marshall, Texas, is looking for a new raison d’être after the Supreme Court reversed the Federal Circuit and narrowed the scope of jurisdiction over patent cases in the federal courts in TC Heartland v. Kraft Food Group Brands. While the case involved a lawsuit filed in the District of Delaware, the decision will also effectively cut off the torrent of patent cases to the patent-holder-friendly Eastern District of Texas.

Next, the Court continues its trend of analogizing patents to copyrights with its ruling in Impression Products v. Lexmark International that the first sale doctrine applies to exhaust patent rights in a particular item after it has been sold. Thus, said the Court, a third party can refurbish and resell used ink cartridges even if the original manufacturer expressly forbids such activity. And, referencing its copyright decision in Kirtsaeng I, the Court held it doesn’t matter if the third party sources used goods from overseas.

Petitions

Seven denials this time around for media-related cases, in the fields of photography, public records, and intellectual property. The Court won’t review a First Circuit ruling striking down New Hampshire’s ballot selfie law, or a Fifth Circuit ruling that a veteran cop-recorder’s Section 1983 claim was foreclosed by a grand jury’s finding that there was probable cause for his arrest. The Detroit Free Press’ FOIA challenge to the withholding of mug shots in federal cases hit a dead end, as did the ACLU’s quest for the full 2014 Senate Torture Report. And the Court declined to take up either the Second Circuit’s fair use/copyright ownership ruling about Abbott.
& Costello’s “Who’s on First?” or a pair of Federal Circuit decisions invalidating two streaming media patents.

New petitions this month include filesharing mogul Kim Dotcom challenging U.S. attempts to seize his overseas assets while he fights extradition from New Zealand on criminal copyright charges, and Broadband iTV seeking to have its patent for video-on-demand technology reinstated. Meanwhile, Louis Vuitton signaled that an appeal to the Supreme Court in the “My Other Bag” case is in the offing, with a request to extend the filing deadline for a petition into July.

Reporters’ Privilege

In Oregon state court this month, a reporter for the Oregonian sought to avoid being compelled to testify in a criminal forgery case against a state consultant. In state court in Maine, WGME-TV and Maine Public fought the compelled production of outtakes in a lawsuit seeking to vacate a murder conviction; after in camera review, the judge ordered disclosure.

In the District of Nevada, a magistrate judge denied Boulder City attorneys a subpoena for newsgathering materials developed by a reporter for KLAS-TV; the city wanted the materials in connection with defending a wrongful termination suit brought by a former police chief. In the courts of South Dakota, a journalist who reported on a proposed “marijuana resort” on an Indian reservation was told by the attorney general that she wouldn’t have to testify. But in the Northern District of Illinois, an documentary filmmaker who was also an attorney was found to have waived protection under Illinois’ reporter’s privilege law by later representing the subject of his film.

Vermont now has a brand new shield law, which is fantastic news -- congratulations to all who worked to achieve that result. On the other hand, at least one legislator in the Lone Star State wants to carve up Texas’ shield bill, seeking an amendment to the bill that would deny protection to reporters with connections to political campaigns in the preceding five years.

Defamation

The same Texas state rep also wants to make it easier for public officials to sue the press for defamation. He’s submitted a separate bill that would compel news reports to explain how a story relates to an official’s public duties, apparently based on idea that if stories about public officials don’t relate to their on-the-job activities, the actual malice standard won’t apply. That’s not how it works, of course, nor would addressing this issue through compelled speech survive constitutional muster.

Still, if the White House will keep babbling about making it easier to sue the press, I suppose it’s not surprising that some idiot would give it a shot.
New Cases

In the federal courts: In D.D.C., a Russian aluminum magnate sued the AP over a story connecting him to former Trump campaign chair Paul Manafort. In N.D. Ill., Laura Kipnis (Northwestern professor and critic of university handling of sexual misconduct complaints) has been sued by a graduate student over her depiction in a new book. In D. Mont., the target of a criminal libel investigation, triggered by the subject’s allegation of misbehavior by a judge, has filed suit alleging that the Montana statute is unconstitutional. In S.D. Ohio, a cancer researcher at Ohio State sued The New York Times over a profile that he alleged falsely accused him of being shielded by OSU from discipline for multiple ethics violations. In S.D.N.Y., three owners of a Russian bank sued BuzzFeed for republishing allegations that they bribed Vladimir Putin and were involved in influencing the 2016 presidential election. And in E.D. Va., movie company Kylin Network is facing a defamation counterclaim from an attorney it sued for malpractice and fraud in the course of a rights acquisition deal.

Quite a few in the state courts:

- California: Hews Media Group was sued over a report that a water district official in Los Angeles County had attempted to extort campaign contributions from a developer in exchange for the ability to purchase recycled water.
- Florida: The son and daughter-in-law of Mexican music star Juan Gabriel have sued Univision and Telemundo, alleging that they were defamed by the networks’ reporting on accusations by another man claiming to be Gabriel’s secret biological child.
- Illinois: Law firm Johnson & Bell, after being targeted with a class action lawsuit for allegedly using outdated technology to protect client data, filed its own suit alleging that it was defamed by social media and press activity by the plaintiff class’s law firm.
- Louisiana: A resident of Plaquemines Parish named Byron V. Williams Jr. sued Louisiana Media Co. LLC, WVUE LLC of Delaware, Raycom Media Inc., and two individuals over a television news broadcast on February 21 of this year. One would think the coverage of this lawsuit might mention what the alleged defamation was, but no; perhaps the result of Louisiana’s relatively limited fair report privilege?
- Montana: The former mayor of Libby, Montana, sued The Western News over a series of three articles and an editorial about his performance as mayor that the politician alleges forced him from office.
- Nevada: An anti-Trump protester sued Fox News over allegations that he was using his dead grandmother’s absentee ballots to vote Democrat. The grandmother, as it turns out, was still alive. Oops.
- New York: A Connecticut woman who sued medical cannabis company for sexual harassment was in turn sued by one of her employers for defamation. We’ll hear more about this case under Prior Restraint, below.

- North Carolina: A Salisbury business owner sued the operators of blog “Rowan Free Press” over an allegedly false report of a shooting at or near the business, claiming the report portrayed the business as unsafe.

- South Carolina: A former detention officer has sued the Post and Courier alleging that he was made the scapegoat in a report on a jailhouse attack on Emanuel AME Church shooter Dylann Roof.

- West Virginia: Murray Energy Corp. sued The New York Times over a report that it claims accuses its CEO of lying about the cause of a mine tunnel collapse.

Defense Losses

Lots of ups and downs this month. In federal cases, a judge in D.D.C. denied a motion to dismiss two baseball players’ allegations against Al Jazeera, holding that a report on sports doping made statements capable of a defamatory meaning and that the plaintiffs adequately alleged actual malice. In S.D. Fla., a judge rejected BuzzFeed’s attempt to move a Russian tech executive’s case over the Trump Dossier from Florida to New York. In S.D.N.Y., a judge denied Ghislaine Maxwell’s motion for summary judgment in a defamation case filed by a woman who alleges she was recruited by Maxwell as a sex slave and defamed by Maxwell’s denials. The court found a dispute of fact on truth and rejected Maxwell’s claim that she could not be held liable for republication of her press release; the case subsequently settled.

In California state court, a San Jose councilman’s lawsuit against two Vietnamese bloggers over allegations he supports flying the communist Vietnam flag will proceed, after a motion to dismiss was denied. In the same state, two writers for CalCoastNews failed in their bid for a new trial following a $1.1 million verdict in favor of a local businessman; an appeal is in the offing. In Florida, a heart surgeon fought off a motion to dismiss filed by CNN in a case over a report on high surgical death rate for children at his hospital, with the court rejecting actual malice and opinion defenses. In New Hampshire, a judge granted $12 million in preliminary attachments against a mortgage broker who allegedly used electronic signs outside of his office to accuse the plaintiffs of drug and gun running; this was followed up with a permanent injunction. (New Hampshire’s become a bit more exciting since I was last there, apparently.) In New York, the court rejected a motion to dismiss filed by lawyer Mark Geragos in a case brought by Dr. Luke, with the judge rejecting an argument that tweets suggesting that the record producer was a rapist were opinion or hyperbole. And in Texas, a judge awarded $5.5 million to the family of deceased lawyer Ira Tobolowsky; the case, filed when Tobolowsky was still alive, alleged that the defendants had accused him of mortgage fraud.
Plaintiffs secured a number of notable settlements as well. **Rolling Stone settled with UVA associate dean Nicole Eramo** in the “A Rape on Campus” litigation on undisclosed terms following a $3 million verdict in E.D. Va.; however, Eramo and the magazine will be allowed to proceed with a dispute over sanctions for the dean’s leaking of deposition videos to the press. **Blake Shelton settled his California case against InTouch magazine** over an article saying he was headed to rehab. **Alex Jones of InfoWars quickly settled** a defamation case in Idaho brought by the manufacturers of Chobani yogurt over allegations that the company was linked to a sex assault case involving refugee children; Jones retracted his statements. The **Daily Mail settled Melania Trump’s lawsuit** in New York for $2.9 million. And there was a confidential settlement in North Carolina in a case brought by **homeowners against the producers of HGTV’s “Love It or List It”;** the producers had filed counterclaims for defamation that were dismissed, but on appeal, at the time of the settlement.

The real whammies this month were on appeal, however. The high courts of both California and Massachusetts decided to set limits on their states’ respective anti-SLAPP laws. The California Supreme Court held that for the law to apply, **protected speech or petitioning could not be tangential to the plaintiff’s claims.** Meanwhile, the Massachusetts Supreme Judicial Court held that a plaintiff can evade an anti-SLAPP motion by arguing that even if a lawsuit involves petitioning activity, it was not brought **with the intent to suppress that activity.** Well, I suppose most folks already believed that the Commonwealth’s anti-SLAPP statute is useless.

The South Dakota Supreme Court rejected an appeal from ABC in the “pink slime” case; jury selection **was set for the end of May.** And the Texas Court of Appeals held that plaintiffs had made a prima facie showing of falsity in a case involving **Dallas Morning News** articles about **illegal relationships between physicians and compounding pharmacies.**

**Defense Wins**

On the bright side, BuzzFeed defeated a motion for partial summary judgment filed in S.D.N.Y.; the motion asked the judge to rule that statements in an **article entitled “The King of Bullsh*t News”** were false and defamatory as a matter of law and that the plaintiffs were private figures. The **Scranton Times** succeeded in persuading a Pennsylvania court to bifurcate issues of falsity and actual malice in an upcoming defamation trial over articles published in 2004 (!) suggesting that the plaintiffs gave “**less than candid**” grand jury testimony.

Plenty of defense judgments, as well. Bloomberg BNA defeated a lawsuit in D.D.C. alleging defamatory **errors in a summary of the plaintiff’s murder case** in the Criminal Law Reporter; on summary judgment, the court found no actual malice. Bloomberg also scored a win based on a lack of actual malice in a D. Mass. case brought by a Greek Orthodox priest **reported to be under investigation for stock manipulation.** A playwright’s defamation claim in S.D.N.Y.
against Dr. Seuss Enterprises was tossed, with the court finding nothing wrongful about the defendant’s cease-and-desist letters accusing the plaintiff of copyright infringement. Being portrayed as a “venal harlot” doesn’t support a defamation claim, said a judge in E.D. Pa., if you’re an ex-supermodel and the author of a Norman Mailer biography acted without actual malice. And Katie Couric is off the hook in E.D. Va. for editing of the documentary Under the Gun to make it appear that gun rights activists couldn’t answer basic questions about their platform; the court, strikingly, held that there was no material difference between the “sophistry” with which the plaintiffs did respond and not responding at all. (Prof. Eugene Volokh agrees with the result but not the analysis.)

The CFO of Kylin Pictures defeated a lawsuit by rival Bliss Media on an anti-SLAPP motion in California, with the court finding statements describing Bliss as a “shell company” and its CEO a “swindler” not defamatory. In New York, the producers of a musical version of du Maurier’s “Rebecca” won $90,000 in damages against a press agent who breached his contract and interfered with a prospective investor, but took nothing on a defamation claim.

On appeal:

- The First Circuit affirmed the vacation of a $14.5 million verdict in favor of the operator of a Haiti orphanage based on lack of jurisdiction; the plaintiff has asked for rehearing.

- The Second Circuit affirmed the dismissal of claims brought against Harry Belafonte by his half-brother over the singer’s autobiography. Interestingly, the Court held that dismissal of a defamation claim does not automatically support dismissal of a parallel emotional distress claim, although in this particular case both claims were found to lack merit.

- The Eleventh Circuit denied a stay of dismissal of a doctor’s defamation claim over a blog post allegedly calling him a quack, pending a petition for review to the Supreme Court.

- The California Supreme Court declined to take up a defense win on a lawyer’s defamation case against Marc Zuckerberg and Facebook’s GC over comments to the press made during a suit Zuckerberg filed against the plaintiff.

- The California Court of Appeal upheld dismissal of an environmental lawyer’s claim over a series of news articles raising ethical questions about the cases he filed.

- The Appellate Court of Illinois affirmed the dismissal of a lawsuit against a law firm over a client newsletter, holding that the firm’s statements about the plaintiff business were protected under the innocent construction rule.
• The Michigan Court of Appeals held that a report in the *Morning Sun* about an attorney who *allegedly manufactured an award for marketing purposes* was substantially true, affirming summary judgment.

• The Supreme Court of Mississippi held that a *county circuit judge was immune* to a defamation suit by his former court administrator.

• The Supreme Court of Missouri held that *statements by advocacy groups about an alleged puppy mill* were hyperbole.

• The New Mexico Court of Appeals held that a paid civilian employee of the Albuquerque Police Department was properly treated as a public official with respect to a series of articles in the *Albuquerque Journal* questioning his dual service as an unpaid reserve officer; the court also held it was opinion to refer to the plaintiff as a “wannabe cop.”

• The Texas Court of Appeals (First District) held that a *book written by a lawyer about his former client*, whom he described as a “monster;” did not defame members of the family who had sued the client.

  • The Texas Court of Appeals (Fifth District) held that *D Magazine* had not defamed a *volunteer for the Dallas Symphony Orchestra with a headline* the court found to be opinion or hyperbole.

  • The Utah Court of Appeals affirmed the dismissal of an attorney’s lawsuit over an *online review referring to him, inter alia, as the “Worst, Ever.”* Of course, this was held to be opinion.

*New & Pending Appeals*

The Second Circuit heard argument in April in the *other Rolling Stone case*, brought by members of the Phi Kappa Psi fraternity, on appeal of a district court ruling that the article (which used pseudonyms for the alleged attackers) was not “of and concerning” the plaintiffs. The plaintiffs sought to narrow down the number of individuals to which the article could possibly have been referring, while *Rolling Stone* argued that no one had pinpointed the plaintiffs as the attackers except for the plaintiffs themselves.

Embattled internet streaming service FilmOn found itself in California’s appellate courts arguing over defamation instead of its usual IP woes, though not without a copyright twist. The company was appealing a ruling below that it was not defamatory for the plaintiff, an online advertising company, to have *labeled FilmOn a copyright infringer*. It will be interesting to see if FilmOn’s recent settlement with the networks (discussed under Intellectual Property) will affect this case.
Privacy

Rights of Publicity

Speaking of copyright showing up in other tort cases, the Ninth Circuit considered the boundary between rights of publicity and copyright in a case involving a digital photo library that the NCAA hired to store and license images of student athletes. The Court held that publicity claims might apply to the use of a copyrighted work on merchandise or in advertising, but that sale of the work itself is governed by copyright law; thus, the student athletes had no claim against the photo library. Maybe the Supreme Court’s decision on conceptual separability in Star Athletica gives us a basis to distinguish between “a work” and “merchandise on which a work appears,” but this still seems to be inviting some vague line-drawing exercises.

Meanwhile, retired professional footballers are back in court defending their likenesses, with an argument in N.D. Cal. over Electronic Arts’ Madden NFL games in the latest installment of this seven-year battle. And a different type of athlete was dealt a setback in N.D. Ill., as the world-record holder for footbag kicks had his amended complaint against Wendy’s dismissed; the court relied upon an exemption in Illinois’ right of publicity statute for use of an individual’s name to identify him as the performer in a particular performance.

In California state court, the El Paso Boot Company has been sued by John Wayne Enterprises over an ad with a photo of the Duke and a caption identifying his boots as theirs. In New York, studios and media groups have urged the Appellate Division to rehear a case involving a convicted killer’s lawsuit against Lifetime Entertainment over a dramatization, arguing that allowing such a claim makes it hazardous to produce dramatic works about real people.

Finally, a new right of publicity bill (A. 8155) has been introduced in New York. The bill creates a post-mortem right of publicity and expressly calls “name, voice, signature and likeness” a property right subject to expanded protections both before and after death.

Disclosure of Private Information

InTouch Weekly was hit with a privacy claim in Arkansas by four sisters on the reality show “19 Kids and Counting” who alleged that they were molested by their older brother. They claim that they were promised confidentiality by police investigators, which promise was breached when InTouch was given sufficient information to identify them; they further allege that InTouch invaded their privacy by publishing that information.

That Playboy model who snapped a pic of a 71-year-old woman naked at the gym and then posted it to social media with a nasty comment lost her motion to dismiss misdemeanor invasion of privacy charges in California Superior Court. After pleading no contest, she was sentenced to three years’ probation and 30 hours of glamorous graffiti removal.
Also in California, actress Amber Heard filed a counterclaim spinning out of litigation over the controversial film *London Fields*, alleging a complicated pattern of invasion of privacy, violation of rights of publicity, contract claims and more arising from the producer’s alleged collection of semi-nude “continuity photos” and the depiction of Heard nude in the film using a body double.

Finally, the Texas Court of Appeals affirmed the denial of a motion to dismiss a claim against the producers of “The First 48” for failing to mask the identity of the plaintiff, which allegedly led to death threats and his being shot.

*Intrusion*

Dish Network suffered a hard defeat in M.D.N.C. this month, with a judge delivering a $61 million verdict (trebled from a base $20.5M jury award) on claims that it had “repeatedly looked the other way” on Telephone Consumer Protection Act violations.

In Massachusetts, an advertising agency struck a deal with the Commonwealth to cease using location tracking to identify women entering abortion clinics and hit them with anti-abortion smart phone ads.

*False Light*

Univision was hit with a $72,000 verdict – much less than the plaintiff sought -- in a California false light case involving the use of the plaintiff’s photo and a fabricated narrative on Facebook in connection with its show “El Bueno, El Mayo, y El Feo.”

Meanwhile, Richard Simmons has filed an interesting false light/defamation lawsuit in California over reports that he’s transitioning to being a woman. He’s trying to thread the needle past rulings that allegations regarding sexuality and gender are not defamatory by arguing that, on the one hand, it is still defamatory (though unfortunately so) in some groups to say that someone is transgender, and, on the other, it is still false light to present someone falsely in this manner even among groups where it is not defamatory.

And in the California appellate courts, Floyd Mayweather, Jr., escaped false light, disclosure of private facts, and defamation claims brought by his former fiancée on the basis that the boxer’s statements about her cosmetic surgery and the reasons for their breakup were newsworthy and either true or non-defamatory.
Access/FOIA

New Cases

Let’s start with what folks have been attempting to pry out of the federal government via FOIA. In the District Court for the District of Columbia, cases have been filed over:

- former acting Attorney General Sally Yates’ Justice Department emails;
- records from the FBI and DOJ supporting Donald Trump’s allegations of wiretapping ordered by President Obama;
- records related to Trump’s tweeting about the alleged wiretapping in the possession of the DOJ, FBI, NSA, or Office of the Director of National Intelligence;
- records related to spy planes used by the FBI to gather surveillance;
- records from the FBI on any surveillance of Trump’s presidential campaign;
- the FBI’s use of paid informants on Best Buy’s “Geek Squad” to gain Fourth Amendment-exempt intel about electronic devices being “repaired”; 
- materials removed from public view by the U.S. Department of Agriculture;
- Trump’s tax returns at the IRS;
- Trump’s travel records;
- encrypted EPA employee communications sent via messaging tool Signal (anyone else see an inherent problem with that one?); and
- records relating to the ex-CIA official central to Congress’ investigation of the Kennedy assassination (sure, why not?).

In other federal courts, we’ve got cases involving: records from the FBI about Andrew Breitbart (N.D. Cal.); records on the CIA’s use of Twitter (D. Mass.); documents from the FBI investigation and prosecution of Tim Donaghy in the 2007 NBA betting scandal (S.D.N.Y.); documents from the FBI about the investigation and prosecution of Jeffrey Epstein for sex trafficking (S.D.N.Y.); and Trump’s visitor logs, which the White House has decided it will start withholding (S.D.N.Y.).

On top of that, the ACLU launched a campaign of lawsuits in 13 different federal courts seeking information on how each U.S. Customs and Border Protection field office implemented Trump’s travel ban.

In the states, we have Michigan State University suing ESPN after it was put in a bind by a public records request for records about a sexual assault investigation that prosecutors had asked MSU to withhold. Also in Michigan, a reporter sued for access to video of a fatal incident.
at Bellamy Creek prison. And because we can’t have enough Michigan public records cases, let’s add MLive Media’s suit for subpoenas issued to the city of Flint by the U.S. Department of Justice related to the water crisis.

In South Carolina, a group of news organizations sued for access to the records of the state’s House Republican Caucus.

Turning to courtroom access cases, we’ve got KQED filing a motion in N.D. Cal. for access to videotapes from the 2010 trial over California’s same-sex marriage ban, the Cincinnati Enquirer asking for access to a hearing in S.D. Ohio on bias against the Tea Party at the IRS, and media outlets demanding a transcript from a closed hearing in a state delegate’s child cruelty case and a declaration that the press was improperly denied access.

Access Granted

Courtesy of a ruling unsealing documents in D.D.C., we’ve got new insight into one of the first cases invoking a 2015 law to challenge the use of gag orders in national security investigations. In the same court, the Bureau of Prisons has finally settled a 14-year-old FOIA lawsuit with a payment of over $500,000 of your money and mine to Prison Legal News, and Professor Rebecca Tushnet scored an order directing Immigration and Customs Enforcement to try harder to find documents and limit redactions on records related to how ICE detects counterfeit goods.

In N.D. Cal., the FBI settled a case in which anti-war journalists demanded records of their investigation by the Bureau; the FBI released the records and forked over almost $300K in attorneys’ fees. In S.D.N.Y., The New York Times also was awarded fees on its lawsuit against the CIA for records about chemical weapons in Iraq.

A judge in Arkansas ruled that a blanket policy at the Arkansas State Police of withholding dashcam video until adjudication violated the state’s FOIA law. A judge in Colorado unsealed the arrest affidavit in a murder case in Broomfield. In Florida, media plaintiffs recovered their fees in a case over 911 recordings related to the Pulse nightclub attack, obtained access to prison videos in another case, and in a third case obtained a ruling that the state’s public records law trumps HIPAA exemptions. An Illinois appellate panel ruled that the College of DuPage Foundation is subject to state open records laws, and required it to turn over a copy of a federal subpoena to the Chicago Tribune.

A couple of interesting courtroom reporting decisions: (1) The Nevada Supreme Court ruled that a cable TV show focusing on Las Vegas prosecutors had the right to be treated as a “news reporter” under the rules for cameras in the court; and (2) the Indiana Commission on Judicial Qualifications ruled that a ban on broadcasting trials doesn’t affect live-tweeting.
Access Denied

Two judges in Pennsylvania, on the other hand, threatened reporters covering the upcoming sexual assault trial of Bill Cosby with jail time if they live-tweet the proceedings. Because what, your honors, you want the opportunity to slap the press with a prior restraint if something happens you wish you’d closed the courtroom for?

Then there’s the Manhattan Supreme Court judge who told the press not to quote her because she “thinks out loud,” ordered reporters to close their laptops, called one jounro a “wiseass,” and moved the proceedings in her robing room to avoid “humiliation” by the press. Now she’s facing demotion back to city civil court.

In other courtroom access issues: The U.S. Supreme Court denied a request for same-day audio of the April argument in Trinity Lutheran Church v. Comer; a Florida appellate panel upheld a ruling barring the media from a bond hearing in a gruesome murder case; the press won’t be tagging along for a crime scene visit in the N.J. murder case of David “DJ” Creato; a N.Y. judge has sealed a trove of court records in Bill O’Reilly’s lawsuit against his ex-wife’s lawyer; a R.I. judge has rejected a bid to unseal grand jury records from the criminal probe of a $75M deal between the state and video game developer 38 Studios; and a Wisconsin judge refused to unseal court records related to a high school student accused of bringing a gun to school.

The Ninth Circuit flipped a lower court decision granting access to records identifying students of the Department of Defense’s Western Hemisphere Institute for Security Cooperation—the successor to the infamous “School of the Americas”—citing concerns for the students’ privacy. The Indiana Supreme Court shut down efforts to obtain emails held by Mike Pence as governor of the state, following revelations that Pence, like so many other politicians, used a private account for public business. The Kansas Court of Appeals denied press outlets access to records about applicants for appointment to two county commissioner positions. The West Virginia Supreme Court ruled that the Western Regional Jail did not have to release video of flash-bang grenades being tossed into an inmate’s cell, stating that the video included detail that could be used to plot an escape or injure inmates or employees. (Seriously?)

Pending Cases

Still in the hopper, we have the following:

• The Second Circuit heard argument on a district judge’s decision not to unseal settlement documents from a labor class action that might reveal whether Donald Trump knew he was using undocumented labor to build Trump Tower.

• A media coalition argued in D.D.C. that the FBI’s admission at a Senate hearing that it paid $900K to hack the San Bernardino iPhone provides a basis to release related records.
• The Georgia Supreme Court heard argument on whether a hospital system based in Atlanta that was created by a public hospital authority is subject to the state’s Open Records Act.

• The Associated Press has appealed a decision by a Pennsylvania judge keeping court records sealed in the criminal cases of three Penn State administrators.

• A Vermont trial court judge is considering whether the state AG’s decision to withhold records on a multi-state probe into Exxon from groups sympathetic to the company was proper.

• The Vermont Supreme Court will decide whether the private emails of public officials are subject to search for public records.

Legislation

Colorado has passed a bill requiring electronic records to be released in their native format. Delaware is considering legislation to permit nonresidents to make state FOIA requests. South Carolina’s Senate passed a bill to improve freedom of information in the state, including deadlines for turning over records, improving access to dash cam video, and setting a quick schedule for court challenges; however, the bill was amended to strip out a proposed administrative procedural remedy.

Tennessee lawyers are worried about a new court rule that would exempt an unclear category of draft and informal documentation from public access. A Florida bill targeting online publishers of mugshots (already we’re off on the wrong foot here) morphed at the last minute into a sweeping rule allowing the sealing of 2.7 million criminal records related to persons found not guilty or against whom charges were dismissed. The bill is on its way to Gov. Scott’s desk; multiple voices are calling for a veto. (Utah, as it happens, recently rejected a similar proposal.) On the other hand, the Florida legislature did reject a bill that would have let local government officials discuss public business with each other one-on-one in secret.

Michigan is considering locking down access to body cam video. The NYPD, meanwhile, came up with a body cam policy that forces requests through the turgid New York Freedom of Information Law process, which is great for delay but not so much for heading off the kinds of unrest that can occur when the public thinks cops are hiding the ball. Tennessee has the right idea – its Senate unanimously voted to open records of the state’s Bureau of Investigation on officer-involved shooting deaths.

Newsgathering

Prosecution of Journalists

When did it become acceptable in this country to assault journalists? What, are the semi-evolved thugs who grudgingly kept their base instincts in check when we still were a civilized nation letting loose now that we are led by an insecure bully who breaks stuff because he thinks people are laughing at him?
I count three outright physical assaults in this issue alone: the manhandling of John M. Donnelly of CQ Roll Call by plainclothes guards at an FCC news conference (the FCC did apologize), the weird face-slap of Alaska Dispatch News reporter Nathaniel Herz by state Sen. David Wilson (R-Wasilla), and of course the attack on The Guardian’s Ben Jacobs by newly-elected congressman Greg Gianforte (R-MT). Gianforte at least is facing misdemeanor assault charges, which somehow, I don’t know, just doesn’t seem like enough. And then there are the apparent gunshots being fired at the offices of the Lexington Herald-Leader in Kentucky.

Not that it’s better when reporters are simply arrested for doing their jobs, as in the case of Public News Service reporter Dan Heyman, who was arrested for trying to ask Health and Human Service Secretary Tom Price a question. Donald Trump is all on board for jailing journalists, urging former FBI Director James Comey to prosecute reporters for publishing classified information – a move media outlets called out as a naked act of intimidation. And Comey might be gone, but the Justice Department is apparently glad to oblige as they develop a case against Wikileaks’ Julian Assange that could have some serious chilling effects. Trump’s CIA Director, Michael Pompeo, jumped on the bandwagon as well.

In other news, a reporter in Iowa is facing contempt of court charges after she violated an order not to shoot video of Chris Soules (of “The Bachelor”) in a hit-and-run case. Barrett Brown spent three more days in jail for speaking with Motherboard, in violation of instructions by his parole officer to fill out permission forms before giving interviews. And photojournalist Nebyou Solomon of KLAS-TV was released after two days in jail; he was arrested for trespassing on private property while covering a tax protest outside the Trump International.

Punishment of Sources

Of course, the fact that the White House supports arresting journalists doesn’t mean that the Feds aren’t still interested in going after their sources. The CIA and FBI are actively hunting for leakers to Wikileaks, the DOJ is looking into leaks related to the Manchester Arena bombing, the FBI has clamped down on its own communications with the press, and Jeff Sessions is just champing at the bit to prosecute. Presumably so he has something to do while walled off from the Russia investigation.

The New York Post reports that the Justice Department has gone so far as to obtain a FISA warrant to conduct electronic surveillance against journalists in order to trace a particular source. One assumes we’ll be hearing a lot more about that.

If you want to know if you might be considered a suspect in a leak investigation, you might check out the training slides for the FBI’s “Insider Threat” program (obtained in May by FOIA ninja Jason Leopold). For some sure-fire fun, try applying these in your own office!
Trump Administration

Did you think we were done with Trump and his anocratic kakistocracy after the above amusements? *Mais non, mes amis.* There is so much more. You can check out PEN America’s new report “[Trump the Truth: Free Expression in the President’s First 100 Days](http)” if you really feel like you need an excuse to drink before noon, but let me serve up a few recent morsels. (Oh, and don’t worry if you’re reading this after noon – your excuse is good through tomorrow.)

The insults continue, of course. Particularly notable was the Trump 2020 Campaign’s attempt to get CNN, ABC, CBS and NBC to carry an ad labeling prominent news anchors as ”fake news”; the networks predictably declined.

Avoiding American journalists also continues to be a trend. Trump himself cut off an interview with CBS when anchor John Dickerson had the temerity to ask about the imaginary wiretapping by the Obama Administration, and kept reporters at a distance during his recent overseas trip. The White House made some staff financial disclosures available, but in a way that required a coalition of media outlets working together to actually access them. But that’s better than Betsy DeVos’s Department of Education; these days, you can get more information out of a Comcast service representative. And Rex Tillerson cut U.S. journalists out of a press conference with the Saudi foreign minister, though foreign reporters were allowed.

If that sounds familiar, you might have heard of a little incident where the President met with Russian Foreign Minister Sergey Lavrov and Russian Ambassador Sergey Kislyak in the Oval Office and betrayed his country disclosed classified information to his guests in front of a photographer from Russian state news service TASS. No U.S. news organizations were allowed in, and—laughably—intelligence officials told the U.S. press that the information discussed was too sensitive to be reported to the American people.

But what’s the problem? Sean Spicer tells us that all of this transparency nonsense isn’t really good for anyone. Unless you’re InfoWars or one of the other outlets for which the White House has made special arrangements. ([Breitbart](http://www.breitbart.com) and [Sputnik](http://www.sputniknews.com) are still having problems gaining access to Capitol Hill, though [LifeZette](http://www.lifezette.com) picked up its press pass in May.)

Ah, yes, Mr. Spicer, who was conveniently on Navy reserve duties when the firing of James Comey broke, leaving deputy press secretary Sarah Huckabee Sanders to field the only question of any relevance (i.e., “Are you f*cking kidding me?”). And yet Spicer found a way to talk to the press anyway, among the bushes. (I’m sorry, I can’t stop thinking of this when I hear that phrase.) Rumors have started that Spicer, whose role in the administration is roughly the same as that of a stuffed toy wired to the grille of an 18-wheeler, is no longer in Trump’s good graces. Will Spicer’s role diminish or vanish? Will the daily press briefings be
cancelled, or perhaps—I kid you not, this is an actual thing Trump said—handled by the President himself?

First round’s on me, folks.

Lawsuits

The constitutionality of Idaho’s ag-gag law was argued before the Ninth Circuit, with the state looking to flip a district court ruling. The law prohibits misrepresentations used to gain access to private agricultural facilities in order to access records or make undercover recordings, which makes me wonder if a law not explicitly targeting newsgathering would have passed muster (and whether the Ninth Circuit will wind up citing R.A.V. v. St. Paul in making the distinction). Twelve amicus briefs were filed arguing that the panel should affirm the district court’s order.

Drones

Speaking of protecting agricultural installations, a new Texas bill would add large-scale animal feeding operations to areas off-limits to drone flights (along with oil and gas well pads and cell towers). The FAA had also recently banned drone flights over 133 military facilities.

However, the FAA’s regulation of drones was upended in May when the D.C. Circuit held that the agency’s registration requirement for small unmanned aerial vehicles conflicted directly with the 2012 FAA Modernization and Reform Act, which explicitly bars the agency from regulating model aircraft. Before you all rush out of your newsrooms to take to the skies, keep in mind that “model aircraft” under the 2012 law are limited to those “flown for hobby or recreational purposes.” So if you’re doing it professionally or for other purposes, the FAA’s rules are likely still in effect.

Prior Restraint

Those who know me know that I have a serious problem with injunctions in any defamation action, even a post-trial injunction limited to the defendant following a plaintiff’s verdict. In my view, such injunctions are based on a fundamental misunderstanding of the truth-finding function of the justice system. It’s even less tolerable when a post-judgment order follows a default judgment and/or is directed at third parties (as in the now infamous Hassell v. Bird decision).

But even that pales in comparison to this nonsense. Up above, I mentioned a new defamation case in New York state court involving a woman sued by her former employer after she filed a sexual harassment claim. What I didn’t mention was the order to show cause directed at the New York Daily News, which wrote an article about the harassment allegations. The court (1) directed the plaintiff and the Daily News to show cause why they should not be ordered to remove the plaintiff’s name from the article and any
“associated keywords and Facebook posts” and (2) ordered the Daily News to remove the plaintiff’s name pending the determination of the show cause hearing.

The Daily News, to their credit, responded by publishing an editorial including the following passage:


As usually happens when a judge realizes that he plum forgot about the First Amendment, the issue seems to have resolved itself; the Daily News has withdrawn an appeal that it had swiftly filed.

In other matters, a judge in Ohio ordered attorneys suing a personal injury law firm to delete blog and social media posts about the lawsuit; the order was issued in the context of the judge’s consideration of whether to maintain broader gag orders in the case. The Albuquerque Journal and others appealed to the New Mexico Supreme Court from a district court order prohibiting anyone from reporting on financial information disclosed in an open-door bench trial of a breach of fiduciary duty case. A judge in N.D. Cal. issued a show-cause order as to why an anti-abortion activist and his attorneys should not be held in contempt for violating an order not to publish secretly recorded videos of abortion providers. In the same court, the Electronic Frontier Foundation invoked the SPEECH Act of 2010 seeking a declaration that an Australian takedown order against EFF’s “Stupid Patent of the Month” column is unenforceable in the United States.

The New Jersey Appellate Division issued a strong rebuke of a trial court’s prior restraint against The Trentonian’s reporting on a child abuse case, denying the state AG’s request for a stay of the lower court’s decision to rescind the restraint. With the cat now good and truly out of the bag, that should wrap up that whole sorry saga.

Adobe scored a win on gag orders associated with search warrants in C.D. Cal., with an order that these prior restraints must have an expiration date after which the company can tell the public about a federal investigation. Microsoft, meanwhile, joined a number of other tech companies in being allowed to publish a National Security Letter from the FBI. Facebook reports that more than half of the government demands it receives carry gag orders, though search warrants far exceed NSLs as the vehicle for such demands.
Information Infrastructure

Federal Communications Commission

For what it’s worth, the D.C. Circuit denied rehearing on its decision upholding the FCC’s 2015 Open Internet Order, reaffirming the agency’s authority to reclassify broadband as a common carrier under Title II of the Communications Act of 1934. FCC Chair Ajit Pai isn’t upset, though, claiming it supports his goal to move broadband back under Title I.

Pai has moved very quickly to repeal the 2015 Order, including: meeting with tech giants about his intentions; issuing a Notice of Proposed Rulemaking; attempting to pull critics’ teeth with an information sheet entitled “Internet Regulation: Myths vs. Facts” (though many believe he confused as to which were which); opening public comment via the FCC website (which quickly resulted in chaos) and then shutting it down; supporting congressional intervention on the issue; and obtaining a 2-1 vote on party lines to open debate on revoking Title II and, indeed, any net neutrality regulation at all. We’re now in the 90-day comment period before the FCC formulates a final rule.

Naturally, this has all resulted in outrage and push-back from a broad spectrum of net neutrality proponents, including: consumers, congressional Democrats, tech companies, agency officials, and Tim Wu himself. But with spambots out there filing fake comments to match proponents’ numbers, expect Pai to call it a wash and do whatever he wants despite widespread calls for bogus comments to be investigated and thrown out.

In the midst of all of this, the Ninth Circuit agreed to rehear FTC v. AT&T Mobility, a 2016 ruling that the Federal Trade Commission lacked jurisdiction over any company that offered common carrier services as part of its portfolio (even if the FTC was interested in the company’s non-common carrier activities). That ruling was problematic for a lot of reasons, not the least of which was its implications for the FTC’s authority over broadband, but with luck the Ninth Circuit will fix it en banc.

In other FCC news, the agency has been trying to make life easier in the M&A space, approving Time Warner’s sale of WPCH to Meredith (which will help to avert FCC scrutiny of Time Warner’s merger with AT&T), and reversing a merger condition on Charter Communications that required the company to enhance competition by building out broadband service to a million households already served by a competitor.

The FCC also voted 2-1 in April to reinstate the UHF discount for TV station ownership, a key element of Sinclair’s plan to acquire Tribune Media without running afoul of the 39% ownership limit. But, in a late-breaking development, the D.C. Circuit stayed the FCC’s action pending a panel review. Meanwhile, the agency has moved to eliminate rules requiring TV and radio stations to have staffed studios in the communities where they are licensed.
More generally, Chairman Pai is taking a Trump-style look at the FCC’s body of regulations with an eye toward slashing any that seem “no longer needed or counterproductive.” That’s not the only thing being slashed, apparently – the FCC’s proposed budget suggests that the staff will see substantial cuts too.

The FCC’s spectrum auction netted about $10.05 billion for stations, giving some public television stations in particular a financial boost in the face of substantial budget uncertainty. There’s still one last low-power TV station challenge to the auction to resolve, though; argument was heard by the D.C. Circuit in mid-May. The D.C. Circuit also dished out a slam to Wheeler-era rules governing faxed advertising.

Finally, the FCC has been receiving complaints about “fake news” on television recently. That’s a mess that I suspect Chairman Pai doesn’t want to touch with a 39½’ pole; the agency has been responding in a number of different ways. Still, it seems to be an issue of enough concern to some House Democrats that they’ve proposed bills that would prohibit the FCC from engaging in viewpoint discrimination and address a number of other issues. One thing that the FCC definitely won’t be spending its time on is action against Stephen Colbert for a joke about the symbiotic relationship between allegedly complementary elements of the anatomies of Donald Trump and Vladimir Putin. Because even now there are limits to the madness.

Other Litigation

Lest we forget, the states also have a hand in the net neutrality debate. A judge in S.D.N.Y. recently remanded New York’s consumer protection lawsuit against Charter over throttling and allegedly deceptive promises of speed to state court.

The Fourth Circuit reversed the dismissal of a claim that the city of Greensboro, N.C., where I once spent several days at a very unusual conference, discriminated against an African-American-owned TV network. SiriusXM was sued in C.D. Cal. for its decision not to carry ads for escort sites; the satellite broadcaster responded with an anti-SLAPP motion which the court granted. (Take note, if the Trump campaign wants you to run ads insulting yourself.) And the Florida Supreme Court upheld the legality of a distinction in tax rates for cable versus satellite TV services.

Digital Content

I just want to take a moment to acknowledge the work that folks including Prof. Eugene Volokh and Paul Levy at Public Citizen have been doing lately to track and to respond to the ongoing use around the country of a variety of litigation tactics (some above board, some less so) used to leverage the removal of news articles from search engine results and public view. They’ve found people suing sources quoted in news stories to secure stipulated judgments, cases
involving apparently fake defendants or in the names of plaintiffs who claim to know nothing about the case, and even more. At least one attempt involving forged court orders has resulted in a federal prosecution of the plaintiff in the Southern District of New York; the defense looks like it’s shaping up to be “the bad things people said online made me stupid.”

Along the same lines, see this article from Techdirt on an Illinois resident suing Zillow to take down an estimate of her home’s value that is lower than she’d like, and this one from Prof. Eric Goldman on a plaintiff in the Eastern District of New York who learned that the right to be forgotten doesn’t work in the United States, at least with respect to court orders.

Section 230

Speaking of Eric, he’s sounding the alarm again about H.R. 1865, the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” bill (p/k/a the “No Immunity for Sex Traffickers Online Act”). The bill, which would allow state legislatures to bypass Section 230 with certain types of criminal laws about sex trafficking, has now been formally introduced in the House. It really seems like the kind of thing that could slip through without much protest or coverage while all eyes are on the White House follies; Eric is trying to rally the troops, so reach out to him if you want to get involved.

Speaking of the troops rallying, kudos to everyone who filed amicus briefs in support of Yelp (or Section 230 and the First Amendment generally) in Hassell v. Bird. We’re still waiting for a hearing date in the California Supreme Court, as I understand it, but we should have more news soon.

San Francisco’s troubling suit against Airbnb is no more, after the company settled with the city. Expect the district court’s decision creating a Section 230 workaround for transaction-based liability to plague us for a while to come. And this was a no-brainer, but I’m still for some reason breathing a sigh of relief: Facebook defeated another suit in E.D.N.Y. seeking to hold it liable for terrorist activity by third parties. But these cases keep on coming – Facebook, Google and Twitter are facing yet another suit of this nature, with the families of the San Bernardino victims filing a new suit in the Central District of California.

And in D. Mont., the Southern Poverty Law Center has sued neo-Nazi cesspit Daily Stormer for inciting an online “troll storm” against a Jewish real estate agent and her family. I guess we’ll see how strong the logic of Jones v. Dirty World really is.

Hate, Terror, and Other Internet Nastiness

Newsweek writer Kurt Eichenwald filed suit in D. Md. against the person believed to have sent a strobing tweet designed to trigger Eichenwald’s epilepsy. The suit follows an apparently successful effort to discover the pseudonymous sender’s true identity.
Prof. Volokh has filed a new lawsuit in N.D. Ohio to block the enforcement of Ohio Rev. Code § 2917.21, a statute that makes it a crime for non-media entities to post online content “for the purpose of abusing…or harassing” people. Utah is also trying to crack down on online bullying with a new law.

Google has been updating its policies regarding content deemed too offensive to be allowed to generate advertising revenue, though not without controversy. Facebook encountered new challenges after a murder was streamed across the site, raising difficult policy questions and leading the company to hire 3,000 new employees to help speed up the removal of such content. Facebook then faced renewed scrutiny after its internal guidelines on content removal were leaked to The Guardian, with sextortion and revenge porn emerging as particular issues.

I just have to say that the session at the Digital conference in May on social responsibility for online platforms, which dealt with precisely these issues, was fantastic – if you missed it, we’ll have an audio recording of the session (and the rest of the conference) available in the next few weeks.

Terms of Service

If you want to form contracts via mobile app, make sure that the design of the app doesn’t wind up obscuring critical information. That’s the message of a new decision from N.D. Cal., which held that a user couldn’t be held to have been bound to pay Uber a cancellation fee if the pop-up keyboard on his phone blocked him from seeing the relevant terms.

Miscellaneous

Let’s reach into the stump, but watch out for the Wood Beast:

- A Third Circuit decision on violation of the Fair Housing Act and alleged intimidation via blogging is bizarre but of little import given that the court somehow managed to get through the opinion without discussing the First Amendment.

- The Fourth Circuit left owners of data trapped on servers seized from filesharing site Megaupload in limbo, refusing an effort by one owner to gain access to his data.

- The D.C. Circuit washed its hands of Backpage’s demand for the return or destruction of documents turned over in response to a recent Senate subcommittee investigation, holding that separation of powers barred it from getting involved once the investigation was terminated.

- Milwaukee County was sued in E.D. Wis. by an augmented reality game developer over an ordinance requiring developers to obtain permits to allow their AR games to be played in the county; Candy Lab AR claims that the ordinance violates the First Amendment.
Speaking of AR, a Minnesota appellate panel didn’t see the difference between sexting and in-person indecent exposure in a recent ruling that poses some interesting questions for the future of integrated online/real life experiences.

- New York has ditched an effort to impose a duty to collect sales taxes from N.Y. residents on online retailers.
- USA Today has reached out to the FBI, asking it to investigate a flood of fake accounts following the paper on Facebook.
- Speaking of weird stats and figures online, Eric Goldman collected a number of recent “click fraud” cases worth a look. He’s done the same with respect to geoblocking.

Digital Privacy

Anonymity

Twitter sued the Department of Homeland Security as well as Customs & Border Protection to block efforts to uncover the identity of the operator of an “alt-agency” account critical of Donald Trump. The government gave up on its attempts almost immediately after widespread condemnation, and for its trouble drew an investigation from the DHS Inspector General’s office at the request of Sen. Ron Wyden (D-OR). And yes, in contrast to other reports of thin-skinned lashing out by Trump’s team, this one actually happened. (Berke, I love your work, but you’re not helping.)

Hacking

It’s too bad this one didn’t get decided in time for March’s loosely cat-themed issue: The Sixth Circuit upheld the conviction of a hacker behind an extortion attempt over Mitt Romney’s tax returns in 2012, which depended on some clever connecting of the dots – and two photos of cats.

We’ve got a new record for longest sentence for hacking in the United States, 27 years from the Western District of Washington for a Russian man called a pioneer in the stolen credit card market. And in E.D. Va., the feds have arrested a man who developed a remote administration tool popular with hackers (but which appears to have perfectly legitimate applications). I can just hear the simplistic and misleading arguments now – “It’s just like handing a gun to a bank robber!”

Control of Personal Information

Well, as anticipated Congress overruled the Wheeler-era FCC’s broadband privacy rules, and Trump signed off; had they come into effect, the rule would have required ISPs to get opt-in consent before selling customer data to third parties. The White House doesn’t seem interested in replacing those rules with anything, although Representative Marsha Blackburn (R-Tenn.) has proposed a bill (cutely acronymmed as the “BROWSER Act”). The ACLU expressed caution about Blackburn’s proposal because the bill would expressly preempt state efforts to impose
more robust privacy standards, as a number of states are attempting to do in response to the loss of the FCC rules. Blackburn’s bill also extends to edge providers, so a fight from internet giants like Facebook and Google is expected. Separately, Prof. Orin Kerr wants us to remember that the Wiretap Act still plays a role in this area.

My only comment is that no one should let Rep. Jim Sensenbrenner (R-Wis.) vote on anything more technologically complicated than stacking one very square block on top of a somewhat larger but also very square block. His explanation as to why he supported rolling back the FCC privacy rules: "Nobody's got to use the Internet." Perhaps not in whatever century you’re commuting from, Congressman, but let another Jimmy S. tell you: it comes in pretty handy around here, bub.

The Second Circuit will consider whether to revive an Illinois Biometric Privacy Act lawsuit over facial recognition in the NBA 2K video game series in a new appeal filed in April. The Eleventh Circuit upheld the dismissal of a Video Privacy Protection Act claim by a user of a CNN app, finding that the user had standing but wasn’t a “subscriber” under the VPPA.

Facebook escaped liability in a case in N.D. Cal. in a case accusing it of gathering private medical information from third-party websites, with the court holding that it lacked personal jurisdiction over medical organizations outside of California and that the plaintiffs had consented to Facebook’s tracking. Other companies including Twitter, Yelp, and Facebook’s Instagram settled a class action in the same court over app privacy for $5.3 million.

Uber was sued by Lyft drivers in N.D. Cal. for allegedly using a stealth program referred to as “Hell” to track their movements. A new complaint in N.D. Ill. alleges that certain models of Bose headphones collect information about music played on them and transfer that information, along with a personally identifiable serial number, to third party data miners.

And speaking about gizmos gathering data, California’s Senate is considering S.B. 327, a new bill governing privacy and security of connected devices.

Encryption & Data Security

So a California court told a minor convicted of a nonviolent sexual offense with his minor girlfriend that, as a condition of his parole, he couldn’t use encryption in his online communications. But while many people think of encryption as a tool of hackers and spies, it is essential to the basic operation of the Internet; the Court of Appeal modified the condition.

In the prosecution of a reality TV star for “sextorting” a social media celebrity (yes, this is a Florida case, how did you guess?), a trial court judge rejected a Fifth Amendment argument and ordered the defendants to unlock phones believed by the police to have been used in the crime.
Internet Surveillance

Way to go, Wikimedia! We finally have a plaintiff who has been found to have standing to challenge the NSA’s mass online surveillance program, with a Fourth Circuit ruling that the online activities of Wikipedia are widespread enough that it is likely that they have been caught in the NSA’s dragnet. That in turn will at long last allow a constitutional challenge to the government’s sweeping surveillance of online activity. The Electronic Frontier Foundation has had some success in its own battle over the issue, with a judge in N.D. Cal. ordering the NSA to respond to discovery on whether the plaintiffs in Jewel v. NSA were subject to Section 702 surveillance or the Presidents Surveillance Program.

The Fifth Circuit ruled that real-time government tracking of cell location data (so-called prospective cell-site collection) is not a search, disagreeing with the Florida Supreme Court. Prof. Kerr disagrees with the Fifth’s logic. The Eighth Circuit, meanwhile, held that an IP address is enough to search eleven people’s devices for child porn that never materialized.

Facebook lost a challenge in New York’s highest court against the mass use of search warrants by the New York County DA’s Office to obtain information on hundreds of user accounts. The determination was procedural, with the Court of Appeals holding that a lower court’s denial of a motion to quash a warrant is not an appealable final order.

The FBI is apparently moving slowly in exploring its new powers under Fed. R. Crim. P. 41 to hack computers around the country on the back of a single search warrant. Its first exercise of that power was a carefully circumscribed effort to shut down a malicious botnet and free victims’ computers from its effects.

Government requests to Google and Facebook continue to increase according to the latest transparency reports, while the first transparency report issued by the Director of National Intelligence presents some dramatic statistics about the scope of surveillance activities. But the latter numbers might drop soon, with the NSA declaring that it will end its “upstream” collection of messages from U.S. citizens regarding foreign targets under Section 702. There are still questions and caveats, of course.

Finally, there is a new bipartisan proposal in both chambers of Congress to require Customs & Border Protection to get a warrant to search the electronic devices of U.S. persons.
Intellectual Property

So, *Charging Bull vs. Fearless Girl*. Does the creator of an iconic sculpture on Wall St. embodying the power of American capitalism have a potential claim against New York City for permitting the nearby installation of a statue of a girl facing down the bull, representing resistance from those whom unbridled commerce would trample beneath its hooves? Short answer, no. Sure, you might be able cobble together a *vaguely plausible-sounding VARA claim* due to the loose language of the statute, except for this, And this, And *especially this*.

But really, the first artist’s problem isn’t with the second artist’s statue at all – it’s with the fact that after dot com bubbles and subprime meltdowns we have a very different perception of Wall Street in the 2010s than we did in the Gordon Gekko era. People just aren’t as fond of his bull, and you don’t need a little girl to tell you that.

[Photo of Fearless Girl, CC BY-SA 4.0 Rachel Knipel; Photo of Charging Bull, CC BY-SA 2.0 Aseba]

Copyright – New Cases

We did have an actual VARA lawsuit in New York in April, with a sculptor suing Trinity Church in S.D.N.Y. over *removal and relocation of a bronze memorial* commemorating 9/11; the production of the memorial had been funded by the artist himself at a cost of over $1 million on the promise that it would remain permanently.

In photography cases, a *U.K. photo company sued Khloe Kardashian* in C.D. Cal. for reposting one of its images to Instagram sans watermark (or permission). We also had three new photo suits in the Southern District of New York: a *photojournalist sued NESN* for unauthorized display of a photo of N.Y. Mets pitcher Matt Harvey kissing a Victoria’s Secret model; a *photographer from Brooklyn sued IMDb.com* for displaying his photo of Tom Holland on the set of the upcoming Spider-Man film without permission; and *Andy Warhol’s estate preemptively sued a photographer* to shut down her claim that the pop superstar had ripped off her photo of decade-transcendent musical icon Prince.

Speaking of decade-transcendent musical icon Prince, the Purple One’s estate successfully secured a TRO against a sound engineer in D. Minn. to block his release of *Deliverance*, a collection of five previously unreleased songs; the order was later extended to a full preliminary injunction. (⇠ See, that’s added value right there. We didn’t cover the PI in the *MediaLawDaily*, because not even our vast and somewhat frightening network can catch everything on the first pass. Aren’t you glad you read this far?)
What else…ah, we’ve got recording companies battling, with Golden Crown Publishing suing Sony Music in S.D.N.Y. over whether Lil Jon and DJ Snake stole from Freddie GZ in “Turn Down for What.” And in C.D. Cal., a man who sold a plane to the producers of Sully has now claimed that he was a co-author of the film; the producers have moved to dismiss.

Copyright – Plaintiffs’ Victories

The Ninth Circuit shook up the social media landscape in May with a ruling that LiveJournal’s volunteer moderators could be agents with sufficient knowledge of infringement to skewer a DMCA defense. As with last year’s similar Section 230 decision from S.D.N.Y. in Enigma Software, treating third-party moderators as agents could blow a huge hole in protection for online intermediaries. LiveJournal has petitioned for rehearing, with Silicon Valley’s best and brightest filing amicus support.

In other digital news, ISP Windstream sought to avoid the fate of Cox Communications in the latter’s battle with BMG Rights Management. Windstream filed a DJ action in S.D.N.Y. for a declaration that it was compliant with the DMCA vis-à-vis BMG’s content, but the court kicked it out as a question that was both premature and ill-suited to preemptive resolution. Speaking of preemption, a remarkable TRO was issued by a judge in S.D. Tex. ordering a group of ISPs to block a list of domain names in order to prevent “anticipated” infringements.

Major networks secured a settlement from Aereo-alike streaming service FilmOn X; the settlement followed the Ninth Circuit’s denial of a petition for en banc review of its decision that FilmOn is not entitled to a Section 111 compulsory license.

Ed Sheeran settled a claim that his song “Photograph” derived from others’ work. Spotify settled with songwriters in consolidated cases in C.D. Cal. for $43.4 million. Sirius XM also reached a settlement in C.D. Cal. to resolve its long-running battles over the satellite broadcast of pre-1972 sound recordings; the settlement is a high-low, with the payout depending on how pending appeals turn out. Speaking of which, the Florida Supreme Court heard argument on whether sale of a pre-‘72 sound recording exhausted state law copyright interests.

A judge in N.D. Cal. issued a fascinating decision on the copyright implications of user-generated content for videogames in a case in which Blizzard Entertainment sued for infringement of third-party “mods” for Warcraft III. The court denied a defense motion for partial summary judgment. A film distributor who tried to create a “new” horror flick by re-splicing another film is still facing a $460K copyright verdict after a judge in C.D. Cal. denied a motion for a new trial. In the same court, NBC settled a claim that its show “Timeless” was a knock-off of a Spanish-language show. And in S.D. Cal., Conan O’Brien is still facing a claim that he stole jokes about Caitlyn Jenner, Tom Brady, and the Washington Monument after his motion for summary judgment was denied. That’s three jokes on discrete topics, mind you; don’t do what I did and try to figure out how they could have been tied together.

I told you not to.
Copyright – Defense Victories

The Ninth Circuit rejected a writer’s appeal on a claim over *Disney’s Pirates of the Caribbean* franchise, holding that the plaintiff had prejudiced Disney by his delay in rescinding a copyright release until after filing suit. The same court also summarily affirmed actress Elizabeth Banks’ victory over a screenwriter in a case involving the movie *Walk of Shame*. Meanwhile, the Eleventh Circuit held standing to sue for copyright infringement does not exist until an application for registration has been approved by the Copyright Office. And in a case involving copyright, trademark and patent claims, the Federal Circuit held that Amazon.com does not “sell” infringing products offered through its third-party “Marketplace” service.

In the district courts:

- Judge William Alsup of N.D. Cal. issued a show cause order as to why he shouldn’t ban porn copyright troll Malibu Media from filing new lawsuits in which the defendant is identified solely via an IP address.
- Also in C.D. Cal., an attempt to clear the path for an unlicensed Zorro musical via declaratory judgment has been allowed to move forward over a motion to dismiss (though some non-copyright claims were pared back). The case asserts, among other things, that the character should be in the public domain.
- In D. Mass., the cartoonist who had pursued a frivolous copyright suit against DreamWorks over the Kung Fu Panda franchise was sentenced to two years in prison for his fraud on the court.
- In S.D.N.Y., the court allowed a DJ action filed by 2K Games (producer of the NBA 2K game series) to move forward on the question of whether a license is required to depict LeBron James’ tattoos in the game.
- Also in S.D.N.Y., judge dismissed claims by songwriters that they hold rights alongside UMG in the 1973 song “Sho’ Nuff,” holding that the plaintiffs blew the statute of limitations.
- Yet again in S.D.N.Y., Drake won summary judgment on a claim that he infringed a 1982 spoken-word recording in his song “Pound Cake/Paris Morton Music 2,” with the court holding that his use of the spoken track was transformative fair use.
- In E.D. Pa., the creator of Fox’s TV series “Empire” was exonerated from claims of infringement of the plaintiff’s work. (I’m not really watching the show anymore, I’m afraid; I fell off the bandwagon around the same time that “Legion” started airing on FX.)
Finally, a photographer who sued a teacher and student in M.D. Tenn. over the use of his image in a school project saw the claim kicked out on fair use grounds.

Copyright – New & Pending Appeals

Coming soon to a Ninth Circuit opinion near you: The Village People skirmished with one of the group’s original singers over recapture of the rights in “YMCA,” “In the Navy,” and other songs; Pharrell and Thicke finished up their briefing in the appeal of the “Blurred Lines” case, arguing that "a groove or feeling cannot be copyrighted"; and digital advocacy groups tossed an amicus brief onto the grave of erstwhile copyright plaintiff Perfect 10 in the appeal of a district court ruling rejecting vicarious copyright liability for online platforms.

In the Second Circuit, Google, Netflix, and other large tech and media companies filed an amicus brief in support of the U.S. Department of Justice in its fight with BMI over fractional music licensing, arguing that such licenses raise prices and increase the risk of infringement. In the Federal Circuit, a host of tech companies, IP professors, and computer scientists filed amicus briefs in May supporting Google’s verdict in the Oracle America API trial.

Copyright – Miscellaneous

It’s called the PROMOTE Act of 2017, and if this federal bill is passed, record labels would be able to block the play of particular music on U.S. radio. Because everyone likes to buy music they’ve never been allowed to hear.

John Steele of Prenda Law infamy was disbarred in Illinois in May. I’ve only ever been glad once about a lawyer being disbarred, and I still feel guilty about it years later even though it was richly deserved, so no victory dance here.

The House passed the Register of Copyrights Selection and Accountability Act of 2017, which makes the head of the Copyright Office a presidential nominee rather than an appointee of the Librarian of Congress. The legislation moved swiftly, and Techdirt had an interesting series asking what the hurry is and considering some recent revelations regarding mismanagement of the Office.

Patent

The big patent news this month was the Supreme Court’s decision in TC Heartland, discussed way back at the start of this article. It will be interesting to see how diversity in the district courts issuing patent decisions affects the pattern of cases making their way up to the Federal Circuit.

Apple settled some big smartphone patent woes recently, putting to bed its fights with Nokia and patent holding company Unwired Planet in the Northern District of California and elsewhere.
The Federal Circuit was lining up the defense wins this month, reviving an Apple smartphone patent that had been invalidated in an ex parte proceeding and knocking out plaintiffs’ patents for online messaging, image processing, and sports videogames under Alice.

**Commercial Speech**

**Trademark**

In N.D. Ill., a trademark dispute has spun out of the copyright battle over photographs taken by street photographer Vivian Maier. On top of a copyright claim based on the sale of copies of Maier’s work, her estate is suing a collector for allegedly using Maier’s name to suggest that his sales are authorized by the estate. There’s a cybersquatting claim in there too.

PayPal and Pandora are fighting in S.D.N.Y. over the right to use a blue sans-serif “P” without a counter. (Typography nerd fact: a “counter” is the partially or entirely enclosed whitespace inside a letter.)

Musicians are rocking the trademark complaints this time around with the Eagles suing the “Hotel California” in C.D. Cal., Jefferson Starship’s lead guitarist suing his former bandmates over use of the band name (and his likeness, for an ROP twist), and Deadmau5 filing a trademark counterclaim over a website that uses the name of his cat. JayZ’s Roc Nation finds itself on the other side of the v., though, with Iconix Brand Group claiming it holds the exclusive rights to “Roc Nation” baseball caps under a licensing deal and that Roc Nation is infringing with alternative merchandise.

Google fought off a challenge to its trademark rights in “Google,” with the Ninth Circuit holding that it still has TM rights even if the term has become a generic verb for the act of searching for content on the internet. The Ninth Circuit also held that the Kardashian sisters have not lost their trademark rights due to unclean hands, affirming a preliminary injunction against a cosmetics company. The U.S. Olympic Committee will keep on policing nominative use of its mark on social media, after a declaratory judgment action was kicked out of D. Minn. for lack of an active case or controversy. Nominative fair use also found no purchase in the Sixth Circuit, which continues to avoid the theory but did affirm the dismissal of a claim between Oaklawn Jockey Club and Kentucky Downs on a “trademark use” test that reached the same result.

And in S.D.N.Y., a photojournalist was not allowed to pad out his copyright claims over World Trade Center 9/11 photos with trademark and Lanham Act claims.
Compelled Speech

The Ninth Circuit heard argument on San Francisco’s requirement of warning labels for soda in April. It’s probably not a good sign for beverage manufacturers that, less than a week after the argument, the Ninth Circuit upheld Berkeley’s ordinance requiring radiation warning signs in all cell phone stores in the city limits. The D.C. Circuit held that tobacco companies have no further First Amendment justification to delay in the use of new mandatory warnings.

And in N.D. Cal., a bookseller is suing to block enforcement of a new California law compelling disclosures about autographed memorabilia that it alleges would “make it extremely risky, if not impossible, for stores to sell autographed books or host author events.”

False Advertising

Lots going on in the world of false advertising, so I’m just going to run it down quickly.

- Fourth Circuit: The court affirmed the dismissal of a false advertising claim where the plaintiff failed to plead lost consumers or sales.
- Sixth Circuit: Ordinary false advertising is not “disparagement” covered by insurance for “personal or advertising injury.”
- Ninth Circuit: A former student of Trump University is appealing the $25 million class action settlement, keeping alive some hopes that Trump might eventually have to face a public trial over the matter.
- N.D. Cal.: One of the two FTC Commissioner backed out of a deal with DirecTV over allegedly deceptive marketing practices, claiming that the company had not offered enough financial recompense.
- S.D. Cal.: In two cases over the marketing of bobblehead dolls of Donald Trump and Hillary Clinton (flattering to the first and disparaging of the latter), the court held that false claims of official endorsement by Donald Trump and his campaign can be false advertising under the Lanham Act.
- S.D. Cal.: A cab company’s claims against Uber over the latter’s assertion of the safety of Uber rides and the relative danger of cab rides survived a motion to dismiss, with the court finding specific and testable claims by Uber that exceeded mere puffery.
- M.D. Fla.: A false advertising claim against Warner Bros. over alleged implications that its film War Dogs portrays a true story survived a motion to dismiss.
• S.D.N.Y.: The developers of secure messaging tool “Confide” are being sued for the tool allegedly not being quite as secure as claimed.

• S.D.N.Y.: The value appraisal of specific pieces of jewelry is inherently a matter of opinion rather than fact, held the court.

• The FTC warned more than 90 “influencers and marketers,” including celebrities, about sponsored social media posts, noting widespread disregard of FTC rules on Instagram.

• The SEC likewise targeted twenty-seven individuals and entities, including a celebrity, for misleading investors with contributor posts on financial websites.

Unfair Trade Practices

Amazon dropped an appeal at the Ninth Circuit of a district court decision ordering it to refund up to $70 million in unauthorized in-app purchases made by children.

Professional Speech

Montana’s legislature passed a joint resolution rejecting proposed ABA Rule 8.4, which would impose significant limitations on the speech of lawyers in a bid to limit discrimination and harassment. The legislature believed that the rule would violate attorneys’ freedom of speech.

Miscellaneous

Academia

The U.S. Congress is considering a new bipartisan resolution that would ban “free speech zones” on public college campuses into which those exercising their First Amendment rights can be herded. Colorado and Tennessee have already taken action in that regard, but Louisiana’s effort to protect speakers on campus from interference stumbled.

Young America’s Foundation sued the University of California in N.D. Cal. over the treatment of Ann Coulter at Berkeley. Meanwhile, Iowa State settled a case brought by a student over University speech codes that did not comply with the First Amendment.

Finally, a federal judge in N.D. Cal. blocked an expulsion hearing for a high school student who “liked” racist Instagram images.

Government Licensing & Public Fora

The Ninth Circuit rejected a First Amendment challenge to California’s agent licensing law, finding that it regulated only non-expressive conduct.

Mats Järlström sued the Oregon State Board of Examiners for Engineering and Land Surveying in the District of Oregon, after he was fined $500 by the Board for criticizing the
timing of yellow traffic lights based on a mathematical survey – which the Board called practicing engineering without a license. The Board has assented to a preliminary injunction against pursuing further sanctions against Järlström while the case proceeds.

The owner of a video game store in Orange Park, Florida, has sued the town in M.D. Fla. after being told he can no longer display his giant inflatable Mario. In N.D. Ohio, an alt-weekly newspaper is suing the Downtown Cleveland Alliance for removing the paper’s newsracks, allegedly in retaliation for a critical story. And in W.D. Tenn., a judge ruled that the state’s billboard regulation act is unconstitutional.

Political Speech

The Ninth Circuit held that a man who sued the Department of Homeland Security after being fined $500 for stripping naked at a TSA checkpoint failed to carry his burden to show that viewers would understand his ecdysiasm as expressive in nature. I’m struggling to figure out how else it could be interpreted in context, but as with Conan’s jokes, perhaps I shouldn’t.

Hollywood Hijinks

To be clear, I use the term “Hollywood” here as a general term for show business, and as an incredibly obscure tribute to Infocom’s “Hollywood Hijinx,” one of the interactive fiction pioneer’s lesser-known works. No offense intended to either Hollywood or other geographic regions.

A judge in N.D. Ill. denied a motion to dismiss a claim filed by minors who alleged that they suffered psychological distress during the filming of Fox’s “Empire” at a jail in Cook County. And in E.D.N.Y., Gray Television Group sued a pair of comedians that it claims it was duped into booking for a Wisconsin morning show as a “strongman duo.” Guys, what would Hans and Franz think?

Conclusion

All right, that brings us to the end of another issue, more or less to the end of Spring 2017, and the start of what I hope will be a great summer for everyone. See you next time!