The Monthly Daily – April

Notes on the Month’s Media Law News as Seen in MLRC’s MediaLawDaily

By Jeff Hermes

Like many of you, I’ve been reading the MediaLawDaily since it started publishing, long before I joined the MLRC staff. But while I’ve come to depend on the Daily as a critical resource to keep me up to speed on the world of media law, there were a few things that I never expected to learn about – such as a dystopian future revealed by a copy of my hometown newspaper traveling back in time from 2017, or the subset of sexual fetishists known as “furries.” Well, I guess my world is a little broader now. Thanks a bunch, MLD.

Oh, and you folks at the Globe? I’m going to be mighty upset if you wind up erasing your own existence this way. Time travel is not for amateurs. But at least there are still newspapers in 2017.

Enough. Let’s get started.

Legal Frontiers in Digital Media

The MLRC’s Legal Frontiers in Digital Media conference will take place on May 19-20 in Mountain View, CA. You know want to attend, so register. It’ll take just a second.

Supreme Court

The dance around the nomination of Judge Merrick Garland to the Supreme Court continued this month without obvious progress; Garland spent a month meeting with Senate Republicans without much to show for it, and a media push by the White House hasn’t shaken Republican resolve. Meanwhile, Garland opposition leader Sen. Chuck Grassley took to the media to argue that that the Supreme Court is doing just fine with an empty seat, and what’s so magical about the number nine, anyway?

Well, plenty, according to the nine California school teachers whose First Amendment claim foundered last month in Friedrichs v. California Teachers Association on a 4-4 split, and who are now asking the Court to rehear the case once they’re back up to full strength. Also looking for relief from the Supreme Court is the U.S. Patent & Trademark Office, which petitioned for review of the Federal Circuit’s decision in In re Tam (the “Slants” case), which held that the federal ban on registration of scandalous and disparaging trademarks violates the First Amendment.
And in an unusual move, the Washington Redskins – the plaintiff in the other big “disparaging trademark” case – are asking the Court to hear their appeal if the Court takes Tam, even though the football team’s case is still pending before the Fourth Circuit. The team’s petition drew attention not only for its procedural posture (the Court can elevate an appeal that is still pending below, though this is not common), but for the degree of disdain it showed toward Simon Tam’s lawyers. Sigh.

Regardless of whether the Slants are joined by the Redskins, I suspect that the Trademark Office will have more luck getting before the Court than some of the other IP cases that the Justices have bounced recently. Those hoping for a new high court opinion on fair use (or just a smackdown for Google) were disappointed when the Court denied cert on the Second Circuit’s detailed explication of the “transformative purpose” doctrine in Authors Guild v. Google. The Court also rejected a couple of other IP-related petitions, one of which (Vermont v. MPHJ Technology Investments) was sort of interesting because it related to whether allegedly unfair and deceptive threats sent by a patent troll create a federal cause of action based on the underlying merit of the patents at issue. (According to the Fed. Circuit: “No.”) And POM Wonderful was left subject to a 2010 FTC ruling that it engaged in false advertising, after the Court denied its petition for review of a D.C. Circuit ruling last year.

On the other hand, the Court did take a case about the limitation of copyright with respect to useful articles (specifically, cheerleader outfits), the application of laches with respect to patent claims (specifically, for adult diapers). Meanwhile, the Court heard argument in Kirtsaeng v. John Wiley & Sons, about whether Thai professor Supap Kirtsaeng is entitled to recover attorneys’ fees for successfully invoking the first sale doctrine the last time he was before the Court. The same day, the Court drew the attention of holders of technology patents for the argument in Cuozzo Speed Technologies v. Lee, involving standards for patent invalidity in inter partes proceedings under the America Invents Act. And in the last argument of the Term, the Court heard former Virginia Governor Robert F. McDonnell’s argument that the First Amendment protects his communications with political supporters, immunizing him from corruption charges.

The Supreme Court also proposed a change to Fed. R. Crim. P. 41 that would allow law enforcement to obtain search warrants to access computers remotely regardless of their location. Critics are concerned that the amendment will expand FBI hacking activities.

With all that, it’s easy to forget that we actually had a First Amendment opinion this month, in Heffernan v. City of Paterson. The case involved a police officer whose superiors mistakenly thought that he was supporting their political rival and demoted him. The Supreme Court held that the officer could bring a First Amendment retaliation claim against the city even though he hadn’t been exercising First Amendment rights as the defendants believed. The Court focused on the fact that the First Amendment is phrased in terms of prohibiting efforts to suppress
speech rather than protecting the exercise of speech rights; it also noted that allowing the officer to sue would help to stem any chilling effect that the defendants’ actions would have on other would-be speakers. That seems right to me, and very much in line with why we allow overbreadth arguments even when the particular speech at issue in the case might be constitutionally proscribed.

**Reporters’ Privilege**

The LAPD came a-knockin’ at the NY headquarters of American Media this month, serving a search warrant for information about an audio recording that might have captured Charlie Sheen threatening a former fiancée. The company declined to cooperate, asserting that the warrant was illegal under state and federal law. There are so many reasons to love the Privacy Protection Act of 1980, but among other things I just get a kick out of looking at a statute with a section number like “2000aa.”

New York Times reporter Frances Robles won’t be compelled to testify or turn over notes about her interview with the man accused of murdering Baby Hope, with a judge of the New York Supreme Court holding that she was protected by the state’s shield law. Over in S.D.N.Y., Bill Cosby was denied permission to conduct a fishing expedition into New York magazine’s unpublished materials regarding interviews with his accusers. And in Clark County, Nevada, a judge held that the state’s shield law protected a documentary filmmaker against compelled disclosure of notes and outtakess.

**Defamation**

So, what Alabama high school student Tyler Harris did was neither wise nor admirable, taking an article about a school coach charged with having sex with a student and substituting the photo of a different, innocent teacher. Even dumber was arresting the kid and charging him with criminal libel under a statute held unconstitutional by the state supreme court a decade and a half earlier. The charges were, of course, dropped, but did that stop the madness? Of course not. That’s why a bill is now making its way through the state legislature to revive criminal libel in the state.

As I always say, there’s no kill like overkill. Moving on.

**New Complaints**

It was inevitable we’d see a libel lawsuit against Donald Trump this year. GOP consultant Cheryl Jacobus sued the candidate over tweets asserting that she was upset after Trump campaign refused to give her a job, and calling her “really dumb” and a “major loser” with “zero credibility.” Jacobus claims that it was Trump who tried to recruit her, and that she
declined. (NB: I refuse to use the term coined in the Courtney Love case for this type of online libel claim. Just put your portmanteau back on top of the wardrobe where it belongs.)

We’ve got a convoluted libel-by-conduct claim in the state courts of Florida, where radio host Russ Rollins is accused of – let’s see if I’ve got this right – setting up his estranged wife to look vicious by duping her process server into serving divorce papers on him while he was on the air. Okay, seriously, what is it with Florida radio personalities? Is a lawsuit a rite of passage for these guys? And does Todd Schnitt even have the $700K?

In the Northern District of Illinois, a private investigator has asserted defamation claims against a group involved in the documentary Murder in the Park, which he alleges falsely portrayed him as having conspired to frame an innocent man in order to secure the release of a death row inmate. In Texas state court, a former halftime dancer for the Kansas City Chiefs sued Texas Monthly over an article entitled “A Deadly Dance,” which allegedly portrayed the dancer as the femme fatale in a noir-esque tale of deceit, adultery, jealousy and murder.

April also brought us two new cases from Texas state court. The normal one involves a drug-compounding business suing the Dallas Morning News over a report of federal fraud investigation. The wacky one involves Whole Foods Market suing a Texas pastor for defamation, claiming that the pastor added a gay slur to a custom cake he purchased in order to fabricate a basis to sue the store for discrimination. This could wind up being a really special one – there’s blurry surveillance video and everything. More likely that the whole mess vanishes like the morning dew, however.

Pending Cases

Blake Shelton will be able to proceed with his defamation and false light case against In Touch Weekly in C.D. Cal. over allegations of alcoholism, with the court denying the defendants’ anti-SLAPP motion. Warren Redlich, a Libertarian Party candidate for NY Governor in 2010, will go to a Manhattan jury with his claims that he was defamed when three people involved with the Republican campaign that year sent leaflets to 150,000 homes accusing him of being a sexual predator. And the defamation case against Bill Cosby in D. Mass. goes on, despite Cosby’s bid for a stay while criminal proceedings move forward against him in Pennsylvania (but to avoid Fifth Amendment issues, Cosby will be relieved from responding to discovery in the Mass. case during the pendency of the criminal action).

In Nevada state court, an online reviewer won her anti-SLAPP motion against a tax preparation service, with the judge calling her allegations of malpractice a non-actionable “evaluative opinion.” In D.N.J., a self-publishing company escaped on a motion to dismiss based on the single publication rule, with a ruling that publication of a soft-cover edition did not restart the limitations clock. And in Massachusetts, a consultant to companies with

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environmental problems is trying to end its defamation case against two activists, but they don’t want to let the plaintiff out of the case without an apology and a fee award.

Alan Dershowitz’s legal woes in Florida have apparently come to an end, with cross-claims for defamation arising out of the Jeffrey Epstein sex trafficking case withdrawn by the parties. The accuser’s lawyers have suggested that there might have been a case of mistaken identity. The mind boggles. We also learned of confidential settlements this month in: a D. Me. case between the CEO of a paper company and an industry newsletter over use of the term “convicted” referring to a civil suit; an Illinois lawsuit between a Chicago dentist and the local ABC affiliate over an investigative report; and a Florida suit between the Miami Herald and former U.S. Senate candidate Jeff Greene over allegations of yacht parties and questionable real estate deals (a parallel case against the Tampa Bay Times continues).

And if you were wondering what “Jackie” would have to say under oath in the Rolling Stone case, you’ll have to keep wondering; while she was ordered to testify, her testimony has been sealed.

Appeals

The Cosby mess also bubbled up to the California appellate courts this month, with Janice Dickinson appealing the dismissal of her claims against Marty Singer. Again, tough remembering which side I’m on here. Another Cosby accuser is appealing the dismissal of her own defamation case to the Third Circuit.

Moving one state over, the Nevada Supreme Court heard argument in a defamation case brought by, quelle surprise, Sheldon Adelson; the Second Circuit had certified to Nevada the question of whether a hyperlink to a report of an official proceeding can support invocation of the fair report privilege.

Meanwhile, the Texas Supreme Court declined to review a ruling awarding fees and expenses to Univision after dismissal of a Dallas attorney’s defamation claim. And Florida’s Second District Court of Appeal issued a per curiam order affirming the dismissal of defamation claims brought by a real estate lawyer against the Sarasota Herald-Tribune over an article about her mortgages.

Privacy

Right of Publicity

Not much to report this month, following last month’s key decision by the Ninth Circuit in Sarver (on which the panel has now denied rehearing) and the Supreme Court’s denial of cert in EA v. Davis.

There’s a new case in N.D. Ill., in which home improvement guru Bob Vila sued a PR specialist who, without permission, allegedly licensed Vila’s name for
others’ use. We also saw a defense win in an S.D.N.Y. case against Huntington Learning Center over the use of actor likenesses in a commercial, after it was demonstrated that the actors had consented to the continuous replay of the ad.

**Disclosure of Private Information**

No surprise, Gawker has filed post-trial motions to undo last month’s $140M verdict in the Hulk Hogan sex tape case. As I discussed last month, Gawker has some good arguments, but it’s anyone’s guess whether this particular judge will be more inclined to listen after seeing what earlier rulings have wrought. Hogan’s lawyers are not resting, either; they’ve sought access to Gawker’s financial information to see if the company’s net worth is really as low as advertised.

On a related note, Erin Andrews has reached a settlement with the operators of the hotel where a peeping tom secretly filmed her, with respect to their portion of the $55 million judgment. A New York hospital settled a claim over its allowance of a TV crew to film two patients without their consent, agreeing to pay $2.2 million.

The MPAA is opposing a bill to criminalize revenge porn in Minnesota, citing First Amendment concerns with the breadth of the bill and its potential impact on “items of legitimate news, commentary, and historical interest.” And after a heated debate, Vermont rejected an amendment to its constitution that would enshrine a right to privacy.

Finally, Consumer Reports became the target of allegations in S.D.N.Y. that it sold its readers’ subscription data in violation of state law. Is that ironic? I can’t tell.

**Access/FOIA**

**New Cases**

Another square in Trump bingo filled this month, as the Washington Post seeks to unseal documents in a class-action against the Orange One over alleged racket Trump University. Media entities showed up on either side of an access battle in N.Y. state court, as the San Antonio Express-News and the New York Daily News sought access to sealed records in cases involving Maxim magazine. In S.D.N.Y., the New York Times filed a pair of cases against the CIA and the Army, claiming that the Times’ FOIA requests for documents concerning chemical weapons in Iraq were improperly denied. In the U.S. Virgin Islands, the Virgin Islands Daily News is suing under the territory’s Open Records Act for documents on public funding of private individuals and businesses.
Terrorism, surveillance and foreign intelligence were the subject of a number of new actions this month, including two journalist-initiated cases in D.D.C.: one attempting to unseal documents in Abu Zubadayah’s habeas corpus case, and another attempting to access Homeland Security’s file about the journalist himself. In N.D. Cal., EFF has sued the DOJ for access to Foreign Intelligence Surveillance Court opinions on decryption. Finally, a group of nonprofits has filed a new suit against the United States over fees for use of PACER.

Pending Cases

Judicial Watch and the State Department have come to terms regarding the scope and conduct of the depositions of three former aides to Hillary Clinton in the ongoing FOIA fight over the former secretary of state’s private e-mail system. The deal specifically identifies the subject matter about which the deponents may be questioned.

A few state supreme court arguments to note:

- Michigan: How to define a “public official” in the context of the state’s open meetings law.
- Ohio: Whether police can withhold files in criminal cases until all chance of appeal is gone.
- Montana: Whether bestselling author Jon Krakauer is entitled to documents about the University of Montana’s decision to vacate the expulsion of Grizzlies QB Jordan Johnson despite the school finding him guilty of rape.

And in the Third Circuit, a panel of judges was skeptical of whether resealing publicly available documents relating to an old case against Bill Cosby would serve any purpose.

Victories

Media coalitions obtained access to sealed documents in several cases this month, including the Gawker-Hogan trial in Florida and the case of a Planned Parenthood shooter in Colorado. The upcoming trial over the health and care of Sumner Redstone in California will be public, according to a ruling by the trial judge. The Commonwealth of Kentucky settled with the Courier-Journal and the Lexington Herald-Leader for approximately $700K in a case over records of child abuse deaths and injuries.

There were a few broad rulings as well: the Florida Supreme Court made clear that open records violations trigger liability for attorneys’ fees; the New Hampshire Supreme Court held that the public has a right to government records in electronic format; and the Texas Court of Appeals held that public officials must disclose their personal e-mail addresses if used for public business.
Defeats

With the spring upon us, I must admit that living in New York I miss the New England tradition of discovering all of the new potholes that were hidden by snow during the winter. (Yes, New Yorkers, your roads are bad too, don’t be jealous.) And indeed in the courts of New England, the road to access was not running smooth this month. The Supreme Court of the State of Rhode Island and Providence Plantations – remember the full name if you’re ever in court there, because the judges have been known to quiz visitors – denied the Providence Journal access to police records relating to a party at the governor’s home that resulted in the hospitalization of a minor. Further west, a superior court judge in Connecticut overturned an administrative decision to release personal documents of the Sandy Hook shooter.

A New Jersey appellate court has held that the state did not have to create an e-mail log that did not exist in response to a records request, even if the information to be contained in such a log was stored electronically in other records. Look, the idea that the government doesn’t have to create a record for you is well established, but the definition of a “record” has been getting murkier ever since the advent of digital databases. This is particularly true with search technology that allows many different views into data irrespective of the formal file structure into which that data is categorized. It is more or less arbitrary to claim that the particular view dictated by the file structure is a record while a view permitted by a search function is not.

A panel of the Ninth Circuit regretfully affirmed a district court’s decision allowing the FDA to withhold information regarding egg-production farms. The court went so far as to issue a “per curiam concurrence” questioning the standard for appellate review of summary judgment grants in FOIA cases, suggesting that the case might have come out differently under a more liberal standard and urging the full court to reconsider. (I’m still trying to figure out why, if the whole panel agreed to the “concurrence,” it wasn’t simply part of the opinion. At least—with all due respect to Mr. Dooley—it wasn’t a unanimous dissent.)

Finally, the D.C. Circuit rejected a bid by the ACLU to gain access to DOJ records about drone strikes.

Legislation

On the federal side, a new House bill would bring National Security Council records under FOIA, overturning a 1996 decision of the D.C. Circuit that the NSC is not a federal “agency” subject to the law. The Congressional Research Office has also released a helpful summary and analysis of FOIA legislation in the 114th Congress.

In the states, Gov. Terry McAuliffe of Virginia signed a bill requiring government agencies to release nonexempt portions of public records containing some exempt content; the bill overturned a decision of the Virginia Supreme Court allowing the withholding of entire
records. A Kansas bill would shut down the ability of public officials to hide their activity by using private e-mail accounts.

Unfortunately, Georgia has passed a bill we mentioned last month, allowing university athletic departments an extended period to respond to public records requests. Let’s keep that campus coverage light and fluffy, folks.

**Newsgathering**

*Courtroom Battles*

A questionable victory for the student press this month in the Ninth Circuit, with a ruling that a student journalist stated a First Amendment claim that he suffered retaliation as a result of his reporting – but with a statement that “asking hostile questions and videotaping” might be punishable as behavior “threatening or endangering health or safety.” Light and fluffy, I said.

The family of murdered journalist Steven Sotloff has filed a federal action against Syria in D.D.C., accusing the country’s government of supporting Islamic State militants. In Missouri, two journalists arrested in the Ferguson protests are fighting the denial of their motions to dismiss the charges against them, filing petitions to terminate the cases.

**Legislative Issues**

Commercial drone use moves ever closer to reality, with the Senate passing the FAA Reauthorization Act with provisions that would open up commercial use of small drones. The bill would also preempt state and local drone regulation (so that, for example, Utahns wouldn’t be able to blow them out of the sky).

**Other**

As I commented in a research study I published a couple of years ago, credentialing is one of the most important and least regulated intersections of press and government. I took this opportunity for a blatant plug because a pair of credentialing issues cropped up this month. The Arizona House denied several media organizations access after the organizations refused to allow House staff to conduct criminal and civil background checks on reporters; after the inevitable backlash, the House dropped the requirement. The Secret Service, meanwhile, has taken on a disturbing new role in controlling press access to the Democratic and Republican National Conventions later this year, which had previously been the domain of the Congressional press galleries.

Finally, we should note the international reporting coup that is the Panama Papers, with 400 journalists in more than 80...
countries working in secret for a year to bring to light stories derived from 2.6 terabytes of data about Panamanian law firm Mossack Fonseca. (That’s about 3,640 full CD-ROMs of material, for those of you who might wonder how many associates the document review would take. And if you just said, “Two, in a basement with a vending machine,” shame on you.) Already the reporting has revealed a vast scheme to hide the assets of some of the world’s most wealthy and powerful people. The consortium behind the reporting has also made clear that it won’t turn over materials to the Manhattan U.S. Attorney in connection with a criminal probe launched as a result of the disclosures, so we’ll watch this one for a reporters’ privilege issue in coming months.

**Prior Restraint**

The Massachusetts Supreme Judicial Court held this month that a “harassment prevention order” sought by a local planning board member against a critic was blatantly unconstitutional, and could support a malicious prosecution claim against the politician. In Wisconsin, a trial court judge denied a gag order requested by the state in a securities fraud case. On the other hand, a federal judge in N.D. Cal. who held that National Security Letter gag orders are unconstitutional has now changed her mind, citing changes in the law.

And the saga of the Planned Parenthood hidden-camera sting rolls on, with agents from the California state AG’s office seizing video files from the apartment of the Center for Medical Progress activist who shot the video. Sure, that will help matters.

**Broadcast/Cable/Satellite**

So, the big news of the month is that the FCC and DOJ have approved Charter Communications’ acquisition of Time Warner Cable and Bright House Networks, but not without conditions – including a prohibition against data caps on internet plans. The DOJ has filed a pro forma complaint against the various entities in D.D.C., along with a proposed final judgment that would back up the DOJ’s conditions with enforcement authority in court. I look forward to the new branding on my cable bill.

The FCC’s spectrum auction launched, with the agency already deeming it a success based on broadcaster participation and the spectrum available. The FCC was also involved in a couple of Comcast broadcast discrimination fights, receiving a complaint that Comcast is bolstering its Spanish-language subsidiaries at the expense of Estrella TV, and being sued itself in the D.C. Circuit over its dismissal of discrimination charges brought against Comcast by the Tennis Channel.

Finally, the FCC’s plan to facilitate set-top box coalition continues to draw comments and criticism, including support from the White House, a wide variety of industry commentary, and
a request by the FTC that any FCC rules do not interfere with the other agency’s ability to regulate privacy.

**Internet/New Media**

*Net Neutrality/FCC*

Inspired by the classic FDA nutritional information labels, the FCC has introduced broadband “nutrition” labels in order to promote better understanding of ISP services. ISPs that use the labels will qualify for a safe harbor for compliance with the Open Internet Order’s transparency requirements.

At the end of the month, the FCC proposed new rules for “business data services” to put cable companies on the same footing as telcos when it comes to pricing bandwidth for data networks. Meanwhile, the House has passed a measure (H.R. 2666) that would gut the FCC’s ability to pursue ISPs for unfair pricing. The White House has promised to veto the bill.

**Section 230**

A win cloaked in a loss for Google this month, as the Fifth Circuit held that the search giant’s efforts to shut down Mississippi AG Jim Hood’s investigation of the company were premature. At the time that Google filed suit, the court held, Hood had made nothing more than vague threats and issued a non-self-enforcing subpoena. But the court also made clear that Google could properly file a new federal action if Hood were to take things further, and heavily hinted that any further enforcement efforts would be inconsistent with Section 230 and other federal laws. Google has moved for reconsideration, while Hood has withdrawn the original subpoena.

Google also had a straight-up 230 win in California’s appellate courts, in a case involving a takedown demand directed at search listings for an allegedly defamatory Ripoff Report post. It didn’t help that the plaintiff waited six years to sue.

Online commercial arrangements seem to be a soft spot for Section 230 protection lately. Last year, we had the FTC v. LeanSpa decision, which was vague at best as to exactly what the intermediary did besides pass communications back and forth. Now, we have Congoo v. Revcontent from the District of New Jersey, which held that claims against a native advertising broker survived a motion to dismiss based on vague allegations of responsibility for content without any specific allegations as to the content the broker allegedly created. As I’ve commented before, with the quantum leaps in the complexity of online business relationships since the early days of Section 230, there is an increasing danger that courts will throw up their hands and assume some degree of responsibility for content.

**Fantasy Sports**

Fantasy sports continues to take up a surprising amount of legislative effort. The Commerce,
Manufacturing, and Trade subcommittee of the U.S. House has scheduled a hearing on the legality of the games for next month. In the states, the AGs of Alabama and Tennessee have come out against fantasy sports, though the Tennessee legislature overrode its AG’s opinion, passing a measure to legalize and regulate games.

Hate, Threats & Terror

Less about terror this month than run-of-the-mill misery, with the Guardian conducting an in-depth study of nastiness in its website comments and Reddit strengthening the tools it offers to avoid other users – including not only those users’ comments but entire threads that they created. By the way, if you decide to harass someone online, don’t count on your homeowner’s insurance for defense costs; a federal judge in W.D. Wash. held that a State Farm exclusion for intentional conduct let the insurer off the hook in a cyberharassment case.

Oh, and remember those halcyon days when Sarah Palin was the weirdest thing about the Republican ticket? Well, she’s back, threatening a lawsuit against rapper Azealia Banks over tweets advocating that Palin be sexually assaulted; apparently, Banks took seriously a parody article attributing insensitive comments about slavery to Palin. I tend to agree with Jack Greiner that this one isn’t going anywhere.

Miscellaneous

- The Kentucky Supreme Court heard argument this month on whether anonymous critics using the website Topix can be unmasked in a suit for libel by a local politician.
- A judge in W.D. Wash. held that Amazon can be held liable for failing to get parental consent for in-app purchases by kids, in a lawsuit brought by the FTC. The opinion was redacted, but a technical glitch revealed the redacted portions.
- BET has settled a case pending before the 11th Circuit over the ownership of Facebook likes on a fan page, on undisclosed terms.
- California jurors who misuse the internet to research or discuss trials on which they are sitting could be fined up to $1,500 if a new state bill passes.
- AMC Entertainment is facing an Americans with Disabilities Act class action in S.D.N.Y. alleging that the ticket-purchasing function of its website is inaccessible to blind people.

Streisand Awards

We won’t do this every month (I hope), but we have two Streisand Award winners in April: UC Davis, for dumping $175,000 into reputation management companies who promised (incorrectly) they
could suppress bad online press about a November 2011 incident where students were pepper-sprayed; and Florida Senate candidate David Jolly, who attempted to delete references to the Church of Scientology from his own Wikipedia entry. Well done, both of you.

Internet Privacy

Hacking/CFAA

Intrigue under the California sun in the case of journalist Matthew Keys, sentenced to 24 months in prison for facilitating the defacement of the L.A. Times website. Less than two hours before the sentencing hearing, a detailed but anonymous letter was delivered to the press taking responsibility for the hack and claiming that Keys was innocent. The parties and the court had received the letter earlier, but—with no way to verify its claims and no time left to investigate—had disregarded it. Will the mystery confessor come forward, and provide a basis for habeas relief? Will some other hacker dox the sender? Stay tuned.

A new bill in Rhode Island would create a state-level CFAA. The bill has drawn criticism for penalizing access to information designated as confidential even if it is not protected from access in any way.

Sony will pay out about $15 million to settle the class action over disclosure of personal information in connection with the massive hack at the end of 2014. But if you want cash out of the Ashley Madison class action in connection with that notorious hack, don’t expect to be able to collect secretly—a judge in E.D. Mo. has disallowed pseudonymous claims in the case.

Control of Personal Information

With all due respect to Yakov Smirnoff, on the internet, TV watches you. The FTC is looking into smart TVs, the use of viewing habit data by the ad industry, and transparency to consumers. Meanwhile, Senator Al Franken is conducting a similar inquiry into the Oculus Rift virtual reality device, which offers opportunities to collect whole new categories of data about its users’ digital activity. Think about it.

Finally, the First Circuit dropped a bombshell opinion applying the Video Privacy Protection Act to mobile apps, holding that Gannett potentially violated the VPPA with its USA Today app. The app was alleged to disclose the titles of watched videos to Adobe along with a device identifier and GPS coordinates; moreover, the court held that the plaintiff was a “subscriber” under the app even though he never paid any subscription fees or incurred any continuing obligations.

Encryption & Other Security Measures

The highly-publicized Apple cases are coming to a close, with the final dismissal of the San Bernardino case, a voluntary disclosure of a passcode short-circuiting the E.D.N.Y. case, and
strong encryption meaning that Apple lacks the ability to access data on a phone at the center of a D. Mass. case. The government doesn’t seem to have found very much on the California phone, and isn’t telling Apple how the hack was done (though admitting that it cost $1.3 million); Apple doesn’t seem concerned, especially since the FBI has admitted that the California hack doesn’t work on newer phones.

It might seem like a colossal waste of time and effort with no clear resolution, but the issues are important and won’t go away. As expected, WhatsApp has switched on end-to-end encryption on its service. On the other side of the equation, the FBI has promised to share its 1337 hax0r skillz with local law enforcement. A widely-reviled Senate bill would criminalize device manufacturers’ use of encryption that they cannot break themselves; the White House isn’t backing it, and Sen. Ron Wyden is threatening a filibuster. A similar California bill was introduced and quickly defeated.

We’ll delve into all of this next month at Legal Frontiers in Digital Media, so register already!

**Internet Surveillance**

Wait, is that motion on Stored Communications Act reform that I see? Why yes! The House unanimously approved the Email Privacy Act, which would require a warrant to obtain older e-mails from tech companies. It’s still got to make it past the Senate, of course, but it’s a good start. Microsoft has also filed a new suit in W.D. Wash. challenging the DOJ’s use of gag orders banning the company from letting people know that the government has obtained a warrant for their e-mails.

**Transatlantic Privacy**

The WP29 has finally issued its verdict on the new EU-US Privacy Shield: “not acceptable.” While praising the new pact as a “great step forward” from the old Safe Harbour, the group said that exceptions permitting mass surveillance of EU citizens are still triggering privacy issues.

**Intellectual Property**

I owe you some answers, though no one guessed correctly: “uncopyrightable” is the longest English word with no repeating letters; “facetiously” contains all five vowels plus y in alphabetical order; and “strengths” has the highest consonant-to-vowel ratio of any standard English word (i.e., excluding irregular onomatopoetic terms like “tsktskings” and the trivial case of individual letters being considered the “word” for that letter). Actually, no one guessed
at all, meaning that I either need to make my quizzes simpler or that you aren’t into linguistic puzzles.

Or, of course, that no one is reading these articles, but that would send me into an ontological spiral (if no one reads an article, is anyone writing them?), so I’ll just keep going.

Copyright – New Cases

I have to start with this case from C.D. Cal.: the Ultimate Armwrestling League is suing the World Armwrestling League, saying that the WAL televised a photo of a former UAL star flexing his biceps without permission. So, first – there’s such a thing as an armwrestling league? Second – there’s more than one? Third – there’s such a thing as an armwrestling star? I thought these were things that Sylvester Stallone just made up for Over the Top, a movie whose domestic gross makes me feel better about the size of my own audience.

Not to be outdone, normal (I use that term advisedly) wrestlers have charged into the ring with a would-be class action against the WWE in D. Conn., claiming that the performance artists have been deprived of their fair share of streaming revenues from Netflix and the company’s over-the-top network. Which has nothing to do with Sylvester Stallone.

We’ve also got: Oxygen Media hit with a lawsuit in N.D. Fla. by a woman who claims “Preachers of L.A.” ripped off her idea; Kendrick Lamar sued in C.D. Cal. by Bill Withers’ publisher, who claims Lamar’s “I Do This” infringes “Don’t You Want to Stay”; a photographer suing Robert Mapplethorpe’s foundation and a group of art galleries in S.D.N.Y., alleging that his photos of the artist have been falsely sold as self-portraits; and the legal team behind the “Happy Birthday” case intent on bringing “We Shall Overcome” into the public domain.

In C.D. Cal., there’s a new suit between GDC Technology and Dolby Labs over the interoperability codes that allow different elements of digital theater systems to work together. And in E.D.N.Y., Dish Network has sued a Hong Kong-based streaming service alleged to be transmitting unlicensed content into the U.S. from China.

Copyright – Pending Cases

Led Zeppelin is going to trial in C.D. Cal. over claims that it stole the opening chords of Spirit’s “Taurus” for “Stairway to Heaven”; the defendants’ summary judgment motion went over like a...well, you know...with the court holding that substantial similarities were enough to go to a jury. The potential jurors will face questioning on their knowledge of classic rock, music downloading, and more. The jurors won’t hear about Led Zeppelin’s drug use, wealth or history of plagiarism, and the
judge has strictly limited the sound recordings and expert testimony that the plaintiff can present at trial.

Google and Oracle have agreed not to conduct internet research on their jurors at the second API copyright trial in the Northern District of California. Judge Alsup is continuing to drop orders to keep the trial from getting out of hand, including limiting the use of photos to remind the jury of who the witnesses are. Apparently in some past trial the judge sat on, a lawyer photoshopped a picture of one of the opposing side’s witnesses to make her look like “the Wicked Witch of the West.” It’s starting to feel like Alsup is driving a car with two kids in the back, and is preemptively threatening to climb back there if they don’t behave.

Turning to defense wins in the district court, what do “a winged, taxidermied horse that appears to be in the process of breaking through the roof of a sleek lowrider” and “a massive, pink stuffed animal—specifically, a hybrid of a unicorn and Pegasus—strapped to the roof of a Toyota RAV4” have in common? Apparently ideas but not expression, according to a judge in S.D.N.Y. who rejected a claim by creator of the former against the ad company behind the latter. By the way, the correct term for a unicorn/pegasus hybrid is apparently “alicorn,” as I learned while researching the My Little Pony font copyright case in February. There goes another neuron.

In N.D. Tex., a website operator defeated a secondary infringement claim brought by celebrity photo licensing service BWP Media; while the site fumbled its DMCA protection by failing to register a copyright agent, the claim failed on its merits due to a lack of evidence that the site profited from the alleged infringement. In the wake of the Google Books cases, Cambridge University Press hit a wall with its claims against Georgia State University in N.D. Ga., with the court finding that the vast majority of the university’s “e-reserve” system fell within the bounds of fair use. Everyone’s favorite humanitarian Martin Shkreli was dropped from a lawsuit over the cover art on a unique Wu-Tang Clan album that he owns, which—schadenfreude aside—was probably the right result. And plaintiffs in music cases had a couple of defeats, with a judge in S.D. Fla. finding that rapper Rick Ross didn’t have a registered copyright for “Hustlin’,” and Marvin Gaye’s family left on the hook for their attorneys’ fees by C.D. Cal. in the “Blurred Lines” case (Gaye’s family is appealing the ruling).

Universal Music and Capitol Records are headed to a jury in C.D. Cal. with a lawsuit against worldwide providers of in-flight entertainment over airline in-flight music. The plaintiffs obtained a partial summary judgment ruling against the defendants, holding that they never licensed the plaintiffs’ music.

Finally, in the Axanar Productions lawsuit, a language society has grabbed its bat’leths and waded into the fray with an amicus brief arguing that the Klingon language is not protected by copyright.
Copyright – Appeals

There was a major DMCA win in the Tenth Circuit for online publishers this month. Examiner.com relies on independent contractors for the content on its “dynamic entertainment, news and lifestyle network”; BWP Media (the same photo licensing service mentioned above) sued the operators of the site for infringement. The court held that the site could claim DMCA protection for material posted by its freelancers; but more strikingly, the court held that even if the freelancers were considered employees, such a finding would not automatically disqualify the site from the DMCA safe harbor. The court further found that the site lacked actual or circumstantial knowledge of infringement. Notably, the court did not consider whether the knowledge of the freelancers could be imputed to the website on agency principles, because that argument had not been presented below.

In the Second Circuit, all eyes are on digital music. In one of the many “Flo & Eddie” cases, the court certified the question of whether New York law grants performance rights in pre-1972 sound recordings to the New York Court of Appeals. Meanwhile, the application of the “first sale” doctrine to digital media is on its way to the Second Circuit in a battle between used digital music market ReDigi and Capitol Records.

In the Ninth Circuit, FilmOn picked up some support from the Consumer Federation of America, which submitted an amicus brief arguing that granting the Aereo knockoff a compulsory license would create much-needed competition in the paid television space. The court also heard argument in a case involving Madonna’s “Vogue,” where the plaintiff sought reinstatement of its claim that sampling a single horn chord could be infringing. And finally, the Ninth Circuit held that the Clint Eastwood baseball flick Trouble with the Curve didn’t infringe the plaintiff’s script, citing numerous differences between the two. (I contemplated a baseball pun there, but...no.)

Copyright – Other

The period for submitting comments to the Copyright Office in connection with its wide-ranging Section 512 Study came to a close this month, and more than 90,000 submissions were received. Some daring folks have dug in to find some of the more interesting responses.

Recently I reported on a scam by a reputation management company that was filing bogus defamation cases to secure content removal orders in default judgments. This month has revealed another approach: creation of fake news articles incorporating the content to be removed, which are used as the basis for bogus DMCA notices.

Unlike Judge Garland, Dr. Carla Hayden – the President’s nominee to become the new Librarian of Congress – did get her Senate hearing this month. Everything appears on track there, for what most folks seem to agree is a needed change.
Patent

A blow for those seeking to shut down E.D. Tex. as a favorite for forum shoppers; the Federal Circuit held that if you ship into a federal district, venue is proper there. I can just see the Eastern District reverting to the stone age as manufacturers halt all technology at the border.

Apple settled a dispute in N.D.N.Y. with a patent troll over its “Siri” voice system for $25 million. The Federal Circuit granted a pair of defense wins to Google in two cases, one involving a patent for a desktop notification system, and the other a patent for geographic searching. And in that weird case about a Spider-Man toy patent, Marvel Entertainment was denied its attorneys’ fees connected to an earlier win on patent royalties.

Commercial Speech

Trademark

A new trademark suit from Beyoncé this month, whose name is so well known that Microsoft Word corrected me when I inadvertently left off the accent over the last “e.” She’s suing an online company selling clothes and other products under the “Feyoncé” label, using the tag line “He put a ring on it.” See, it’s kind of a play on words, with “Feyoncé” clearly echoing the singer’s name while also sounding like “fiancée,” while riffing on Queen Bey’s “Put a ring on it” lyric, and...yeah. Anyway, she is not amused.

Booking.com has filed a lawsuit in E.D. Va. to compel the USPTO to register the site’s name as a trademark; the TTAB found that the name was descriptive and lacked secondary meaning. Atari, meanwhile, is trying to persuade the TTAB that it alone has the right to use the term “Haunted House” in connection with interactive entertainment. I guess when your company is a ghost of its former self, it’s only (super)natural to try to scare off folks who want to move into your patch.

The Eleventh Circuit affirmed an injunction in favor of the company holding the IP rights for the Commodores, barring the former lead guitarist from using the band name. The Western District of Kentucky tossed out a trademark claim by horse racetracks against a maker of electronic games that referenced the historical results of real races, holding that identification of the tracks at which the races occurred was a fair use. And finally, billboard company Outfront Media (f/k/a CBS Outdoor) settled an infringement claim by LGBT publication OutFront in the District of Colorado.

Restricted Subject Matter

Speaking of Colorado, the state is cracking down on medical marijuana ads with a bill that would prohibit advertising that is likely to reach minors. San Francisco, meanwhile, is
embroiled in a battle in N.D. Cal. over an ordinance requiring sugary drinks to carry warning labels.

**False Advertising**

Kanye West has been accused of falsely inducing consumers to subscribe to Tidal with promises of an album completely exclusive to that platform; the singer, whose foot has more than a passing acquaintance with his mouth, was hit with a class action in N.D. Cal when the “exclusive” showed up elsewhere.

The Fifth Circuit has whacked the plaintiff in a deceptive advertising suit against Dish Network with $64K in damages and fees over “frivolous” claims that Dish failed to tell customers that its ad-skipping service had limitations.

**Professional Speech**

Also in the Fifth Circuit, a lawyer who had his federal bar admission suspended after he criticized the prosecution of his friend (another lawyer, who shot himself during trial) had the suspension revoked. The Fifth Circuit held that the rule under which the lawyer was disciplined violated the First Amendment. Meanwhile, the Georgia Supreme Court heard argument on whether a law firm’s free speech rights were violated by a judge’s ban on an ad targeting victims of nursing home abuse.

**Miscellaneous**

**Academia**

North Carolina is in the news for other civil rights scandals lately, but let’s not miss a new measure urged by the Lieutenant Governor that would punish those who heckle speakers on college campuses in the state. The idea of preventing protesters from actually shutting down someone else’s speech has some appeal, sure, but is this the right approach? How do you identify the particular protesters who tip the scale from protected speech into unlawful interference?

The Arizona Senate has passed a bill to grant attorneys’ fees to successful plaintiffs in First Amendment claims against universities and community colleges. The house added an amendment that would enhance criminal penalties for blocking traffic with the purpose of interfering with access to a political campaign event. The added measure was inspired by protesters who blocked access to a Trump rally.

Speaking of Donald, the provost of Eleanor Roosevelt College at UC-San Diego apparently forgot about the First Amendment when he threatened “the fullest sanctions” against those who chalked pro-Trump/anti-immigration slogans on the university’s sidewalks. Really, there’s no
need for that. Chalking might be particularly persistent in San Diego – it’s one of the driest cities in the U.S. – but the soles of student shoes will eventually take care of the problem.

**Government Licensing & Public Fora**

It’s not only college campuses in California that are threatening viewpoint discrimination inspired by Trump loathing. The mayor of West Hollywood stated that the city wouldn’t issue special event permits for a Trump rally – though as it turns out, the mayoralty is a rotating position that doesn’t carry the authority to make such things happen.

Turning to more seemly subject matter, the Seventh Circuit issued an opinion in a case between a pair of strip clubs and the City of Milwaukee over licensing ordinances. The city repealed the ordinances in the face of a First Amendment challenge, and then tried to escape the case; the court held that the repeal didn’t moot the clubs’ claims for damages.

In contrast, the Northern District of Texas upheld the city of Dallas’ decision not to allow the Exxxotica 2016 sex expo to return to a convention center in the city. The court accepted the city’s argument that the denial of access was based on breaches of contract and local ordinances in past years, but the city’s decision has been criticized as a pretext for its dislike of the expo’s subject matter.

**The True Miscellany**

The Massachusetts Supreme Judicial Court heard argument this month in Commonwealth v. Carter, in which it will consider whether text messages that encouraged a teen to commit suicide (and which are alleged to have been successful) can be constitutionally punished.

Ordinarily “The True Miscellany” is the last section, but I don’t want to leave you on a downer.

**Hollywood Hijinx**

We’ve got three Hollywood idea theft cases in the news this month. In C.D. Cal., Legendary Pictures and Warner Bros. have been accused of stealing the ideas for the forthcoming Kong: Skull Island from a television pitch, in breach of contract and interference claims. In M.D. Fla., similar claims were lodged against Warner Bros. in connection with the upcoming film War Dogs.

Meanwhile, in a move that could impact the Kong case, the California Court of Appeal ordered publication of its decision last month in favor of James Cameron on claims that he and his production company stole the plaintiff’s ideas to use in Avatar. Critically, the court used a copyright-like “substantial similarity” test in determining that the defendants had developed
many creative elements of the film before being exposed to the plaintiff’s work and that any similarities were at an abstract rather than detailed level. (A hat-tip to David Aronoff for flagging the importance of this move for us.)

* * *

Well, that’s that. I will be taking next month off from the Monthly Daily in order to focus on our Legal Frontiers in Digital Media conference (did I mention that you should register right now?). But don’t worry – I’ll be returning with a combined May/June edition to help you transition into the summer.

As always, comments are welcome at jhermes [at] medialaw.org, and look for me at the conference in Mountain View on May 19-20 if you’d like to say hello in person. And if you happen to send more newspapers back from the future, please send the financial section as well.

Jeff Hermes is a deputy director at the Media Law Resource Center.

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