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

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

You can feel things ramping up here at the MLRC as we get ready for the fall events season. We’ve got Virginia next month, of course; there’s a little surprise in Northern California we’re cooking up for October (save the afternoon of October 14th if you can get to San Francisco!); then comes the Forum and Annual Dinner in November; and we’re already shifting into higher gear for Entertainment in January and Digital next May. As you return to your offices after a well-earned summer break (please tell me some of you took vacations), this is a great time to think about what the MLRC has to offer and how you can get involved.

As for me, this is a great time to write quickly, because there’s a lot going on in the world of media law, my deadline is coming up fast, and there’s plenty of other work to do...

Supreme Court

I don’t know why, but I’ve got an uneasy feeling that the Court might decide to take *Armstrong v. Thompson*. The case involves a criminal investigator with the U.S. Treasury who was treated as a public official in a defamation claim in the local courts of the District of Columbia; the petition for cert asks the Supreme Court to decide whether all “garden-variety law enforcement officers are ‘public officials.’”

I have fewer qualms about the reversal of Jesse Ventura’s defamation win by the Eighth Circuit making its way to the Supreme Court. Something tells me the Justices won’t care to delve into the evidentiary issues.

We’ve also seen an attempt by EFF to get the Court to take *Lenz v. Universal Music* (yes, the dancing baby case), asking that the justices find some teeth in Section 512(f) of the DMCA. My instinct is that the Court would want the case to run its course below—the petition is from a Ninth Circuit opinion upholding a denial of summary judgment—but the critical issue in the case could be lost if Lenz were to win at trial.

Google wants to take a dispute over which party gets the benefit of ambiguity in the meaning of a patent up to the Supreme Court. Less surprise if the Court takes this one, given their apparent willingness to review the Federal Circuit at the drop of a hat.

Finally, Justice Kennedy declined to stay a district court order that allowed enforcement of a Montana attorney disciplinary rule against false statements by and about judicial candidates.
Reporters’ Privilege

A rough month for the reporters’ privilege, I’m afraid. A New York supreme court judge has held that a New York Times reporter will be required to testify about an interview she conducted with the defendant in the “Baby Hope” trial. In D. Mass., Glenn Beck has been ordered to disclose the identity of two sources in a defamation lawsuit over his coverage of the Boston Marathon bombing. And in D.D.C., controversial website Backpage.com has been ordered to turn over documents on its review process for adult advertising in response to a subpoena from a Senate subcommittee.

Expect all three of these cases to face further review. Beck has refused to comply with the order, leading to a demand that judgment be entered against him. The D.C. Circuit has already granted a stay to allow briefing in the Backpage case, with Backpage asserting that the subpoena intrudes on its editorial judgment.

Meanwhile, efforts are underway in W.D.N.C. to find the identity of a source who leaked a deposition transcript in an environmental case to an AP reporter. And in C.D. Cal., the Justice Department has opposed filmmaker Mark Boal’s effort to keep the fight over access to outtakes from his interview with Bowe Bergdahl out of military court; a large coalition of media outlets jumped in with an amicus brief in support of Boal.

One spot of light: the Arizona Court of Appeals quashed a defense subpoena to an Arizona Republic author who interviewed the surviving victim in a murder/attempted murder case.

Defamation

There’s been plenty written about the Republican nominee’s statement that “It is not ‘freedom of the press’ when newspapers and others are allowed to say and write whatever they want even if it is completely false!” Articles have quite correctly pointed to my all-time favorite Supreme Court case, U.S. v. Alvarez. But I’d just like to point out the internal inconsistency – if you’re talking about the media being “allowed” to do something, then by definition you’re talking about a liberty granted to the press. It would have made more sense had he deleted the phrase “are allowed to.”

Pedantic? Totally. But this is a man who wants final say over enactment of federal legislation, and he can’t even compose a logical tweet. (And if you’re still wondering why Alvarez is my favorite, come find me in Virginia and I’ll explain.)

New cases

No comment from me though on Melania Trump’s new case in Maryland circuit court over stories describing her as having been “escort” in the 1990’s – other than that I trust Sullivan’s sorting algorithm will do its work.
Add another case to the list of defamation claims where plaintiffs sue a defendant for calling them liars when the defendant denies the plaintiffs’ own public accusations. This time, it’s **parents of two Americans killed in Benghazi suing Hillary Clinton** in D.C., claiming that she defamed them when she denied telling them that the Benghazi riots were triggered by the *Innocence of Muslims* video. As with others of the genre, the case **seems to be nonsense**.

An Atlanta prosecutor sued Fox 5 News in Georgia superior court after a report on his **2015 speeding arrest**. Meanwhile, two **former prosecutors are suing the Philadelphia Daily News** over its coverage of Pennsylvania’s “Porngate” woes in the Court of Common Pleas; the pair already struck out once in federal court. And speaking of porn-related suits, a former adult film star has sued Facebook in S.D. Tex. for helping to spread **a rumor that she used to be male**. Expect the follow-up to this story to be covered under Section 230 in a month or two.

Reality TV has made its way to California Superior Court, with **Ozzy Osbourne’s mistress suing his daughter** over accusations that she abused the aging Godfather of Metal. Popcorn is available in the lobby. But don’t start throwing it – a radio show was sued in Michigan state court this month for allegedly accusing a Detroit minister of **tossing a pot of grits on singer Al Green** back in the ’70s. The minister says another woman was the hot grit-thrower.

That weird Section 230 case in S.D.N.Y. that I mentioned last month involving **super-users on Bleeping Computer’s online forum** has taken another twist, as the forum operators who failed to escape liability have **counterclaimed for defamation** against the plaintiff. Great, cross-defamation claims, I love those. Across the river in E.D.N.Y., a **judge in Brooklyn** is suing the Brooklyn Democratic Party Judicial Screening Committee for $5 million after it declared her unqualified; the *New York Post* picked up the story and ran a scathing article, but is not named in the suit.

And, surprise, we have local businesses upset about reviews and media reports. A twofer from Houston this month: A **law firm is suing a student** over a Facebook review, and a **lounge/cigar bar** is suing the *Houston Chronicle* and KHOU-TV over a report of a shooting involving the bar’s owner. The former case in particular might be short-lived, as an anti-SLAPP motion has already been filed by pro bono counsel.

**Defense Losses**

Speaking of online review cases, something’s rotten in Maryland, my friends. A Georgia dentist has been caught up in apparent **scheme to defraud the courts** of the Old Line State by filing a defamation action against a non-existent defendant, culminating in a forged stipulation to a consent order that was used to obtain the removal of negative reviews. The dentist **claims he had no idea what was happening**, and there are meaningful glances being cast toward the SEO firm that he hired to clean up his search results. Ms. Streisand, that’s your cue.
The Oklahoma Court of Civil Appeals has affirmed a ruling that the state’s anti-SLAPP law
does not apply retroactively, leaving sponsors of a failed grand jury petition stuck defending a
bogus libel suit filed by a former DA. And it looks like a suit brought by a former associate
dean at U.-Va. against Rolling Stone over the “A Rape on Campus” article will proceed to a jury, with a judge in W.D. Va. suggesting that he will deny at least part of the magazine’s motion for summary judgment.

In E.D. Mo., a federal judge has sanctioned an advocacy group sued for accusing a St. Louis
priest of sexual abuse, directing the jury that the facts alleged by the plaintiff will be deemed established for the purposes of the case. The group had failed to comply with a court order to turn over information about the individuals behind the accusations.

Defense Wins

The California Supreme Court significantly boosted the protection offered by the state’s anti
-SLAPP law this month, holding that it can apply in cases involving mixed causes of action. That’s a spot of clarity on an issue with which I know a lot of us have struggled. Also in California, the Court of Appeal affirmed an anti-SLAPP win in TMZ’s favor in a case involving alleged incriminating photos on the phone of Sara Evans’ ex-husband.

As mentioned up above, Jesse Ventura is thinking about a Supreme Court run after his defamation win was flipped at the 8th Circuit. The Court of Appeals also rejected Ventura’s petitions for rehearing.

A defamation lawsuit in Texas state court over a one-star Yelp review left by a dissatisfied customer of a pet-sitting service drew a lot of attention recently; it has now been dismissed on the defendants’ anti-SLAPP motion. Notably, the court also rejected a breach of contract claim based on the service’s non-disparagement clause, although the basis for that ruling was not clear.

A long-running battle between a billionaire and a fashion icon was kicked out of New York state court this month, with a ruling that the claims more properly belonged in the Bahamas where the two were neighbors.

An Olympic swimmer’s defamation claim against website “Swimming World” over speculation about doping was dismissed in D. Ariz., with the court finding the challenged statements protected as opinion. An Arkansas state judge kicked out a doctor’s lawsuit against the Democrat-Gazette, though he took a swipe at the paper’s ethics in passing. And the website “Quackwatch” also escaped liability in S.D.N.Y. after it labeled two leaders in the “anti-aging” movement as, you guessed it, quacks.

Miscellaneous

The Seventh Circuit will see an Illinois attorney’s defamation case against Gawker proceed, after the company agreed to let the case move forward in the face of the automatic bankruptcy

(Continued on page 35)
stay. Meanwhile, it looks as if Gawker is close to settling with Mail Online in a rare media-on-media defamation case against the bankrupt company.

The “pink slime” defamation suit in South Dakota circuit court has been trimmed back a bit, with the plaintiffs dropping ABC News, reporter David Kerley, and a few others from the suit; the ABC network and other network personnel remain in the case.

And how’s this for ridiculous: the Sheriff of Terrebone Parish in Louisiana raided a police officer’s home to search for evidence that the officer was an anonymous blogger who accused the Sheriff of corruption. Some hack parish judge granted this thug a search warrant in connection with charges of, you guessed it, criminal defamation. Besides having his digital life explored by gun-toting hooligans, the officer was suspended for “conduct unbecoming”; thankfully, he was later reinstated and an appellate court ruled the warrant flatly unconstitutional in light of blisteringly clear appellate precedent.

Privacy

So, Gawker.com is done, the rest of Gawker is now part of Univision, Nick Denton has filed for bankruptcy, Peter Thiel continues to believe (wrongly) he’s helping journalism, and most people (present company excluded) don’t seem to care. Despite rumblings of settlement talks, I’m still hoping for an appeals court victory—even if a Pyrrhic one—for Gawker at the end of this mess.

Rights of Publicity

Chuck Yeager sued Clear Channel Outdoor in county court in Texas, alleging that the use of his name and a reference to his Mach 1-breaking flight on billboards in Texas airports violated his rights of publicity. This one seems like it should be pretty close to the fair use line (wherever that is in ROP cases).

The Sixth Circuit rejected student athletes’ right of publicity claims against ESPN over sports broadcasts, holding that the Tennessee statute specifically excluded such broadcasts from the right and that the state had never recognized common law protections. Pop icon Darlene Love gave up on a right of publicity claim in the Northern District of California over the use of her performance of “Christmas (Baby Please Come Home)” by HGTV. (It’s rare to see a Zacchini-style performance-based ROP claim these days, isn’t it?) In the same court, an attorney dropped his misappropriation claim against legal marketplace Avvo.

Disclosure of Private Information

The federal Intimate Privacy Protection Act is working its way forward, with some interesting by-play as Peter Thiel attempted to co-opt the bill for his own narrative. Rep. Jackie
Speier wasn’t thrilled with that, but others pointed out that the bill might well have applied to the Hogan article.

A petition for review by the Vermont Supreme Court is now pending from a superior court ruling that scuttled the state’s revenge porn law on First Amendment grounds.

In W.D. Mich., Rolling Stone is facing a lawsuit over its alleged sale of subscriber information to third parties, which plaintiffs claim violates Michigan’s Video Rental Privacy Act (which is not limited to videos). In N.D. Cal., a bride has sued her videographer after her groom’s embarrassing behavior at the wedding, and her reaction, became the subject of a viral video.

And in California, a pending bill passed the state Senate that would give actors a right to prevent employment websites from disclosing their ages. I sympathize with the actors, but when you start passing laws that enshrine a societal dysfunction, you’re going down a dark path.

Access/FOIA

New Cases

The University of Kentucky must be trying for some kind of record. Last month I mentioned a lawsuit filed against a former student to block the release of records related to the school’s Medical Services Foundation. This month, we have two more suits, one against the school’s student paper to prevent the release of documents related to a professor who resigned after sexual harassment allegations, and one against the Lexington Herald-Leader, which had obtained a ruling from the state AG that the school violated the Ky. Open Meetings Act.

Turning to efforts to gain access, we have a handful of new cases driven by the election cycle, including: a suit in D.D.C. by the Republican National Committee looking for Bill Clinton’s post-presidency schedules; a motion by Gannett and the New York Times to unseal Donald Trump’s divorce records in New York; and a motion by a media coalition to unseal video of a deposition that Trump provided in a business dispute in D.C. superior court.

In addition: The First Amendment Coalition sued the government of Los Angeles over missing (and possibly destroyed) records relating to a former councilman; a new suit was filed by Judicial Watch in D.D.C. for documents relating to the State Department’s editing of video of a 2013 press briefing regarding nuclear talks with Iran; and a reporter in Wisconsin has sued a state representative for access to searchable electronic versions of correspondence regarding water issues.

Access Granted

Some bad news for celebrities this month. Bill Cosby’s attempt at closing the barn door post-equine exodus failed before the Third Circuit, with the Court of Appeals holding that the contents of court documents that Cosby wished to “reseal” were already widely known.
Meanwhile, Randy Travis’s bid to keep a police video of his DWI arrest under wraps ran aground in Texas’ appellate courts, with a ruling that Travis’s privacy was adequately protected by redactions to obscure his nudity at the time.

The Clinton email scandal continues to generate rulings, with a judge in S.D. Fla. giving the State Department until September 13th to produce relevant materials from the Benghazi era for public inspection. Meanwhile, a judge in D.D.C. has directed Clinton to answer written questions about her private email server in another FOIA dispute by mid-September.

The New Hampshire Supreme Court held that the annulment of a defendant’s case does not exempt police and prosecution documents from the state’s public records law. The District of Massachusetts held that the FBI had to release documents relating to Massachusetts’ Joint Terrorism Task Forces. An Illinois circuit judge ordered the Naperville police to release dashcam video from an officer accused of trying to run over a man. A Florida circuit court held that the UCF student newspaper was entitled to student government association files.

Some helpful decisions outside of the courts as well. The New York Committee on Open Government opined that NYC Mayor Bill de Blasio cannot hide his communications with non-governmental political consultants as if they were government employees. Illinois’ Attorney General ruled that emails concerning public business on the private accounts of Chicago Police Department officers were subject to disclosure. Iowa’s Department of Administrative Services has dropped its policy of allowing bidders on public contracts to redact information from publicly filed versions of bids.

**Access Denied**

While the media are still trying to get a peek at Trump deposition video in D.C., an effort in S.D. Cal. to access video depositions in the Trump University case has taken a bad turn. Not only has the media been denied access to the video (in part because it was not attached to any dispositive motion or introduced as evidence), but video can now only be filed with the court under seal and there is an order barring its dissemination to the media. And a judge in S.D.N.Y. has denied a motion to unseal documents that would purportedly reveal a settlement agreement in a case where Trump was alleged to have hired illegal workers to build Trump Tower.

In the Ninth Circuit, journalists have dropped an effort to gain access to the allegedly racist emails of a Montana federal judge. A district judge in Oklahoma barred release of police video of the arrest of a man accused of killing his 21-month-old daughter (the video apparently depicts the victim, as well as the suspect strenuously resisting arrest, but no word on the possibility of redaction).

After a suit by North Jersey Media Group against the Bergen County Prosecutor’s Office, the New Jersey Appellate Division has authorized state agencies to provide a Glomar response.
in any case where revealing the existence of responsive documents would undermine the purpose of the public records exemption pursuant to which records might be withheld. Ugh. To make it even more fun, there’s some fairly vague discussion of the N.J. statute’s catch-all exemption in there too.

NJMG also hit a wall in the Appellate Division in connection with its “Bridgegate” investigation. The company had sought the names of individuals in the Christie administration who had asked for legal representation; the court held the information was shielded by attorney-client privilege.

Pending Cases

Undaunted, NJMG’s efforts in the Bridgegate case continue in federal court, with letters to both the District of New Jersey and the Third Circuit. The letters ask the lower court to lift or modify the existing protective order in the case, and the Court of Appeals to narrow its stay of a district court disclosure order to apply only to the list of unindicted co-conspirators that is the subject of the appeal.

In the Southern District of New York, the Treasury Department was ordered to better explain its efforts to search for documents connected to a warrantless surveillance program, although the court denied the New York Times’ motion to be allowed to take depositions. The same court has rejected the U.S. Trade Representative’s claim that national security concerns sufficed to withhold drafts of the Trans-Pacific Partnership agreement from the public, while denying cross-motions for summary judgment in a case brought by Intellectual Property Watch.

The Dallas Police Department has asked the state’s Attorney General to allow it to deny FOIA requests related to the department’s use of a bomb-laden robot to end an armed standoff, arguing that much of the information requested is not subject to mandatory disclosure on the grounds that it is “embarrassing” or of no public interest.

Legislation

Oregon’s attorney general is pushing for amendments to that state’s law that would include deadlines for compliance and better tracking of invoked exemptions. Texas legislators are trying to find a way to restore public access after a 2015 Texas Supreme Court ruling allowing businesses dealing with government agencies to seal away information they provide to the state.

Meanwhile, the Pentagon wants a new FOIA exemption for unclassified military tactics, techniques and procedures. That is to say, basically every unclassified record it possesses – and you can bet that this will be followed by internal procedures restricting voluntary disclosure of such records. So tell me, what’s the point of classification?
Newsgathering

Drones

Y’know, I usually start this section with persecution/prosecution of journalists, but let’s talk about something a bit more fun first. On August 29th, the FAA’s new regulations for commercial use of small drones went into effect – hooray! Be safe out there, kids. CNN’s already on it, with its new CNN Aerial Imagery and Reporting, or “CNN AIR” (groan), project. But if you’re trying to catch drone footage of Robert Duvall at his Virginia home, watch out for his neighbors...

The FAA also granted one drone start-up company permission to conduct “beyond visual line-of-sight” flights. Between that and another company receiving permission to fly fleets of drones at night, is the FAA perhaps working up to considering drone delivery systems?

Credentialing & Access to Places/Events

The entirety of Mexico’s National Commission of Physical Culture and Sports had their Olympic press credentials yanked for posting a video of a Mexican gymnast to social media. So much for national pride at the Olympic Games. A sports journalist was also kicked off Twitter for tweeting three GIFs from Rio.

More seriously, things got rough in Milwaukee this month after the shooting of a black man by police. Reporters were caught up in the violent protest, with several journalists chased by a crowd and at least one assaulted. News organizations began pulling their people out of the immediate area as a result.

And the Trump campaign has launched its print pool rotation; the media refused to allow Trump to select the composition of the pool, so many of the outlets previously blacklisted by the campaign are participating. Not that it helped when Trump decamped to Mexico at the very end of the month without any of his press corps.

Persecution of Sources

The DOJ lawyer who tipped off the media about post-9/11 warrantless surveillance was publicly censured by D.C.’s top court, though the court acknowledged his motives were pure. Meanwhile, the 4th Circuit has revived First Amendment claims brought by a deputy sheriff, who told the media his suspicions that the sheriff’s office was covering up evidence that gunshot wounds he suffered were caused by friendly fire. The Court of Appeals held that he’d stated a claim against the sheriff for retaliatory termination.

Legislation

California being California, the Planned Parenthood sting video incident has naturally resulted in new legislation designed to protect privacy by criminalizing undercover videos. Needless to say, the press is not thrilled.
Prior Restraint

Rebecca Tushnet described a very interesting decision from the D.C. Circuit this month that should give trademark lawyers some pause. The case involved the Federal Election Commission’s ban on the use of candidate names in website titles and on social media pages by unauthorized political committees; the law had an exception for situations where such use would not be confusing or misleading. So, more or less like trademark law. But here, the Court of Appeals found that the FEC rule violated the First Amendment as a content-based prohibition on speech that was not narrowly tailored, because disclaimers can work wonders to prevent confusion.

We also had a few gag order cases this month. A New Hampshire superior court judge declined to issue a preliminary injunction against a defamation defendant to keep him from speaking about the plaintiffs during the pendency of the case. Meanwhile, attorneys for five 9/11 defendants potentially facing the death penalty in military tribunals are fighting against a gag order that prevents their clients from speaking to anyone outside of their defense teams, and prevents the defense teams from sharing what they hear with anyone else.

And while we’re talking about national security, a recent order from D.D.C. directs the FBI to schedule periodic reviews of the gag orders attached to National Security Letters to see if they are still necessary. Previously, the recipient of an NSL had to repeatedly challenge the order in court to determine if compliance was still required.

Broadcast/Cable/Satellite

A setback for supporters of municipal broadband this month, as the Sixth Circuit holds that Congress did not explicitly grant the FCC authority override state bans on city-operated broadband networks. A coalition of U.S. mayors has objected to the decision, but the FCC has decided that it will not appeal (although the affected cities still might). I can hear my old colleagues at the Berkman Klein Center gnashing their teeth.

The FCC’s had quite a bit on its plate, though. It just ruled in favor of Comcast on a discrimination complaint, and received a favorable D.C. Cir. ruling on an LPTV challenge to the agency’s spectrum incentive auction (which isn’t going as well as the FCC had hoped). The agency is also dealing with the Copyright Office’s criticism of its set-top-box plan (for which the Copyright Office is itself taking some heat), the NAB is blasting the FCC for its decision to keep cross-ownership rules in effect, Comcast is on the FCC’s back to reject rules that would allow broadband companies from charging higher fees to subscribers who opt out of behavioral advertising, and the Senate Commerce Committee is reportedly cooking up an oversight hearing for September.
Meanwhile, this section has seen more than the usual degree of new non-FCC court activity this month. Washington State has filed a $100 million consumer protection claim against Comcast for charging consumers for service calls that were supposed to be free. DirectTV is on the receiving end of a RICO suit in C.D. Cal. for allegedly selling residential-class TV service to businesses, and then smacking them with penalties for ordering services for which they didn’t qualify. Showtime sued Charter in New York state court, accusing it of attempting to dodge license fees through the mechanics of its recent merger; Charter is also facing an amended race bias complaint in the Central District of California.

Comcast did score a win at the 5th Circuit, however, with a ruling that its property the Golf Channel did not need to repay $5.9 million that it innocently acquired in the course of a convicted swindler’s Ponzi scheme.

Internet/New Media

Section 230

Well, it looks like the Ninth Circuit is sticking by its Internet Brands decision. It just reversed a pre-Internet Brands ruling dismissing a “failure to warn” claim against Match.com under Nevada law. I keep hoping that these cases will right themselves on summary judgment, when it becomes clear that the only role that could give rise to a duty to warn is these sites’ publishing function.

The California Court of Appeal’s disastrous Section 230 decision in Hassell v. Bird (I say Section 230, but I can only assume that the court was looking at Section 230 of some statute other than the CDA) also continues keep media companies and digital platforms up at night. More than 40 companies, including the MLRC, and more than a dozen law professors sent letters to the California Supreme Court asking the justices to fix it.

Some sanity in other Section 230 cases, though. A judge in N.D. Cal. kicked out one of those lawsuits against Twitter by families of victims of ISIL; although he granted leave to amend, it seems like that’s just postponing the inevitable based on the court’s reasoning.

And last month I reported on a case involving the so-called “Reverse Streisand” effect; we’ll call this next case the “Recursive Streisand.” The plaintiff sued nine defendants alleged to provide search engine services because, he claimed, search results related to his past litigation caused him to be unemployable. And now that a judge in W.D. Pa. has dismissed this new case, it too will show up in his results.

Anonymity

Not every California appellate panel is as blinkered as the Hassell court. (No, seriously, it’s a really bad decision.) In another recent case, the court granted a nice win for anonymous
speech in a case where a visual effects company sued a Doe defendant for libel. The claim was based on pseudonymous e-mails purporting to “whistle-blow” on the company.

Net Neutrality

Bad news for net neutrality activists who were looking to the FTC to augment FCC regulation: The Ninth Circuit has held that the FCC’s reclassification of broadband as a common carrier service exempted ISPs from FTC regulation entirely, and not only with respect to activity covered by the FCC’s net neutrality regulation. The result is that the FTC had no authority to pursue a claim against AT&T Mobility for throttling.

Terms of Service

According to a judge in S.D.N.Y., Uber wasn’t clear enough in delivering its Terms of Service to a user suing for antitrust violations for the court to enforce an arbitration clause. As Prof. Eric Goldman points out, the case doesn’t specifically say mobile is different, but does raise questions about clarity of presentation of ToS and acceptance thereof on mobile devices. Eric also continues to cover the ongoing chaos around standards for online contract formation more generally, including a number of notable recent decisions; his survey article is worth a read.

Hate, Terror, and Other Internet Nastiness

New York’s governor ordered the state correctional department to make it a parole violation for sex offenders to play online games. Driven by the Pokémon Go craze (such as it is), the measure is intended to prevent use of the games to lure children to particular locations. Meanwhile, some N.Y. legislators want developers of augmented reality games to prevent game assets from being located near sex offenders’ homes.

Twitter is rolling out filtering options so that users can only see mentions from people they’ve already chosen to follow—an option that will limit network-building but clean up one’s feeds. Instagram, on the other hand, introduced a customizable filter where users can identify particular words they do not want to see. (Asking users to identify every word to which they don’t want exposure seems like an exercise designed to teach people about the difficulty of implementing content-based censorship.)

Twitter is still playing whack-a-mole with terrorism-related activity, reporting suspension of 235,000 separate accounts. Not to worry, says Donald Trump, repeating his line that he’ll just turn off the terrorists’ internet access. Facebook and Instagram were under pressure from Senator Markey this month over peer-to-peer gun sales across the site. And a 2015 New York lawsuit seeking to force Facebook to block social media posts that allegedly incite violence against Israeli citizens was revived and removed to E.D.N.Y., after a long stay following the death of the original lead plaintiff.
Finally, there was some controversy arising out of an armed standoff with police in Maryland, where the suspect was livestreaming to Facebook. Police asked Facebook to shut down the live feed and Facebook complied, moments before the suspect was shot and killed.

**Internet Governance**

Another very interesting ruling from the D.C. Circuit this month, this time involving country-code top level domains (you know, like .ca for Canada, .fr for France, and, infamously, .ly for Libya). Plaintiffs who obtained judgments against Iran, North Korea, and Syria for damages caused by those countries’ support of terrorism issued writs of attachment for those countries’ TLDs (.ir, .kp, and .sy) as property to satisfy the judgments. (Why? Think how much, say, online marketplace Etsy.com might pay to control the URL “et.sy” for its website, or Delta might pay for “a.ir,” and then multiply that accordingly.) But, held the D.C. Circuit, permitting the attachments would have a potentially catastrophic effect on the organization of the internet. There’s a nice piece on this decision elsewhere in this issue of the LawLetter, which I recommend you read.

If you want a big shift in internet governance, though, the net is getting ready for one as the U.S. government prepares to release its grip on the Internet Corporation for Assigned Names and Numbers (ICANN) on October 1st. Control is intended pass to a multi-stakeholder, non-governmental group.

**Miscellaneous**

Minnesota’s new law that allows individuals to transfer digital assets (like social media accounts) upon death went into effect this month. Meanwhile, Minnesota’s top court held that buying geographic terms as advertising keywords can support a finding of personal jurisdiction.

Pennsylvania has launched its “Netflix tax,” which imposes a 6% sales tax on digital downloads. That looks like a litigation engine.

Fantasy sports games are back in New York, after Governor Cuomo signed a bill legalizing the games.

And in Ohio, a man was acquitted by a jury of felony charges for disrupting public services for his publication of a parodic Facebook page making fun of the Parma Police Department. The parodist also his apartment raided by a SWAT team, though he wasn’t home at the time. (Unfortunately, his roommate – who was, ahem, indisposed at the time – was there; that’s going to be an awkward apartment meeting.)

**Internet Privacy**

**Hacking**

So, Matthew Keys has sought clemency from the President. There’s a lot that’s weird about this case, but somehow I think the White House will decide that Keys can serve the 24 months
and get on with his life. Also, Keys has filed his appellant’s brief at the Ninth Circuit, arguing a lack of the damage required to trigger Computer Fraud and Abuse Act penalties.

Meanwhile, the team of pro bono counsel who represented Andrew “weev” Aurenheimer in the Third Circuit in his CFAA case has stepped up with a petition for rehearing of Facebook v. Power Ventures (or is it Facebook v. Vachani?). The Court’s decision that visiting a website after being told not to constitutes “unauthorized access” under the CFAA has drawn a fair bit of criticism, including from the EFF and ACLU, which filed an amicus brief.

LinkedIn, however, would probably like the Facebook decision to stand; it filed a complaint this month under the CFAA against Doe defendants using bots to scrape data about the site’s users.

Over in the Sixth Circuit, a manufacturer of online surveillance tools faces a lawsuit for wiretapping. The Court of Appeals held that the company could be subject to a secondary liability claim after its product was used by a husband to intercept another man’s messages to his wife.

The New York Times and other news organizations have been targeted by hackers recently; Russian intelligence is suspected. Separately, a powerful iPhone hack has been used to target journalists and activists, and Yahoo is investigating a black hat hacker’s claim that he’s offering over 200 million user accounts for sale.

And what happens when tech companies hack one another? Google will pay $5.5 million in settlement in answer to that question, resolving claims that it circumvented privacy protections in Apple’s Safari browser to serve ad-tracking software to users back in 2012.

Control of Personal Information

Kudos to GameStop’s attorneys for their careful drafting of the electronic gaming store’s privacy policy for its online magazine. The Eighth Circuit dismissed claims based on sharing of browsing history and Facebook IDs used to access the magazine, finding that the data in question was unambiguously excluded from the definition of protected PII.

A new complaint was filed against the Golden State Warriors claiming that their official app eavesdrops on nearby conversations. Meanwhile, the makers of Pokémon Go responded to concerns voiced by Sen. Al Franken last month about their data collection practices.

This is a problem I haven’t seen in a while: Online employer review site Glassdoor recently sent out a notice of updates to the site’s Terms of Service, but accidentally copied 600K e-mail addresses into the cc: field, revealing them to all recipients. A lawsuit in C.D. Cal. naturally followed. Yeah, that’s a whopping blunder, but I have to ask – by 2016 shouldn’t any reasonable e-mail product pop up a warning or confirmation dialog when it detects 600,000 cc:s?

Speaking of e-mail, we’ve had a few cases about automatic scanning of electronic mail messages with recent updates. There are two cases against Google in N.D. Cal.; in one, the court denied a motion to dismiss on the merits, but in the other, the court denied certification of
a class of plaintiffs. Another class action in the same court over email scanning by Yahoo has resulted in what is being called a quite lenient settlement.

WhatsApp recently decided to share data with its parent company, Facebook. A coalition of privacy activists has filed a complaint with the FTC in the U.S., while European data protection authorities are undertaking their own inquiry.

A Chicago hospital is being sued by the family of a murder victim in Illinois’ state courts, after a nurse tweeted pictures from the victim’s room where he was treated before he died. This one has a quick settlement and termination of the employee written all over it. Expect a bigger battle in Florida state court over an ESPN reporter’s tweet of NFL player Jason Pierre-Paul’s medical records, after the court denied ESPN’s motion to dismiss on the basis of “common decency” and the “feelings of the individual.” The Florida court made a hash of Bartnicki in particular.

Intrusion

A new complaint in N.D. Cal. alleges that the producers of Pokémon Go should be held liable for causing people to be nuisances, due to unwanted flash crowds near private property and public landmarks. This is one that will be solved by boredom, not the courts. More persistent are the problems faced by a family who recently filed a lawsuit in the District of Kansas. Their home was incorrectly targeted by a glitch in a geolocation company’s mapping software, leading to years of visits by police officers and angry civilians looking for stolen vehicles and other property. The family has sued the geolocation company for compensation.

Internet Surveillance

We’ve learned that the Foreign Intelligence Surveillance Court actually does put the brakes on the FBI from time to time. Recently released court documents reveal an extended back and forth between the court and the agency over the FBI’s use of material gathered while monitoring phone calls. But another recently released FISA opinion held that it was legal for the government to capture “post-cut through” dialing with a pen register (think the digits you enter into a dial-by-name directory). Such information had previously been considered content, not metadata.

A system established by ISPs and the National Center for Missing and Exploited Children to scan e-mail for potential child pornography was conducting “searches” under the Fourth Amendment, held the Tenth Circuit.

The Center for Democracy and Technology has raised concerns about a pending federal bill that might allow the government to search innocent people’s computers in order to destroy malware linking them to hacker-controlled “botnets.” The problem: what else the government might “inadvertently” find in “plain view.”
And the Department of Homeland Security is planning what must be described as a half-baked effort to gain access to the social media information of visitors to the United States. The usual groups are pointing out the obvious flaws.

*Transatlantic Privacy*

The EU-U.S. Privacy Shield is up and running, and accepting its first sign-ups from U.S. companies. Dozens of organizations are already on the list.

*Intellectual Property*

*Copyright – New Cases*

Blame “Blurred Lines” for the fact that we’ve had a ton of music copying lawsuits out of the Central District of California lately. This month, we have: a suit against pop songster Ed Sheeran for allegedly copying Marvin Gaye’s “Let’s Get It On” in “Thinking Out Loud”; a suit against Ariana Grande over “One Last Time”; a suit by Blind Melon alleging that Mandy Jiroux falsely claimed she had a license to borrow from “No Rain” in her song “Insane”; and a suit against Demi Lovato for allegedly sampling from the Sleigh Bells’s “Infinity Guitars” for her song “Stars.” Atlantic Records has also filed a petition in N.Y. state court to get Reddit to unmask a user who allegedly leaked a pre-release version of a single by Twenty One Pilots; Reddit is resisting.

Getty Images was hit with another lawsuit over licensing images that it doesn’t own, with a claim in S.D.N.Y. over 47,000 sports photos. Richard Prince was sued yet again; this time in C.D. Cal. for lifting a model’s Instagram selfie. The copyright in the screenplay for “Friday the 13th” is up for grabs in D. Conn., as an attempt to terminate a copyright grant runs up against a claim that the script was a work for hire. ESPN was sued in N.D. Miss. after it allegedly breached a deal to use footage from a football documentary in its own production. And Riot Games, publisher of popular game “League of Legends,” has sued hackers and cheaters in C.D. Cal. for copyright violations.

*Copyright – Plaintiffs’ Victories*

The judge in a closely watched case in E.D. Va. over ISP liability for user infringement has refused to overturn BMG’s $25 million verdict against Cox Communications. Cox has appealed to the Fourth Circuit.

The Fourth Circuit, meanwhile, held that the U.S. government’s seizure of file-sharing baron Kim Dotcom’s overseas assets was legitimate; his refusal to face charges in the U.S. rendered him a “fugitive,” said the court. The Third Circuit upheld an award of actual damages for infringement that included a multiplier based on the “scarcity and exclusivity” of the plaintiff’s stem cell photos. And the Seventh Circuit reversed a defense verdict over a...
newspaper’s use of the plaintiff’s portrait of Louis Farrakhan, holding that the district court
inappropriately placed the burden on plaintiff to prove lack of authorization.

In E.D. Mich., a court denied a motion by Fox and the creators of “Empire” to
dismiss a copyright claim asserted by an author who claimed the character of Cookie
Lyon was based on her memoir; the court did, however, dismiss a right of publicity
claim. In D. Md., an online real estate service failed to escape claims that it reproduced
a photo without permission and attached a false copyright notice. Finally, a judge in
C.D. Cal. held that lawyers for Led Zeppelin couldn’t recover their attorneys’ fees after
their recent win at trial.

Copyright – Defense Victories

The Second Circuit denied the RIAA’s petition for rehearing of the Court’s recent decision
that the Digital Millennium Copyright Act applies to pre-1972 sound recordings. On the other
cost, the Ninth Circuit gave Live Nation another chance to prove that its unauthorized use of a
photographer’s images of Run-D.M.C. on merchandise was not willful, reversing summary
judgment on that issue.

Famed composer Hans Zimmer defeated a claim that he copied music from a commercial
library for the principal music of “12 Years a Slave,” with the plaintiff dropping the case
voluntarily and sending a written apology. It took longer for Brad Paisley and Carrie
Underwood to fight off an infringement claim in M.D. Tenn. over “Remind Me,” but they
succeeded this month. Tattoo artists failed to register their copyright in LeBron James’ tattoo,
rendering them ineligible for statutory damages in a case in S.D.N.Y. against the publishers of
videogame NBA 2K16. Beyoncé defeated a recent copyright claim over the trailer for her HBO
“Lemonade” special, with an explanation of the ruling yet to come.

Looking at fee awards, plaintiffs were denied their attorneys’ fees in a lawsuit over the
illegal download of a little-known Adam Sandler movie, after judge in the District of Oregon
held that a consent judgment against a single downloader in a file-sharing case did not warrant
burdening that one individual with fees for the entire litigation campaign. Defense attorneys
also picked up: $315K in fees in the “Walk of Shame” lawsuit in C.D. Cal.; $15K in fees in
S.D. Tex. for successfully defending country singer Jason Cassidy; and $22K in S.D. Ind. in a
case alleging infringement of a photograph of the Indianapolis skyline.

The big winners though were the attorneys who fought in C.D. Cal. to show that “Happy
Birthday” is in the public domain; they were awarded a full third of the $14 million settlement
in fees, with the judge lavishing praise upon their efforts against a powerful opponent.

Copyright – Pending Appeals

All eyes on the Ninth Circuit. The first briefing in the “Blurred Lines” case has hit, with
Thicke, Williams, and T.I. receiving the support of more than 200 musicians in an amicus
brief. Streaming company FilmOn X took on pretty much the entire world of broadcasting in
oral argument, arguing for its entitlement to a compulsory license. And the monkey selfie case
continues to generate headlines and puns – *though Naruto may be in trouble*, because one of his “next friends” has dropped out of the case and left PETA’s standing in doubt.

Might I suggest a [replacement friend]?  

*Copyright – Miscellaneous*

Other bits and pieces of copyright news in August:

- A motion for a second new trial in the Oracle v. Google API saga in N.D. Cal. has apparently piqued the interest of Judge Alsup, who has ordered the parties to submit sworn declarations relating to [information allegedly withheld in discovery](#). Because what everyone needs is a *third* trial.

- The Department of Justice has left its consent decrees with ASCAP and BMI over music licensing in place, except for adding [a new and controversial requirement](#) that the organizations must offer “100% licensing” – i.e., that they must be able to license all parts of the song, and not just the percentage interest controlled by artists with which they are affiliated.

- Lawyers representing the alleged operator of massive filesharing site Kickass Torrents have [demanded that criminal charges be dropped](#) on the basis that there is no such thing as secondary criminal liability for copyright infringement under U.S. law.

*Patent*

BlackBerry, apparently transitioning from a technology company to a patent licensing entity, has started to scout out a bridge as it files [three new lawsuits](#) in the Southern District of Florida and the Northern District of Texas. Guys, a tip: [Don’t wait for the third goat](#).

[British Telecom is suing videogame giant Valve Corp.](#) in D. Del. in an effort to lock down several core online gaming technologies, including patents covering online computer or video gaming platforms, digital distribution services, and personalized access to online services and content. In E.D. Tex., a software company is suing BuzzFeed and other media companies for infringement of a [shareware patent](#).

Facebook and WhatsApp succeeded in an AIA inter partes review before the PTAB, which invalidated the claims of a third party’s [electronic messaging patent](#). And podcasting patent troll Personal Audio is [fighting for its life before the Federal Circuit](#), after EFF succeeded last year in having Personal Audio’s core patent declared invalid.

*Trade Secret & Misappropriation*

Warner Bros. is stuck in a case in California superior court, after a judge denied a motion to dismiss claims that the studio breached an implied contract with an artist who pitched [concepts for the upcoming *Kong: Skull Island*](#).
Commercial Speech

Trademark

New cases:

- Up above, I mentioned the counterclaims filed by Bleeping Computer against Enigma Software after Bleeping failed to escape defamation liability under Section 230. Bleeping has also filed a cybersquatting claim against Enigma after the software company allegedly began registering domain names including its name.

- A carpet cleaning business is the latest to tilt at the Olympic windmill, filing a declaratory judgment action in D. Minn. to establish its right to tweet about the Olympics in the face of ridiculously restrictive rules.

- And it’s not exactly a trademark claim, but the FTC sued 1-800 Contacts for antitrust violations, alleging that it illegally over-enforced its trademarks to suppress others’ keyword advertising.

There was a rare keyword advertising win (or at least, not immediate loss) for a plaintiff in D. Conn. this month, in a claim between competitors in “chocolate and fruit-based gift packages.”

In other plaintiffs’ wins, we’ve got a judge in C.D. Cal. reversing his earlier decision that a spoof of “Dirty Dancing” in a TD Ameritrade ad was not infringing. In M.D. Fla., a judge ruled that a founder of the Commodores did not own the band’s name in a case brought by the other band members; questions of infringement remain. Burberry won a preliminary injunction in S.D.N.Y. to stop a rapper from using the name “Burberry Perry.” But in C.D. Cal., it was the performers (loosely defined) winning against a manufacturer, with the Kardashians granted an injunction against the use of their name by Kardashian Beauty. And threesome app “3nder” changed its name, and apparently its raison d’être, in the wake of a lawsuit by dating app Tinder.

I’m glad to report that the silly lawsuit between Citigroup and AT&T over the mark “THANKYOU” was dropped after a judge in S.D.N.Y. refused Citigroup an injunction and explained in detail why the case was going nowhere.

Oh, and if you’d like an interesting read, there’s a law professors’ amicus brief in the appeal of the Louis Vuitton v. My Other Bag case pending in the Second Circuit raising a direct First Amendment challenge to trademark dilution law.

False Advertising/Deception

The FTC has announced that it intends to take a hard line against sponsored celebrity posts on social media that are not labeled as such. One might disagree with the FTC’s lack of flexibility on this topic, but the basic concept isn’t that hard to grasp – so I can’t say I have
much sympathy for anyone who gets caught in the forthcoming dragnet. Particularly not the Kardashians, who are the subject of a new FTC complaint.

Slingbox manufacturer Sling Media defeated a false advertising claim in S.D.N.Y., with a judge finding that there was no evidence that the company lied about its intent to add advertising to its mobile streaming service. And an attempt by a Trump hotel to use a false advertising claim to suppress a labor union’s invocation of the Orange One’s “Make America Great Again” motto on their protest banners fell flat in the District of Nevada, with the court finding the banners weren’t commercial speech.

Professional Speech

The Sixth Circuit has reversed a district court decision dismissing a dentist’s First Amendment challenge to an Ohio rule banning him from calling himself an “endodontist.” Even though the dentist is, indeed, a qualified endodontist, Ohio prohibited him from promoting himself as such unless he restricted his practice to that field.

The American Psychiatric Association warned its members this month about indulging in the almost irresistible temptation to opine on what the hell is wrong with Donald Trump (and, why not, other candidates), finding that doing so would be unethical and irresponsible. The rest of us are free to continue.

Attorneys are facing a separate issue though, with the American Bar Association urging state bars and courts to adopt the following disciplinary rule:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. ... This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

Discrimination and harassment . . . includes harmful verbal ... conduct that manifests bias or prejudice towards others. ... Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ...

Professor Volokh has gone into detail about the problems with this rule, but from the perspective as a First Amendment lawyer in particular, I have to wonder whether attorneys representing clients with repugnant viewpoints in free speech cases are going to be facing a raft of complaints. I know it says “This paragraph does not preclude legitimate advice or advocacy
consistent with these rules,” but the words “legitimate” and “consistent with these rules” leave a lot of room for mischief.

Well, at least Texas lawyers now know they can use their rivals’ names in keyword advertising, thanks to an opinion of the Texas Ethics Commission.

Judges got a break in the Sixth Circuit, with a ruling holding that some of Kentucky’s restrictions on judges’ speech in elections violated the First Amendment. But that doesn’t help Judge Olu Stevens, who was suspended after he took to social media to make some nasty comments about a prosecutor.

**Miscellaneous**

**Academia**

So, you can’t be forced to recite the U.S. pledge of allegiance, we know that. But according to the Fifth Circuit, you can be forced to recite the Mexican pledge of allegiance for a school exercise where you’re not actually expected to mean what you say and everyone present knows that. Jeff says “hmm…”

**Government Licensing & Public Fora**

The Third Circuit held that a Philadelphia prohibition against non-commercial advertisements at the airport was unconstitutional. No big surprise there. The Seventh Circuit explored the issues raised by applying a town’s signage laws to the inflatable rats and cats used by labor unions, though it avoided a final ruling due to a potential mootness issue; Judge Posner, with a lengthy dissent, would have found a violation of the union’s First Amendment rights.

And a Tennessee county settled a First Amendment suit in E.D. Tenn. for $41,000, after its sheriff found religion on a county-operated Facebook page and started deleting negative comments.

**Political Speech**

The D.C. Circuit held this month that a case can proceed seeking an injunction against the IRS to prevent the agency from targeting political groups for heightened scrutiny in their applications for tax-exempt status. I personally was more concerned about the wringer that the agency had been putting journalism non-profits through, but the new decision is still a good thing.

The California Supreme Court held that a public official’s vote was an act protected by the state’s anti-SLAPP law. Interestingly, the Court held it did not matter if the vote itself was not protected by the First Amendment per the U.S. Supreme Court’s 2011 decision in Nevada Commission on Ethics v. Carrigan, because the vote was “in furtherance of” political debate that was constitutionally protected.
Donald Trump’s got a remarkably appropriate defender in bizarre litigation specialist Roy Den Hollander, who has sued every media outlet he could think of for RICO violations for their reporting on the candidate.

And it’s hard to believe that it was only this month that Trump made his infamous comment about Second Amendment people. Raise your hand if, as a First Amendment lawyer, you had to respond patiently to questions from friends and family about why Trump wasn’t arrested. Bonus points if you quoted the sentence, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,” or specifically cited Brandenburg.

Hollywood Hijinx

Comedian and TV host Steve Harvey is continued to be embroiled in a dispute in N.D. Tex. over ownership of about 120 hours of tape of Harvey’s performances at a Dallas club. A summary judgment motion narrowed the claims, but core contractual issues survived the cut.

Just like Lucious Lyon, Fox seems to be having a lot of problems with its “Empire” lately. The latest lawsuit comes from N.D. Ill., which claims that residents of a juvenile detention center were improperly treated when the facility was locked down to allow the show to film on site.

We all knew this, but apparently the former Mrs. Mel Gibson didn’t: You can waive your First Amendment rights by contract, including in a divorce settlement agreement. So no surprise that a California appellate panel held that she forfeited substantial financial benefits under such an agreement after she violated a non-disclosure clause therein.

The True Miscellany

Ms. Grigorieva wasn’t the only one to lose big for violating confidentiality. Matt Bissonnette, the ex-SEAL who wrote a book about the killing of Osama bin Laden, will fork over $6.8 million for failing to get permission from the Pentagon, according to filings in the Eastern District of Virginia.

We’ll end this month with a ruling from the Northern District of Illinois, where a judge relieved renowned artist Peter Doig from an attempt to declare him the creator of a work of art held by the plaintiff. After a bench trial, the judge declared that the artwork was clearly created by another person.

Conclusion

And that’s a wrap on summer. I’ll be taking a break from this column due to our conference next month, but will return with a double-header for September and October.

Hope you enjoyed your Labor Day, everyone, and I’ll see you in Virginia!