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

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

Between the holidays and preparing for the MLRC’s Entertainment Conference (thanks to everyone who attended!), I wasn’t able to publish an issue of the Monthly Daily at the end of December. And apparently, you people never stop working. As a result, this double-header issue is ridiculously long – so I am going to spare you my usual introductory ruminations and instead provide a table of contents to help you skip to the sections you care about. If you’re reading this in electronic format, click a section title below to jump to a specific section, and you can click the main section header to come back here.

It’s just my way of showing that I love you all.

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Supreme Court

Pending Cases

The justices heard argument in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in December; the Court seemed divided along the usual lines, with Justice Kennedy appearing particularly torn between his tendencies to support both gay rights and freedom of expression.

More briefs were filed in the *U.S. v. Microsoft* case on the extraterritorial reach of search warrants for computer data. Among them, thirty-five state attorneys general predictably weighed in on the side of the federal government, a number of foreign countries (including the EU, Ireland, the UK, and New Zealand) claimed that allowing the U.S. to unilaterally demand access to data stored in Ireland would violate international law, and a media coalition filed a brief in order to assert the interests of the press in the security of journalistic information in cloud-based services. Oh, and Microsoft filed its own brief too.

The Cato Institute filed an amicus brief in *Minnesota Voters Alliance v. Mansky*, supporting a challenge to Minnesota’s law banning the wearing of political flair at polling places and arguing that Carthage must be destroyed.

The Trump Administration filed an amicus brief in *NIFLA v. Becerra*, a pending case involving a California law compelling crisis-pregnancy centers to notify women about the availability of low-cost abortion services. The brief attempts to, er, have it both ways (no, I didn’t even THINK of using another Solomonic idiom, shame on you) by arguing that (1) the ability of a state to regulate professions grants it the authority to compel non-commercial speech under a standard lower than strict scrutiny, but that (2) the California law in question is unconstitutional under even the lower standard. (The Fourth Circuit recently reached a contrary result in a similar case, which is discussed below under *Commercial Speech – Professional Speech*.)

Petitions

The Court granted cert in a couple of cases. In *Benisek v. Lamone*, the Court will hear a challenge to a partisan gerrymander in Maryland that is alleged to violate voters’ First Amendment speech and association rights. In *South Dakota v. Wayfair*, the justices will consider whether the explosion of internet commerce requires them to abrogate a 1992 ruling that bans states from compelling businesses to collect online sales taxes if they have no physical presence in the state.
The Court also called for the views of the Solicitor General in *Fourth Estate Pub. Benefit Corp. v. Wall-Street.Com*, a copyright case from the Eleventh Circuit on whether the right to sue for infringement accrues when an application for copyright registration is filed or when the Copyright Office actually registers the claim.

Turning to denials of cert, the Court cleared its decks and gave the cold shoulder to some cases that we’ve been keeping an eye on. *Spokeo v. Robins* failed to secure a return trip to the Supreme Court after remand to the Ninth Circuit, leaving lingering questions about the Court’s earlier pronouncements on standing in data privacy cases unanswered. Likewise, the Court decided not to engage with tricky issues of prior restraint in *Defense Distributed v. Dept. of State*, in which the Fifth Circuit upheld an injunction against distribution of 3D printing templates for firearms. (If you don’t see a First Amendment question in the case, read the last sentence again and leave off “for firearms,” and see if you feel differently.) *Perfect 10 v. Giganews*, involving the definition of a “volitional act” under the Copyright Act, will stand as it was left by the Ninth Circuit.

And in a matter of personal sadness to me, the Court declined to hear *Connecticut v. Baccala*. The case involved the respondent’s conviction for a profane tirade directed at the manager of a Stop & Shop in Vernon, Connecticut; the Connecticut Supreme Court held that the tirade could not be punished under the fighting words doctrine because, basically, grocery store managers have heard it all and should be able to exercise restraint in the face of such provocation. I love it, and would have loved a modern-day pure fighting words ruling.

Other media-related denials included: *Greensboro, NC v. BNT Ad Agency* (4th Cir., denial of economic development loan to minority-owned television network); *Sprint Communications v. Centurytel of Chatham* (5th Cir., Sprint subject to exchange-access tariffs for conversion of Internet-based calling to traditional telephone format); *Sprint Communications Co. v. Lozier* (8th Cir., authority of utility board to compel Sprint's payment of intrastate access charges to Iowa telecom company); *Amalfitano v. Google* (9th Cir., Google Buzz settlement held to bar later lawsuit as res judicata); *Recycle for Change v. Oakland, CA* (9th Cir., restrictions on unattended solicitations for donations); *Evolutionary Intelligence v. Sprint Nextel* (Fed. Cir., invalidity of data processing patents); *RecogniCorp v. Nintendo* (Fed. Cir., patent for encoding and decoding image data held to claim abstract idea); *Smartflash v. Apple* (Fed. Cir., patent for data storage and access held to claim abstract idea); *Prism Technologies v. T-Mobile* (Fed. Cir., affirming plaintiff’s verdict for infringement of patents for managing access.
to protected information on "untrusted" networks); *RPost Communications v. GoDaddy.com* (Fed. Cir., patents for e-mail services); and *Echostar Satellite v. Fla. Dept. Of Revenue* (Fla., discrimination in state taxation between cable and satellite).

Finally, the Cato Institute filed a brief in support of granting cert in *CTIA v. City of Berkeley*, in which the Ninth Circuit upheld mandatory cellphone radiation warnings imposed on retailers in Berkeley, California. Cato is arguing that the Ninth Circuit made a hash of the compelled commercial speech analysis, and that Carthage must be destroyed.

**Reporters’ Privilege**

In California, two journalists are fighting grand jury subpoenas and demanding the return of one of the journalists’ cell phones that was seized by law enforcement without warning (and that she was forced to unlock). The raid and subpoenas occurred after the pair interviewed Marion “Suge” Knight, who is awaiting trial for the hit-and-run murder of Terry Carter; Knight allegedly violated a court order by giving the interview. An emergency hearing on the two journalists’ application for relief was held in Los Angeles Superior Court, and we are watching for updates.

A former reporter for the Dallas Morning News was compelled to testify in a Texas trial over a murder committed in 1960 after the paper apparently dropped its objections; the reporter had interviewed the defendant’s now-deceased supervisor, to whom the defendant reportedly confessed the crime.

A magistrate judge in S.D. Fla. held that the state’s shield law applied to BuzzFeed and rejected an attempt to compel the outlet to disclose its source for the Trump Dossier in a defamation case (although the plaintiff rather pettily declared thereafter that it had discovered the source on its own). In Illinois, a judge quashed a subpoena to journalist Jamie Kalven for the identity of a source who gave him details regarding the shooting death of Laquan McDonald. A Kentucky judge quashed a subpoena to WDRB for unaired footage from a news story about a police shooting, and a judge in Virginia quashed a subpoena issued by the defendant in a felony sexual assault case to WDBJ for unaired information gathered from the alleged victim.
Defamation

So, this happened:

The Orange One wasn’t about to let that pass, and tapped the media bar’s new best friend Charles Harder to fire off letters both to Steve Bannon (whom Trump accused of breaching a non-disparagement/non-disclosure agreement) and to author Michael Wolff and the president of publisher Henry Holt and Co. (demanding that further publication of the book be halted). Bannon’s attempt to grovel his way back into relevance will cement his standing as one of the more undignified political failures in American history; in contrast, the publisher stood firm, actually advancing the book’s release date.

An actual lawsuit may be unlikely; as DWT intimated in its response to Harder on behalf of the author and publisher, discovery from Trump would be wide-ranging. Still, we know that Trump’s lawyers have managed to scare publications into silence in the past, such as when he managed to suppress an interview by In Touch magazine with former adult film star Stormy Daniels in 2011. So it’s not so surprising that he’d try it again, especially given that he’s never seemed to understand the difference between his position now and his position then, or the difference between threatening a gossip magazine versus a major book publisher.

In any event, these events led Trump to pledge once more to “take a strong look” at libel laws, because his fits of pique determine federal policy. The threat has little more force now than the last time he brought this up. That said, the Hollywood Reporter ran this piece, which points out that a (competent) president might not be completely without power to make life harder for defendants in defamation actions. Thanks for explaining that to him, guys.

At least we can presume that he won’t lead the Great Libel Revolution until he’s finished being a libel defendant. He scored a victory in New York’s appellate courts against Cheryl Jacobus, with a panel affirming the trial court’s ruling that his allegedly defamatory tweets were protected as opinion. But we’re still waiting for the decision on Trump’s motion to dismiss Summer Zervos’ defamation suit in New York Supreme Court; Trump argued that any
statements were protected political speech in a public debate, and that exercising state court jurisdiction would unconstitutionally interfere with the actions of the federal executive. Zervos’ lawyer’s response was classic: “We can certainly ensure that we take a deposition down at Mar-a-Lago in between his playing golf.”

New Cases

We have a plethora new cases to report, with Florida, Illinois and New York representing particular hotbeds of activity:

- M.D. Fla.: The Daily Beast is facing a libel suit from Hall of Fame college football coach Lou Holtz, who claims that he never referred to immigrants as “deadbeats” at the Republican National Convention.
- S.D. Fla.: Decade-transcendent music icon Prince’s former attorney sued the Daily Beast and City Pages over articles referring to him as a “shady lawyer” and “con artist.”
- S.D. Fla.: “Real Housewives of New Jersey” star Jackie Robinson claims in a suit against NBC Universal Cable that she was defamed by statements made on “Watch What Happens Live with Andy Cohen” that she stole merchandise from the store Envy.
- N.D. Ill.: Software developer Keeper Security sued Condé Nast and Ars Technica over an article alleging that its software had a 16-month old flaw that allowed the theft of user passwords.
- D. Me.: A Rhode Island podiatrist has sued major national publications as well as Maine’s two largest newspapers for allegedly publishing false statements that he provided substandard care.
- D. Minn.: An auto dealership claims that it was defamed by a news report on KARE 11 that, it alleges, accused it of overcharging law enforcement agencies.
- S.D.N.Y.: Bill O’Reilly and Fox News have been hit with a public denial lawsuit (that’s what I’m calling the cases where an accuser sues you for defamation for publicly denying their accusations) following the revelation that O’Reilly had paid $13 million to settle sexual harassment claims.
- S.D.N.Y.: The first of a pair of new Trump Dossier lawsuits by Trump attorney Michael D. Cohen, who sued Fusion GPS over allegations in the Dossier that he was embroiled in a Russian conspiracy to help Donald Trump.
- Ala. Cir.: Another public denial lawsuit, this time filed by Leigh Corfman against failed Senate candidate Roy Moore for his denials of her accusations of sexual abuse.
• Cal. Super.: The National Enquirer was sued by Charlie Sheen over a report that the troubled actor sexually abused deceased actor Corey Haim when the latter was 13 years old.
• Cal. Super: Ike Kaveladze, the “Eighth Man” at the 2016 Trump Tower meeting with a Russian lawyer, has sued a cognitive science/linguistics professor at U.C. Berkeley for calling him “the major person who has been responsible for money laundering from Russia and other post-Soviet countries” in an MSNBC interview.
• Fla. Cir.: An immigration attorney sued Univision over a report that she claims depicted her as scamming clients and causing them to be deported.
• Fla. Cir.: An American psychiatrist living and practicing in Japan without a license sued anonymous Reddit users for defamation (but then voluntarily dismissed the suit without prejudice, citing concerns over the propriety of jurisdiction).
• Fla. Cir.: Billionaire real estate developer Jeff Greene has sued over an article on gossip website GossipExtra that suggested he was engaged in dirty politics with respect to a West Palm Beach development.
• Ill. Cir.: ESPN is facing a suit from former players in Chicago’s Jackie Robinson West Little League team and their parents over a 2015 report that the parents knowingly falsified the eligibility of their children, resulting in the League stripping the team of its 2014 Championship title.
• Ill. Cir.: Speaking of sports and defamation, former Chicago Bears star Brian Urlacher was sued by the mother of his 12-year-old son for allegedly conspiring with his attorney and the Chicago Tribune to portray her as an unfit parent and murderer in order to secure custody of the child. (Murderer, you say? Well, the mother’s then-husband had died of a gunshot from the mother’s gun while alone with her after an argument. The shot was later determined to be self-inflicted, but the investigation was still open at the time of the Tribune’s report. Meanwhile, custody was awarded to Urlacher before the story ran, which one might think would poke a hole or two in the plaintiff’s theory of the Trib’s complicity. Aren’t you glad you asked?)
• Ill. Cir.: A private investigator at the center of the work done by Northwestern University’s Medill Innocence Project to exonerate death row inmate Anthony Porter claims that his reputation was destroyed by pro-police lawyers and advocates working to undermine the Northwestern project; also swept into the 66-page complaint was a former reporter for the Chicago Tribune.
• N.Y. Sup.: The other shoe in Michael Cohen’s lawsuits over the Trump Dossier was a state court case against BuzzFeed.

• N.Y. Sup.: Fox News host Jeanine Pirro was sued by a Black Lives Matter activist who alleges that Pirro falsely labeled him as the instigator of violence against a Baton Rouge police officer in 2016.

• N.Y. Sup.: Showtime is on the receiving end of a lawsuit filed by the mother of deceased college football player Lawrence Phillips, over a documentary that allegedly attributed Phillips’ suicide to childhood abuse.

• N.Y. Sup.: An ex-reporter for “The Young Turks” has sued the Huffington Post and Oath over a post detailing accusations of sexual misconduct; the post was removed prior to the filing of the lawsuit after the plaintiff challenged its accuracy.

• N.Y. Sup.: A new lawsuit filed by former Fox News co-host Andrea Tantaros alleges that the editor of her book “Tied Up in Knots” conspired with Fox News to defame her after she began asserting sexual harassment claims against the network. (Further legal action by Tantaros is discussed below under Privacy – Wiretapping/Eavesdropping.)

• Pa. Comm. Pl.: A businessman who once received a “40 Under 40” award from the Philadelphia Business Journal sued the Journal over a retrospective article on past winners that, he alleges, reported he was serving prison time for fraud.

**Plaintiff Wins**

A claim brought against CBS in Michigan state court by JonBenet Ramsey’s brother Burke will move forward, after a judge found that a limited series about JonBenet’s death could be interpreted as stating facts, rather than opinion or theory, regarding Burke’s involvement in the crime.

We have three out-of-court resolutions this issue. First, Viacom settled discrimination and defamation claims filed in C.D. Cal. by a former BET exec over the company’s handling of her cancer diagnosis. Second, Rolling Stone reached a settlement in the last pending lawsuit over the “A Rape on Campus” article; the case had been filed in S.D.N.Y. members of the accused fraternity, and had taken an interesting turn through “of and concerning” law. Third, Pete Rose has settled a lawsuit in E.D. Pa. against a lawyer who accused him of statutory rape.

A couple of anti-SLAPP motions ran into trouble in the California Courts of Appeal, with appellate panels ruling that there is no public issue at stake in either opinions on the authenticity of celebrity autographs or allegations that a non-public figure is a “whore” and a “dope-dealer.”
In New York, the Appellate Division carefully explained that while false imputation of HIV status is per se defamation under the “loathsome disease” category, allowing a plaintiff whose image was used without his knowledge in an HIV public service campaign to pursue his case, that archaic label is not intended to convey any moral opprobrium.

And in Texas, the Third District Court of Appeal partially affirmed the denial of anti-SLAPP motions in a lawsuit alleging that media defendants defamed a former NFL player in a TMZ report by alleging that he tried to hire a hitman to kill his agent. The appellate court allowed libel and conspiracy claims to proceed against all defendants except “TMZ.com,” which it found to be simply a domain name rather than a corporate entity; however, the panel held that the trial court should have dismissed the plaintiff’s emotional distress, malicious prosecution, and abuse of process claims against all defendants.

**Defense Wins**

In interlocutory matters, the Middle District of Florida denied an ex parte demand by four brothers for a preliminary injunction against the operator of websites critical of their business activities, finding their cursory allegations insufficient to support a prior restraint. In S.D.N.Y., a magistrate recommended the dismissal of libel claims filed by a medical products manufacturer against financial bloggers, holding that statements accusing the plaintiff of “channel stuffing” were protected opinion. And the Investigative Post scored a ruling in N.Y. state court that a development company and its CEO should be treated as public figures in a pending defamation lawsuit over an article about a deal with Buffalo State College.

Turning to dispositive ruling, the founder of the Open Source Initiative was stating his opinion when he said that a software developer’s license violated the GPL open-source license agreement, held a judge in the Northern District of California. In M.D. Fla., Breitbart escaped a lawsuit by the subject of a Project Veritas sting video published on the conservative website, with the court finding Steve Bannon’s residency in Florida insufficient to support jurisdiction. In S.D.N.Y., a claim by a former vice president for Fox News Latino that he was defamed by a statement regarding sexual misconduct made to the New York Times foundered because the statement did not name or otherwise identify him.
Per a judge’s punctilious pronouncement on punctutation, James Woods was saved by a magic question mark in a suit filed in S.D. Ohio by a woman who claims the actor defamed her on Twitter by asking if she was the person who threw a Nazi salute at a Trump rally. And a lawyer who sued an Ohio-based publication for calling out his ties to white supremacists has now dropped his lawsuit in E.D. Tex., apparently after his employer told him to stop.

A bankruptcy judge in S.D.N.Y. kicked out a defamation claim against Gizmodo by a Las Vegas oddsmaker, but allowed a claim against the author of the Deadspin article at issue to proceed to a trial on the question of whether the author is protected by an anti-suit injunction arising out of the sale of Gawker Media.

In state court, a California judge dismissed claims by a local water official against a Los Cerritos newspaper over allegations that she attempted to extort campaign contributions from a developer who needed water, finding a lack of actual malice. A Massachusetts judge bounced a claim by a former candidate for the Pittsfield City Council, finding that the Berkshire Eagle’s reporting of an incident where the candidate was encountered with alcohol on his breath was accurate. Self-described “badass lawyer” Todd Levitt lost his third defamation lawsuit in Michigan; this time, the suit was against the lawyer and parents of a Central Michigan University student who ran a Twitter feed parodying Levitt (the student was the defendant in Levitt’s first failed lawsuit). In New York, a former gubernatorial candidate’s defamation claim against Roger Stone over allegedly defamatory campaign flyers was rejected by a jury; while the flyers were found to be defamatory, the jury found that the plaintiff had not proved Stone was responsible. Speaking of campaign ads, a judge in Pennsylvania held that attack ads accusing a state house candidate of having appeared in a “torture porn movie” were literally true, after consulting the Dictionary.com definition of “torture porn.” And in South Carolina, a psychiatrist who attempted to sue an anonymous critic who left a one-star review dropped his case without prejudice – but only after successfully unmasking the defendant.

On appeal, the First Circuit declined to reconsider a panel decision that affirmed the dismissal of a high-profile public denial lawsuit against Bill Cosby. The Ninth Circuit affirmed the dismissal of a claim by an Olympic swimmer against Swimming World Magazine, ruling that statements questioning if she had used performance-enhancing drugs were protected as opinion. The
Eleventh Circuit affirmed dismissal of a defamation claim by a former Miami Dolphins coach against a law firm who investigated and reported on bullying within the organization, finding that many of the findings in the report were opinions and that the plaintiff failed to allege actual malice. And in the D.C. Circuit, a Russian oligarch who had sued the Associated Press over a report detailing his interactions with Paul Manafort dropped a pending appeal and ended his case with no settlement or money paid.

In state appeals, a California panel affirmed an anti-SLAPP ruling against actor Andrew Keegan Heying over an article published on Newsmx.com that falsely asserted he had been arrested during an alcohol raid. This was the second appellate ruling against Heying; an earlier ruling by a different division of the Court of Appeal had affirmed an anti-SLAPP decision in favor of another outlet. Both decisions found that the reports at issue were published without actual malice because they republished statements from other coverage whose accuracy was not obviously doubtful.

In Louisiana, an appellate panel held that online commenters were stating their opinions when they argued that a woman who shot and killed her husband should have been charged with murder notwithstanding claims of self-defense. An appellate panel of the Pennsylvania Superior Court ruled that while a statement in the Pottstown Mercury Newspaper about allegations of professional misconduct by a surgeon might be defamatory, any damage to the plaintiff’s reputation flowed from his suspension by his hospital rather than the article. In Texas, the Fourteenth District held that abatement of a lawsuit under the state’s Defamation Mitigation Act applies to the deadline for filing a motion under the Texas Citizens Participation Act, and therefore reversed a trial court ruling that anti-SLAPP motions filed by the Houston Chronicle and KHOU-TV were untimely.

Finally, the Vermont Supreme Court affirmed the anti-SLAPP dismissal of a claim by a failed state house candidate against the Northfield News over a report on his criminal past, finding that the candidate had failed to establish that the newspaper’s report was devoid of reasonable factual support. The court declined to consider a challenge to the constitutionality of the state’s anti-SLAPP law, finding that argument waived because it was not asserted in the trial court.

New & Pending Appeals

The Eleventh Circuit heard argument in January on an award of attorneys’ fees under Florida’s anti-SLAPP statute, with a neurologist attempting to preserve an award of almost $260,000.
Miscellaneous

An anti-SLAPP bill pending in New Jersey’s legislature died in committee at the end of December. No word yet on whether there will be another try.

Privacy

Rights of Publicity

Let’s start this section with yet another data point in the confusing and contradictory terrain of video game right-of-publicity cases, with the Northern District of California refusing to let Electronic Arts off the hook in a class action brought by a class of former NFL players over the Madden series of video games. EA had sought dismissal on a copyright preemption argument under the Ninth Circuit’s relatively recent decision in Maloney v. T3 Media; the district court rejected that argument, holding that the in-game actions of player-controlled digital avatars are not fixed expressions subject to copyright.

Having modded the appearance of a few video game characters in my time, I think this decision is utter nonsense; the appearance of the avatars in a game is fixed in the code, as is the range of actions they can undertake. And if the player’s style of gameplay somehow embodies the persona of the depicted athlete in a way that the code does not, that is by definition a reproduction of the name or likeness by player, not by the game developer.

In other pending ROP cases, we’ve got DraftKings and FanDuel arguing to the Seventh Circuit that the district court properly kicked out a claim by student-athletes on the basis of the newsworthiness exception to Indiana’s right of publicity law. In N.D. Cal., Fox is seeking to knock out a claim by Muhammad Ali Enterprises, arguing that a broadcast segment featuring Ali that aired before Super Bowl LI was protected under both Illinois and California law.

The amicus briefs have landed in the FX/De Havilland fight in the California Courts of Appeal. Predictably, content creators, digital rights activists and law professors are supporting FX while the Screen Actors Guild supports De Havilland.

And in New York’s top court, a law professor amicus brief filed in the Lohan/Gravano case against Take-Two Software argues that (1) New York should strictly construe its right of publicity law to apply to commercial advertising and to the use of names or likenesses, as opposed to general suggestions of persona, and (2) should reject the predominant purpose and transformative use tests advocated by the plaintiffs.
Intrusion

Twitter is (at least for now) off the hook for alleged TCPA violations arising from text messages sent to recycled cell phone numbers, after the name plaintiff in a putative class action in N.D. Cal. dropped her case. Meanwhile, Dish Network claimed to be struggling to pay out a $61 million award in M.D.N.C. to consumers for illegal telemarketing calls, asserting that it cannot identify most of those entitled to relief; the judge rejected the argument.

Infliction of Emotional Distress

The Sixth Circuit handed the city attorney for Grand Rapids, Michigan, a win on an IIED claim brought by the parents of a child with developmental disabilities; according to the Court of Appeals, the attorney’s referring to the child as a “crack and heroin whore” in an email to another attorney was not sufficiently outrageous to support the claim.

Filmmaker Paul Haggis filed an emotional distress claim in New York state court against a woman who, he claimed, attempted to extort $9 million from him by threatening to publicize false claims of sexual assault. [Photo: Canadian Film Centre, CC BY 2.0]

Wiretapping/Eavesdropping

In addition to her new defamation action, Andrea Tantaros has moved to amend her complaint in S.D.N.Y. accusing Fox News Network of intercepting her communications to add new allegations, including claims that Roger Ailes used closed-circuit television cameras to spy on offices where female talent disrobed.

Access/FOIA

Well, this is interesting. Newly released records suggest that in 2016 the FBI considered investigating and taking legal action against those behind requests for large numbers of files relating to deceased Bureau officials – apparently for no reason other than that the Bureau didn’t understand why the requests were being made. Obstruction and pettiness in response to FOIA requests aren’t new (and there was plenty of both in this case as well), but it is outrageous that this was even on the table.

New Cases

Judicial Watch is back with another lawsuit in D.D.C., this time seeking access to FBI records relating to agent Peter Strzok’s involvement in the Mueller probe. Also in D.D.C., the
Reporters Committee for Freedom of the Press is seeking Customs & Border Protection documents on a government attempt to unmask a Twitter user critical of the Trump administration’s stance on immigration.

In the states, two attorneys sued Missouri Governor Eric Greitens and his staff in state court over their use of the Confide secret messaging app, in what the plaintiffs allege is a conspiracy to evade public records laws. A media coalition has sued in Nebraska’s state courts over prison officials’ refusal to produce records identifying the state’s supplier of execution drugs. The Las Vegas Review-Journal moved to unseal documents in the Nevada trial of Cliven Bundy. And just for a twist, New York’s largest police union (who, incidentally, have no sense of humor whatsoever) sued to block the release of body-cam video in three shootings involving police.

Access Granted

An investigative journalist reached a settlement with the Department of Homeland Security in a case pending in the Ninth Circuit, allowing the journalist to obtain certain records on how a coach for the Irish Olympic swim team who was accused of sexual assault was able to move to the United States.

We also had a couple of orders telling the federal government to try harder when responding to FOIA requests. The D.C. Circuit rebuked the FBI for failing to conduct a reasonable search in response to a request by the Reporters Committee for Freedom of the Press for records on FBI impersonation of media personnel. A judge in D.D.C. similarly criticized the State Department and National Archives for “anemic” attempts to locate emails sent by Colin Powell via an AOL account.

In other matters in D.D.C., a magistrate judge unsealed court records related to the FBI’s attempt to identify sources behind a New York Times reporter’s book about the Stuxnet virus attack on Iran’s nuclear program (more on this under Newsgathering below). Meanwhile, media outlets and advocacy groups obtained an order directing the Justice Department to turn the “Comey Memos” regarding the former FBI Director’s interactions with Donald Trump over to the court for in camera review.

The trial of Waymo’s case against Uber in N.D. Cal. for the alleged theft of self-driving car technology will be open to the public, after a media coalition intervened to oppose Waymo’s motion to close the courtroom doors. The Associated Press won access to court documents filed
in a pending lawsuit in D. Md. that reveal the identities of partners of the Kushner Cos. in various Maryland properties. In N.D. Ill., a federal judge ordered the clerk of the Cook County Circuit Court to cease withholding newly filed complaints from the press — a notable win for Courthouse News on an issue that it has been fighting across the country. (The clerk has already filed a notice of appeal.) A judge in D. Nev. unsealed search warrants and affidavits relating to the investigation of the Stephen Paddock shootings to be released, subject to limited redactions. In W.D. Tex., a judge rejected Randy Travis’ attempt to block Texas state officials from releasing footage of him taken during a 2012 DUI arrest.

There were several wins for transparency in the states on the recurring issue of public officials attempting to use private digital devices to evade public records laws, including an appellate ruling in Arizona, a settlement in Florida, and a ruling from Missouri’s attorney general.

A Colorado judge ordered the release of records related to the performance of a candidate for the position of Weld County Clerk and Recorder. ESPN finally succeeded in prying documents out of Michigan State University about sexual assaults on campus after three trips to court. A judge in New York held the NYPD in contempt for failing to release surveillance videos of Black Lives Matter protesters, giving them another 30 days to comply before imposing sanctions. A Nevada judge unsealed search warrant materials connected to the mass shooting in Las Vegas on October 1. An Ohio appellate panel held that access to completed juror questionnaires is an element of the presumptive right to access voir dire proceedings under the state and federal constitutions. Pennsylvania’s Office of Open Records issued a pair of pro-transparency decisions, holding that (1) applications from companies seeking to open marijuana production facilities and dispensaries and (2) Pittsburgh’s proposal to host Amazon’s “second headquarters” were public records.

And finally, after weeks of stonewalling, the West Virginia Supreme Court granted the press access to its warehouse, and in particular to an antique desk and leather couch recently removed from the private home of the state’s Chief Justice.

Access Denied

The D.C. Circuit ruled that the National Archives were not required to release draft indictments against Hillary Clinton related to the Whitewater scandal.

In D.D.C., a judge ruled that tweets by Donald Trump regarding the Trump Dossier did not constitute an official admission that the FBI had investigated the Dossier’s claims or possessed any documents responsive to a FOIA request. In N.D. Cal., recordings of the 2010 trial
over California’s Proposition 8 marriage amendment will not be released until at least August 2020, with a judge allowing for the possibility of a showing of a need for further delay. In S.D. Ohio, updated policies on face-to-face interviews with prisoners in Ohio state correctional facilities were held to have mooted a challenge to an earlier system under which reporters were denied access to prisoners involved in a 1993 riot.

Lists of towns with which former N.J. Governor Chris Christie wanted to improve relations are not subject to the state’s public records law, according to a New Jersey appellate division ruling. [Photo: Michael Vadon, CC BY-SA 4.0] The Ohio Supreme Court held that coroner records were allowed to be redacted under an exemption for confidential police investigatory records, refusing to order the release of unredacted autopsy reports in a 2016 unsolved octuple slaying. And Wisconsin’s attorney general opined that sexual harassment complaints against members of state government should remain confidential to respect the privacy of the victims.

Pending Cases & Appeals

The Connecticut Supreme Court has scheduled arguments for March 1 on the Hartford Courant’s effort to unseal evidence seized from the home of the Sandy Hook shooter.

The Illinois Supreme Court will decide whether the state legislature may block a pending request for a public record by creating a new amendment to the state’s FOIA law. The amendment in question was passed during the pendency of litigation over a records request that, under pre-existing law, had been improperly denied.

The New Jersey Supreme Court will hear argument on whether police dashcam video is a public record subject to disclosure.

Legislation

Kudos to New York, where a bill signed by Governor Cuomo in December now mandates an award of attorneys’ fees if a court finds that a state agency had no reasonable basis to deny a public records request.

Follow a June ruling that the case management system operated by the Virginia Supreme Court’s Office of the Executive Secretary is not a public record, Virginia is now considering two very different FOIA-related bills: A Senate bill would exempt the state’s judicial system from its public records law entirely, while a House bill would open the case management system to the public. The House bill has now cleared its subcommittee.
Miscellaneous

The D.C. Circuit has instituted live audio streaming of some of its arguments, while the Tenth Circuit has begun posting audio recordings of its arguments online. However, Vermont’s Supreme Court is considering requiring members of the media to register with its courts and prohibiting private citizens from recording or streaming video or taking pictures in court.

The Colorado Supreme Court rejected a call for uniform standards to be applied in the sealing of court files in criminal cases. Ah, well. It was a good idea and worth a try.

Newsgathering

Prosecution of Journalists

A jury in D.C. Superior Court found five protesters as well as freelance journalist Alexei Wood not guilty on charges relating to their participation in protests at Donald Trump’s inauguration; the judge had previously dismissed a charge of rioting against the six defendants. Following the verdict, prosecutors dropped charges against 129 other defendants, while proceeding against 59 remaining individuals (including Santa Fe Reporter journalist Aaron Cantú). Cantú has moved to dismiss his indictment.

A Florida appellate court vacated an anti-stalking injunction against a man who photographed the police arresting a woman; the injunction had been obtained by the woman arrested, but the appeals court held that photographing her arrest was a constitutionally protected activity regardless of her objections.

In Georgia, citizen journalist was acquitted of felony obstruction of law enforcement and criminal trespass by a jury in connection with her filming of a Republican rally in 2014, but was convicted on a misdemeanor obstruction charge. A North Dakota judge dismissed charges against a journalist for Mic who was arrested while covering the pipeline protests at Standing Rock Indian Reservation.

In New Jersey, members of a TV crew were arrested at Newark Liberty International Airport while attempting to send what TSA agents believed to be a fake bomb through a checkpoint. It turned out that the “bomb” was a new product that the TV crew was testing called “vacuum compression luggage”; they didn’t clear the segment with TSA in advance because they wanted to film agents’ reactions to the device. Well, now they know.
Facebook personality/citizen journalist Priscilla Villarreal, a/k/a Lagordiloca, was arrested for soliciting confidential information from Laredo Police Department officials in order to obtain a benefit. If that sounds questionable, it gets worse when you realize that she was only asking for material the police planned to disseminate anyway and that her alleged “benefit” was increased popularity on Facebook. I thought that was simply referred to as a “scoop.”

A Mexican reporter who has a price on his head for reporting on drug cartels and military corruption was on the road back to the border with his son to be deported when his attorney obtained a stay of the deportation order. U.S. immigration authorities have denied his asylum requests to date, and he and his son still face deportation if the Board of Immigration Appeals denies reconsideration of his case.

_Punishment of Sources_

The Eleventh Circuit affirmed the denial of pre-trial release for Reality Winner.

Recently released documents from D.D.C. show that prosecutors investigating the leak of information about the Stuxnet virus attack to a New York Times reporter have obtained a court order for access to the personal email account of former Joint Chiefs of Staff Vice Chairman Gen. James Cartwright.

_Trump Administration_

As anyone with a couple of neurons to bang together would have expected, the “Trumpy” awards were a damp squib of pathetic spectacle unworthy of a modern democracy. In other words, classic Donald Trump. Review the fact check on Trump’s accusations if you like, but really the only highlight was that the incident inspired Sen. Jeff Flake to give a harsh speech about the responsibility of the president – and Congress – to protect journalists and the First Amendment. It kind of makes you wish that more Republicans were retiring from the Senate, doesn’t it? (Okay, fine, knowing our membership most of you were probably wishing for that already.)

Trump’s “awards ceremony” was just one particular lowlight of a recent uptick in his attacks on the press. The Committee for the Protection of Journalists issued an end-of-the-year report detailing how Trump’s “fake news” rhetoric had been repeated around the world to justify the imprisonment of a record number of journalists. Meanwhile, inside the United States a Michigan man was arrested by the FBI for threatening to travel to Atlanta to unleash a shooting spree at CNN headquarters in retaliation for “fake news.”
Meanwhile, the fraught interactions between the White House and reporters continue. Reporters traveling with the president on Air Force One in December were surprised when a White House spokesperson refused to take questions on the record after reading a prepared statement on various topics; the reporters, for their part, declined to engage with the spokesperson off the record.

And then there’s Jim Acosta, who somehow has become the poster child for Trump’s abuse of the press. In December, Sarah Sanders warned Acosta – but not other reporters – that if he attempted to ask questions at a “pool spray” at a bill signing later that day, he could be denied access to such events in the future. Acosta asked a question anyway. Then in January, when Acosta pulled pool duty at an event where Trump welcomed Kazakhstan’s president to the White House, Acosta asked a question about whether Trump prefers immigrants from Caucasian countries. Trump responded by throwing Acosta out of the room while a deputy press secretary screamed in his face to keep him from asking any more questions.

[Photo: Gage Skidmore, CC BY-SA 2.0]

As others have pointed out, Acosta’s treatment certainly seems to stem either from the content of his questions or the content of his reporting more generally. Either way, the First Amendment line has not only been crossed but is receding rapidly in the rear-view mirror.

Lawsuits

The Ninth Circuit affirmed in part and reversed in part a district court ruling declaring Idaho’s “ag gag” law unconstitutional. The court affirmed an injunction against the law’s enforcement with respect to provisions criminalizing misrepresentations made to enter an agricultural facility and recordings made of such a facility’s operations. However, the court vacated the injunction in part with the result that misrepresentations made to obtain employment by, or records of, an agricultural facility may still be prosecuted.

A journalist filed a lawsuit in S.D. Ohio after he was shot in the stomach by a deputy (pictured at right) who could not tell the difference between a camera and a gun. The journalist, who claims that he was photographing a traffic stop from a safe distance after alerting the deputy to his presence, also alleged that his news outlet suffered retaliation after the incident.

The Hawaii Supreme Court joined the ranks of courts who have identified a constitutional right to film police officers. The city of Manchester, N.H., was a little late to that
party, and found itself shelling out $275,000 to settle a civil rights action filed by a man who was arrested while filming cops.

Credentials

So, you might remember the back-and-forth over whether you’ll need to register your drones with the FAA. Originally the FAA said yes, then a judge said no. Now, the answer is yes again, under a House bill that was passed and signed into law.

Miscellaneous

A new bill introduced in Kentucky’s legislature is a great example of a content-based measure that is disguised as a time, place and manner restriction. House Bill 149 would ban motorists from taking video or pictures of car crashes while driving, but does not prohibit passengers or drivers in stopped cars from doing the same. It’s clearly not a safe driving measure, though, as other photography is not addressed and the sponsor of the bill explicitly stated that her initial hope was to ban posting of wreck photos to social media before family could be notified.

Prior Restraint

A judge in N.D. Cal. denied a supplement maker an injunction preventing an online pharmaceutical database from changing how it characterized the plaintiff’s products, calling the order sought by the supplement maker a form of prior restraint. However, the plaintiff’s trade libel/Lanham Act complaint survived the defendant’s anti-SLAPP motion.

Paul Manafort found himself in the uncomfortable position of attempting to explain to a judge in D.D.C. why he didn’t violate a gag order in his criminal case by allegedly ghostwriting an op-ed about his lobbying work in Ukraine. In response, he asserted that he merely edited a third party’s work for errors, that the gag order did not prohibit the op-ed, and that if the order did have such an effect, it would violate his First Amendment rights.

A judge in D. Md. upheld a non-disclosure agreement entered into between the Baltimore Police Department and a woman tasered by three police officers against a First Amendment challenge by online news site Baltimore Brew, holding that the site’s claimed inability to gather news from the victim did not give it standing to attack the NDA. Clever argument, though.
Project Veritas dodged a prior restraint in E.D. Mich., with a judge denying a teachers’ union’s motion for a preliminary injunction against the publication of documents that they claim were illegally obtained. The court also vacated a restraining order against publication that had been entered by a state court judge before the case was removed to federal court.

There were more twists and turns in the “Barley House” case that I talked about last issue, with the case now removed to N.D. Ohio. The injunction in question, as you might recall, was issued against two YouTubers by a state court judge and prohibited them from talking about the Barley House bar on social media platforms. After removal, the parties reached a partial settlement agreement that superseded the injunction and included a provision barring the defendants from making certain kinds of statements, but the agreement was never docketed and is not publicly available. Soon thereafter, one of the YouTubers was accused of contempt based on a new video she published. Prof. Eugene Volokh has now moved to intervene in order to gain public access to the agreement, arguing that punishing speech based on an undisclosed agreement violates the First Amendment.

Phew. Okay, turning now to state court decisions.

The Arizona Court of Appeals flipped a trial court order temporarily banning members of the media from publishing the name of a prosecutor involved in a pending murder case, holding that the order amounted to an unconstitutional prior restraint.

The Iowa Supreme Court had an odd tangle with prior restraints when one of its justices issued an order against the publication of information drawn from court records that were legally obtained by a reporter for the Des Moines Register but then sealed by judge after the fact. The justice later lifted his order, stating that it had been a temporary measure to allow briefing to occur. [Photo: Cjf83, CC BY-SA 3.0]

A Michigan appellate court reversed an injunction barring WXYZ-TV from publishing pictures of an elderly couple that had been placed under guardianship.

In Missouri, an appeals court ruling upheld a trial court order denying a grand juror’s petition to be allowed to comment publicly on what she considered to be misconduct during the grand jury process.

Finally, a Washington Superior Court judge vacated an injunction against the publication of “memes” about a community activist.
Information Infrastructure

Federal Communications Commission

Well, this was predictable. After Trump referred to certain countries as “shitholes” (or perhaps “shithouses”), the FCC received complaints against NBC and CNN for repeating the term in their coverage. I could make a comment about the complainants being sensitive to hearing words on television that they don’t mind from their president, but let’s face it, they’re probably in denial that Trump used the term in the first place. [Photo: Billy Hathorn, CC BY 3.0]

The Prometheus Radio Project has sued the FCC in the Third Circuit over its decision to eliminate print/broadcast cross-ownership rules. The NAB has moved to intervene. Meanwhile, the FCC and Free Press continue to tangle in the D.C. Circuit over the agency’s decision to reinstate the UHF discount; further briefing was received from both sides. In other deregulatory news, the elimination of the Main Studio Rule took effect on January 8, the agency has launched a review of the TV station ownership cap, and Commissioner Michael O’Rielly has proposed lifting mandates on broadcasters to include educational and informational children’s programming.

In a move that highlights the perils of native advertising, the FCC gave notice to Sinclair that it was seeking a $13 million fine for failure to disclose that some of its “news” programming was sponsored content produced for a third party. The FCC also took aim at a Miami-area pirate radio station, imposing a fine of $144,344.

The FCC’s Broadband Deployment Advisory Committee was accused of cronyism by San Jose Mayor Sam Liccardo, who resigned from the Committee after deciding that “the industry-heavy makeup of BDAC will simply relegate the body to being a vehicle for advancing the interests of the telecommunications industry over those of the public.”

Regional cable TV service Wave Broadband filed a complaint with the FCC against several Comcast units, alleging that Comcast was using unfair leverage to force it to carry regional sports networks to basic-tier subscribers. Meanwhile, Starz has asked the FCC to penalize Altice for dropping sixteen channels from its NYC-area lineups without providing a 30-day notice period to subscribers. And New Jersey’s two U.S. senators have teamed up to petition the FCC to crack down on WWOR for allegedly failing in its obligation to cover New Jersey news.
Finally, the FCC voted to impose new rules on the delivery of wireless emergency alerts following January’s false missile alert in Hawaii and complaints from local governments attempting to cope with disasters.

**Net Neutrality**

Despite widespread protests, Congressional dismay, allegations of net neutrality complaints left off the FCC docket, dead people offering their opinions on the issue, and calls for delay, the FCC curply rejected any postponement and voted as anticipated to repeal the Open Internet Order on December 14. It quickly released the final version of the order on January 4, and so now we’re off to the races:

- The FCC tried to get a jump on complaints before the vote by releasing its draft Memorandum of Understanding with the Federal Trade Commission about how ISPs would be policed in the future. Not all were convinced.
- The attorneys general of 21 states have filed suit in the D.C. Circuit against the FCC, as have advocacy groups, with The Internet Association has pledged its support.
- Senate Democrats have lined up the support they need to force a vote on the repeal under the Congressional Review Act, and at last count were one vote shy of having the numbers they need to pass a joint resolution in the Senate (of course, there’s the little matter of the House, never mind getting Trump to sign off on it).
- Republicans in the House are pushing an alternative net neutrality bill. AT&T is lobbying Congress for a limited bill that would also apply to edge providers.
- Notwithstanding the FCC’s attempt at preemption, some state legislatures are considering bills that would either reinstate net neutrality principles locally or forbid state and local governments from doing business with ISPs that do not comply with such principles. California’s senate passed a bill incorporating both measures.
- The governors of Montana and New York issued executive orders along the same lines directed at state agencies. Montana’s governor issued a fact sheet explaining why the executive order was not covered by the FCC’s preemption of state net neutrality laws, while also challenging the FCC’s authority to preempt state law on that issue in the first place.
- A new bill is being floated in Congress would prevent states from passing laws that ban municipalities from building community broadband services as an alternative to, or in the absence of, private-sector ISP offerings. It’s a nice idea, but unlikely to go anywhere.
Oh, and finally there’s DJ Baauer, who took offense that his “Harlem Shake” was used without permission by The Daily Caller for a video in which FCC Chair Ajit Pai claims that the repeal of net neutrality will have no effect on users’ online experiences. Such experiences were described in the video as including the posting of stale old memes like “Harlem Shake” videos, making a fair use defense pretty strong. Still, one can understand his being upset about his music being in a video terrible enough that it belongs in a Hall of Shame alongside classics like the Happy Tree Friends YouTube Copyright School.

Mergers & Antitrust

Settlement talks between AT&T and the Department of Justice over the former’s putative merger with Time Warner fell through, and a trial date in D.D.C. has been set for March 19. The judge in the case has stated that he will not impose heightened protections for confidential information. Adding to its troubles, AT&T is facing another antitrust lawsuit in C.D. Cal. from a small cable subscription service alleging that AT&T is charging exorbitant prices for sports content.

Merger conditions on the Comcast-NBCUniversal merger expired in January. Some Democrats have raised fears of anti-competitive behavior, especially in the absence of the Open Internet Order.

The FCC suspended its review of the Sinclair-Tribune deal in order to give Sinclair time to comply with FCC ownership rules (or, if you’re cynical, to give the FCC time to change the rules). The DOJ, for its part, indicated in December that Sinclair must divest around a dozen local stations in order to secure approval, but more recent reports suggest that Sinclair is close to a deal with the DOJ on that front and that approval will be coming shortly.

Finally, Democrats called for hearings on Disney’s planned acquisition of 21st Century Fox.

Miscellaneous

The Trump Administration is not contemplating a federally-operated national 5G wireless network. Forget you ever even thought that might have happened.
Digital Content

Takedown Mania

An update from Professor Volokh on the troubling pattern of libel lawsuits filed against non-existent defendants to secure takedown orders: The Arizona Bar Association has filed a complaint against two lawyers allegedly engaged in such a scheme, accusing them of filing fraudulent and/or frivolous lawsuits.

Section 230

SESTA and FOSTA are still alive and kicking. Support for SESTA in the Senate is becoming even more aggressive, with co-author Sen. Rob Portman (R-OH) threatening that broader legislation directed at the internet would emerge if digital companies do not get behind his efforts. On the other hand, an amended version of FOSTA has been introduced in the House that is, if not entirely unproblematic, a far sight better than the original version. Prof. Eric Goldman has further updates.

In the prior issue of the Monthly Daily, we mentioned a suit filed against Google in N.D. Cal. by Prager University, a producer of conservative-oriented videos that were flagged by YouTube as containing “potentially mature” content. The designation resulted in the videos been blocked by users who had activated “Restricted Mode” on the service. The plaintiff has now sought an injunction preventing YouTube from flagging its content absent specific objective indicia of offensiveness, while Google has moved to dismiss the case under Section 230.

The D.C. Circuit heard argument in January on an appeal by the owner of a sportswear retail outlet, who asserted that Google waived Section 230 protection by failing to enforce its content moderation policies against allegedly defamatory blog posts. (Good luck with that.) In D.D.C., a locksmith’s claim that Google’s indexing and advertising of websites for “scam locksmiths” unfairly required him to purchase advertising to compete was dismissed.

An interesting ruling from N.D. Cal. let a social networking site off the hook for a user’s overdose from drugs he purchased via the site, rejecting efforts to avoid Section 230 based on the site’s alleged data mining, recommendation of content to particular users, and failure to warn. A judge in C.D. Cal. granted Airbnb a Section 230 win against Los Angeles landlords who complained that their tenants were offering subleases through the site in violation of explicit no-Airbnb clauses in their leases.

The Northern District of California held that Twitter, Facebook and Google were not responsible for a cop killer’s alleged exposure to Islamic extremism under Section 230, and also
found no plausible allegations of a connection between Hamas and the crimes in question. Notably, the court left open the question of whether a social media company could be held liable for sharing advertising revenues with a terrorist organization. Along the same lines, a judge in E.D.N.Y. denied reconsideration of his dismissal order and denied leave to amend in another terrorism-related social media case.

But even as these terrorism and violence-related cases keep falling flat, they keep coming. We’ve got another new claim from the family of a crime victim, this time in Ohio’s state courts. The complaint takes the form of a negligence claim, alleging that Facebook could have prevented the victim’s shooting death by alerting law enforcement to the gunman’s intentions. It’s another failure-to-warn variation, of course, and is likely to fail for lack of a duty owed to users even if Section 230 is not found to apply.

Grindr had a Section 230 win in S.D.N.Y., with a ruling that the operator of the service is not responsible for harassment through the creation of fake profiles. Backpage.com is facing yet another sex trafficking lawsuit in Texas state court, this time filed by an 18-year-old rescued by law enforcement from a Houston hotel.

Finally, controversial right-wing activist Charles C. Johnson sued Twitter for banning him from the service, alleging that the site violated his free speech rights under the California Constitution, among other claims. One could reasonably expect a Section 230(c)(1) or (2) defense here.

Hate, Terror, and Other Internet Nastiness

The Ninth Circuit bypassed Section 230 issues to rule that Twitter could not be held liable for the deaths of government contractors killed by an ISIS attack in Jordan, finding that the plaintiff family members did not establish causation between terrorist propaganda on Twitter and the attack under the Anti-Terrorism Act.

Liable or not, Alphabet/Google/YouTube, Facebook and Twitter were called back onto the Congressional carpet yet again, this time with the Senate Commerce Committee holding a hearing on the steps that platforms are taking to fight extremist propaganda. Questions focused on the tools being used by platforms and some notable examples of extremist content slipping through the filters, before spiraling out to Russian misinformation and platform responsibility more generally. Democrats separately chastised Facebook and Twitter for failing to investigate if Russian bots were behind the #ReleasetheMemo campaign.
More from the never-ending battle:

- Google has altered its news search results to suppress content that hides its country of origin.

- Facebook has started to suppress content that asks or goads users to like, share or comment in order to artificially boost the publisher’s statistics. On the other hand, Facebook has given up on tagging “fake news” with a “disputed” flag, after realizing that the flag was triggering readers to entrench rather than reconsider their beliefs; instead, it will focus on providing readers of such material with access to fact-checked articles.

- Twitter has launched a number of new efforts, including: enforcing new policies on violence, abuse and hate (though not without hiccups); alerting users if their content has been removed in response to local laws or legal demands; and alerting over 1.4 million users who followed or engaged with accounts linked to Russian propaganda campaigns during the 2016 elections.

  Turning to bad behavior by users, California is prosecuting a man for harassment for posting five insulting comments on the Facebook page of the Islamic Center of Southern California. The prosecution is explicitly based on the content of the comments, and is facing a pending motion to dismiss.

**Miscellaneous**

A little bit of this, a little bit of that, eye of newt and wing of bat:

- E.D. Wis.: Milwaukee County’s attempt to impose a licensing ordinance on the playing of augmented reality games in county parks has fallen flat, resulting in a settlement payment of $83,000 to a game manufacturer that challenged the ordinance in federal court.

- Cal. App.: An appellate panel ruled that the dismissal of age discrimination claims against Tinder was inappropriate, in a case where the plaintiff alleged that users over the age of 30 were charged an additional $10 per month. That’s right, you’re past your sell-by date if you were born after 1987.

- Cal. Super.: Oath and Mozilla have filed dueling complaints over a legacy agreement whereby Mozilla once provided search services for Yahoo.

- Ind. Super.: Indiana’s attorney general has sued a hotel that attempted to enforce a $350 penalty clause in its terms and conditions. The clause prohibited guests from leaving
negative reviews unless they first gave management an opportunity to correct problems during their stay.

- New York’s attorney general is investigating a company that is in the business of selling automated followers for social media accounts, some of which use the information of actual users.

- Or. Cir.: A magistrate judge recommended the dismissal of a class complaint for racial discrimination against Airbnb, finding that the name plaintiff had not suffered the harm alleged.

- ProPublica reports that Donald Trump is not alone in attempting to quiet his critics online; according to a recent FOIA study, governors and federal agencies are blocking almost 1,300 accounts on Facebook and Twitter.

- Another ProPublica report claims that employers are using Facebook’s ad targeting tools to direct notices about job openings away from older candidates.

- A settlement condition between Google and the FTC that barred Google from scraping data for search results without sites’ consent has reached the end of its five-year term. However, Google has represented to the government that it has no intent to resume the practice.

- As of the beginning of this year, the Library of Congress is no longer archiving every tweet. Alas, your spur-of-the-moment musings will be lost to the ages.

**Digital Privacy**

*Anonymity*

In the last issue, you might recall that we discussed a Sixth Circuit decision holding that an anonymous defendant in a copyright infringement action might be able to resist unmasking even after a finding of liability, if revelation of his/her identity might chill other protected speech. The MLRC has since been informed that the Court of Appeals has rejected a petition for rehearing on the ruling.

The Copia Institute has filed an amicus letter with the California Supreme Court in support of Yelp’s request to depublish part of a recent Court of Appeal ruling that adopted a more limited standard for protection of anonymous speech than other courts have adopted.

As I mentioned up in Defamation, a South Carolina judge ordered Google to unmask the poster of a one-star review of a psychiatrist, after which the psychiatrist dropped his claim for
unexplained reasons. The judge went seriously awry in declaring the review (which contained nothing but the single star) to be commercial speech, and thus holding the author’s First Amendment anonymity rights to be entitled to minimal protection.

CFAA/Hacking

The Ninth Circuit ruled that a third-party servicer of Oracle software did not violate California or Nevada hacking laws by downloading data from Oracle’s website that it was allowed to access but using tools prohibited by the site’s terms of service. (However, the court held that the servicer was still on the hook for copyright infringement for using one client’s software license to download software for other clients. Not too surprising.)

Also in the Ninth Circuit, briefing continues in hiQ Labs v. LinkedIn, in which LinkedIn is contesting an injunction allowing hiQ to continue scraping users’ public profile data from its site.

Southwest Airlines has filed a CFAA claim in N.D. Tex. against a defunct service that scraped data from the Southwest site to inform booked passengers if the price of their tickets had dropped (and thus made them eligible to take advantage of no-fee cancellation and rebooking policies). One fairly serious problem with the claim is that the service stopped scraping data after the airline served a cease & desist letter, taking the case outside of the facts found to be determinative in decisions like Facebook v. Power Ventures.

Control of Personal Information

A judge in N.D. Cal. dismissed privacy-based claims against San Francisco’s BART system over an app intended to allow riders to report crimes or suspicious activity they saw on the service; the plaintiff claimed that the app unlawfully transmitted the user’s clientid and location information to the app’s servers. While BART failed to establish that users were reasonably notified of tracking by a privacy policy linked at the end of the app’s terms of service, the court found that users were nevertheless aware that the app must use location information to serve its purpose and that the use of that information was not egregious.

Under a stipulated order with the FTC in N.D. Ill., smart toy manufacturer VTech was whacked with $650K in fines for unsecure transmission of data from its networked toys and a lack of security on its website, in violation of its own privacy policy.

In D. Nev., the FTC and the state of Nevada have teamed up in a complaint against revenge porn site MyEx.com, alleging, well, just what you think they’d be alleging.
A new issue has arisen as the ability to use artificial intelligence to manipulate video improves: the replacement of faces in porn videos with those of celebrities (or others). Commentators such as Mary Anne Franks and Danielle Citron have expressed concern about the practice falling between the cracks of existing privacy and reputation-based doctrines, which from the media bar’s perspective should raise concerns about courts blurring of rights of publicity, false light, and defamation law to reach a form of injury that is sui generis. Whether there should be a cause of action for such claims of injury is a far more complex question.

Encryption

FBI Director Christopher Wray has gone on the record claiming that, despite all available evidence (and math) to the contrary, secure encryption with backdoors for government is a possible thing. Senator Ron Wyden (D-OR), always on the lookout for threats to online freedom, has asked Wray to identify any cryptographers or other experts who might have somehow given him that impression. Meanwhile, newly released documents indicate that the Director of National Intelligence has taken the position that the Foreign Intelligence Surveillance Court does not have to be consulted before the government demands the inclusion of backdoors.

The Massachusetts Appeals Court has ruled that demonstrating ownership of a smartphone is the only showing that the government needs to make under the Fifth Amendment in order to compel the owner to produce a password. The Minnesota Supreme Court held that compelling someone to unlock their phone with a fingerprint isn’t testimonial and therefore raises no Fifth Amendment issue at all.

Internet Surveillance

The NSA’s surveillance powers under Section 702 were reauthorized for another six years with minimal changes, after the House passed a reauthorization bill and enough Democrats broke ranks in the Senate to overcome a filibuster. So that’s that until 2023.

The Sixth Circuit issued a remarkable ruling suggesting that if there is reason to believe a suspect used a computer to commit a crime, then there is probable cause to search the suspect’s home because most people have computers in their home that might have been used for the crime.

A magistrate judge in D.D.C. ruled that a cruise line does not become a “provider of an electronic communication service” under the Stored Communications Act by offering internet connections to guests.
A New York appeals court held that there is no expectation of privacy in historical cell-site location information, an issue that the Supreme Court is expected to address later this year in Carpenter v. United States.

Government demands to Facebook for information on users continue to increase, according to data recently released by the company. Meanwhile, Google has started including the text of unsealed National Security Letters in its Transparency Reports.

Transatlantic Privacy

In December, the WP29 released its first annual review of the EU-U.S. Privacy Shield agreement, and it’s not happy about what it sees as a failure to make progress on various issues identified previously. Absent improvements, it has threatened to refer the decision supporting the Privacy Shield to the courts for reconsideration. (The clean reauthorization of Section 702, whose provisions were a matter of particular concern, is unlikely to improve their attitude.)

Further complicating matters, our old friend Max Schrems has been given leave by the CJEU to pursue personal privacy claims against Facebook in his home country of Austria. However, he was permitted to proceed only in his own name and not on behalf of a class of Facebook users. [Photo: Manfred Werner – Tsui, CC BY-SA 3.0]

Meanwhile, U.S. companies have begun the final scramble to prepare for the effective date of the EU’s General Data Protection Regulation in May, while the EU is urging businesses to take the deadline seriously. In January, Facebook rolled out a privacy center on a global basis to give users improved control of their data, while other major platforms are proclaiming their readiness.

Intellectual Property

Copyright – New Cases

This month’s new cases include:

- C.D. Cal.: Netflix, Amazon, Universal, Columbia, Disney, Fox, Paramount and Warner Bros. joined forces to file suit against Dragon Media, which manufactures a set-top box pre-loaded with software that can be used to access pirated content.
- C.D. Cal.: Playboy Entertainment has sued Boing Boing over an article linking to a collection of scans of Playboy Centerfolds hosted by a user on Imgur (and since removed).
• C.D. Cal.: A complaint filed against Spotify by Wixen Music Publishing alleges that over a fifth of the songs on the service are infringing, including songs by Tom Petty, Weezer, Neil Young, and more.

• C.D. Cal.: Jessica Simpson is being sued by a photo agency for posting a paparazzo’s snap of her to her Instagram account without permission.

• C.D. Cal.: Redbox, which has been locked in a copyright battle with Disney about the distribution of download codes for Disney films, has filed a new lawsuit seeking to cancel Disney’s ability to enforce its intellectual property rights on the grounds of copyright misuse.

• N.D. Ga.: A coalition of major music labels filed suit against Fit Radio, a fitness app that uses songs by artists such as Beyoncé and Justin Bieber without authorization and that the plaintiffs allege is ineligible for a mandatory license.

• N.D. Ill.: Gillian Flynn, the author of hit novel “Gone Girl,” and the team behind the movie based on the book have been sued by a writer who claims that the defendants copied from her screenplay. The allegations of Flynn’s access to the screenplay are attenuated at best.

• N.D. Ill.: Yet more litigation from the estate of eccentric photographer Vivian Maier, this time alleging that the owner of 20,000 of her prints wrongfully exhibited and sold her photographs at an unauthorized gallery showing.

• S.D. Ind.: Educational publisher Pearson sued the operator of a for-profit website that it alleges used entire test banks created by Pearson to generate interactive flash cards.

• D. Mass.: The estate of decades-transcendent music icon Prince sued a Massachusetts man accused of posting six videos of Prince performing live in concert to YouTube, allegedly infringing copyrights in the songs performed.

• D. Mass.: An unusual unfair business practices claim filed by a streaming video service alleges that a competitor’s trafficking in pirated content undermines its ability to compete fairly for customers. I foresee a preemption argument.

• S.D.N.Y.: A music photographer has alleged that Getty Images reproduced, displayed and sold twelve of his photographs of B.B. King without permission.
• S.D.N.Y.: Two Australian musicians have sued Ed Sheeran, Tim McGraw and Faith Hill over “The Rest of Our Life,” alleging that their song “Where I Found You” may have been leaked to the defendants by a marketing manager at Sony Music.

• S.D.N.Y.: A nominee for the Grammy for Best Instrumental Composition was sued by his former teacher, who alleges that the nominated composition copied from his work.

• N.D. Ohio: Oh, look, it’s another tattoo claim. This time it’s a tattoo artist alleging infringement by digital avatars of NBA stars appearing in the NBA 2K games that are detailed enough to see body art.

Copyright – Plaintiffs’ Victories

The Eleventh Circuit gave Rick Ross another shot at litigating his copyright claim against LMFAO for allegedly copying his song “Hustlin’” for their song “Party Rock Anthem,” ruling that mistakes Ross made in the copyright registration process did not invalidate his registration.

Plenty going on in C.D. Cal.: Indie rockers Sleigh Bells settled their claim against Demi Lovato over sampling from their “Infinity Guitars” for her song “Stars,” and dismissed their case. Atari settled a lawsuit against Nestle over a commercial including an unauthorized display of Atari’s classic game “Breakout” wherein the bricks were replaced with Kit Kat bars. The owners of Grumpy Cat, a/k/a Tardar Sauce, were awarded over $710K in damages for copyright and trademark infringement by a jury based on the unauthorized use of the perpetually scowling feline’s famous mug. Studios and streaming companies obtained a preliminary injunction against TickBox, which manufactures a device to simplify access to streaming content; the injunction compels TickBox to alter its user interface and change its advertising in order to avoid encouraging piracy. And Epic Games won an order allowing it to serve a plaintiff in Russia with a copyright complaint by e-mail, after receiving a DMCA counter-notice from the defendant bearing his e-mail address and an agreement to accept process.

A judge in S.D. Cal. held that Dr. Seuss Enterprises had stated copyright and trademark claims against defendant ComicMix over its attempts to publish a crowdfunded Seuss/Star Trek mash-up book entitled “Oh, The Places You’ll Boldly Go!,” and rejected a fair use defense as a matter of law. There goes another great idea likely to be stymied by a failure to talk to a lawyer...

Two pranksters from New York who faked their way onto morning show “Hello, Wisconsin” with a made-up strongman act and were alleged to have violated Gray Television Group’s copyrights by using the event as part of their “Found Footage Festival” have settled claims pending against them in E.D.N.Y. as a result of the stunt.
Louis Vuitton might have lost its lawsuit in S.D.N.Y. against My Other Bag over the latter’s parody tote bags, but it avoided an award of attorneys’ fees. The defendant plans to appeal.

A dispute in S.D.N.Y. between the producers of a documentary and Michael Jackson’s estate over alleged infringement in photos and video of the singer will go to trial, after cross-motions for summary judgment were denied following the court’s finding that facts concerning copyright ownership were in dispute and the producer’s fair use defense could not be established as a matter of law on the current record.

In an odd ruling where the substance of the court’s opinion is contained entirely within a single multi-page footnote, a judge in E.D. Pa. denied a motion to dismiss filed by Netflix on claims that its movie Burning Sands infringed the plaintiff’s books of the same name. Reading the fine print, the court held that there were sufficient similarities between the works to survive a Rule 12(b)(6) motion; however, because it was concerned about personal jurisdiction against two individual defendants, the court set a short schedule for expedited discovery on that issue.

Copyright – Defense Victories

Copyright ownership proved a serious stumbling block for plaintiffs this month. Two reality stars failed in their bid in C.D. Cal. to assert copyright interests in their performances on the show “Little Couple,” with the court invoking the Ninth Circuit’s decision in Garcia v. Google. A songwriter who claims that Dr. Dre unlawfully sampled his work for “If It Ain’t Ruff” lost his infringement case in W.D. Ky. after the court ruled that he did not in fact own the song that was sampled. Time Warner and related entities defeated a claim over its series Black Jesus on Adult Swim in S.D.N.Y., with the court finding no similarity between the show and the plaintiff’s work beyond the uncopyrightable idea of a black Jesus. A copyright troll that was pursuing BitTorrent users for piracy of the film Fathers & Daughters had its case kicked out of D. Or. when the defendants pointed out that the plaintiff had signed away its rights to a third party. And another troll suing over Once Upon A Time In Venice is facing even greater scrutiny in W.D. Wash., as its ownership of the copyright, its methods of detecting infringement, and even the existence of its expert witnesses are being questioned by the court.

Disney defeated a claim over hit film Inside Out in C.D. Cal.; the court ruled that the plaintiff’s concepts for emotion-based characters were not sufficiently defined to warrant copyright protection. A porn producer failed to demonstrate that a video-sharing site had violated a copyright settlement in N.D. Ill. by restoring the producer’s content to public access as part of a cloud server switch, because it could not identify specific infringed content on the new server. And
a fight over the copyright in a videogame was kicked out of W.D. La. after the court held that a DMCA counternotice filed by a foreign national does not automatically create personal jurisdiction in the plaintiff’s home state.

The very meta fight to bring “We Shall Overcome” into the public domain has ended in S.D.N.Y., with a settlement in which the song’s publisher has agreed that copyrights in the classic protest anthem have expired. U2 and Universal Music defeated an infringement suit in S.D.N.Y. over the band’s 1991 single “The Fly.”

Warner Bros. and New Line settled a lawsuit in S.D. Tex. over horror film The Conjuring with an author who claimed he held the exclusive right to produce derivative works from the case files of the paranormal investigators depicted in the film. The plaintiff dropped his lawsuit with prejudice for no money, a move that seems to have been driven by a much deeper and complicated story behind the scenes.

Copyright – New & Pending Appeals

The Second Circuit found that Broadcast Music, Inc’s antitrust consent decree with the U.S. Department of Justice was silent on the question of whether the company was permitted to grant fractional licenses in musical works. Accordingly, the court held that such licenses were not prohibited (and were perhaps even required to be offered) under the decree.

The Ninth Circuit heard argument in a weird case in which an Egyptian composer attempted to apply foreign moral rights concepts to a copyright claim against Jay-Z over “Big Pimpin’.” The district court had bounced the case as relying on principles that did not exist in U.S. copyright law.

Copyright – Miscellaneous

Did January 1st of this year mark the last time that no new works entered the public domain due to the 1998 extension of copyright terms? Absent another extension from Congress, that seems likely to be the case, and the major players who supported the 1998 extension seem disinclined to fight for one. Of course, that doesn’t mean they’re leaving their IP unprotected, as anyone who’s seen Steamboat Willie used as a trademark at the start of a recent Disney movie should know.

Content producers and tech companies are at odds again with respect to the renegotiation of the North American Free Trade Agreement under Donald Trump. Each side is urging that any
new deal include its preferred approach to questions of intermediary liability for copyright infringement. In related news, Trump’s withdrawal from the Trans-Pacific Partnership negotiations has apparently ensured that, at Canada’s insistence, protective copyright measures will not be included in the agreement.

A new bill in the U.S. Senate sets forth a new structure for compensating copyright holders for music streaming. The bill has the support of licensing agencies but broadcasters are, predictably, not entirely on board.

**Commercial Speech**

*Trademark*

No one would accuse Funko’s wide-ranging series of big-headed (and to my mind, rather creepy) collectible dolls of being particularly lifelike, but its attention to detail with respect to the figurines’ accessories has landed it in hot water. Gibson Brands, which manufactures Les Paul guitars, has claimed in C.D. Cal. that certain dolls are shredding on axes that infringe its marks in the Les Paul design. Also in C.D. Cal., pornography/cryptocurrency company Vice Industry Token (which is apparently experimenting with ecash as a method of monetizing porn) has sued for a declaratory judgment that its name is not infringing after receiving a C&D from Vice Media.

Local news website Hidden City Philadelphia has sued ABC in Pennsylvania state court over the latter’s series of “Hidden Philadelphia” videos. My instinct is that this one won’t fly – the “Hidden” sobriquet seems fairly commonplace in the travel news market – but we’ll see.

Event organizers scored a couple of trademark wins. Coachella built on an earlier win against the “Filmchella” movie festival in C.D. Cal. to block the use of “Filmchilla” as well. (If the defendants move on to “Filmzilla,” they might have other problems.) Meanwhile, San Diego Comic-Con won its jury trial in S.D. Cal. against Salt Lake Comic Con; the Salt Lake team has moved for a new trial.

Orion Pictures and MGM Studios successfully fought off a trademark suit filed by The Sporting Times in W.D. Ky. over the appearance of a mocked-up cover of the magazine in the baseball biopic Spaceman. MGM is now seeking its attorneys’ fees. Dentsply Sirona (you guessed it, a dental supply company) lost a trademark infringement action against the operator of an online marketplace for dental supplies in M.D. Pa., with the court finding that the operator lacked the necessary awareness of counterfeit products for it to be held liable.
It seems that the brother of drug kingpin Pablo Escobar has dropped his efforts to extort trademark licensing payments out of Netflix relating to the show “Narcos.” Well, that’s a relief.

In appellate activity: The Fourth Circuit, following The Slants’ win in *Matal v. Tam*, vacated rulings cancelling the Washington Redskins’ federal trademark registrations. The Sixth Circuit handed Viacom a win on an infringement claim over merchandise associated with the Nickelodeon “Bubble Guppies” cartoon, affirming a ruling that the plaintiff had failed to establish consumer awareness of its brand of children’s clothing. The Ninth Circuit denied rehearing on its decision rejecting Empire Distribution’s case against Fox over its show *Empire*. The Eleventh Circuit held that one of the founders of the Commodores lost the right to use the band’s trademarks after his departure. [Photo: Carl Lender, BY-SA 3.0] And finally, the Federal Circuit, ruling in favor of the manufacturer of FUCT brand clothing, held that the bar on registration of immoral or scandalous marks is content-based even if applied neutrally as to viewpoint.

**Compelled Commercial Speech**

The Ninth Circuit has granted en banc rehearing on a panel decision upholding mandatory health warnings in San Francisco for soda and sugary drinks.

**Restricted Subject Matter**

On remand from the Supreme Court in *Expressions Hair Design v. Schneiderman*, the Second Circuit asked the New York Court of Appeals to decide whether N.Y. state law in fact prohibits characterizing fees for using credit cards as a surcharge (as opposed to a discount for cash). Meanwhile, the Ninth Circuit followed *Expressions Hair Design* in holding that California could not force merchants to call such fees a discount for cash.

A judge in D.N.J. held that if it’s legally permissible to bring your own bottle into strip clubs, strip clubs have a First Amendment right to advertise that fact or any other legal behavior.

**False Advertising**

Arbitral immunity does not extend to claims of false advertising for arbitration services, according to a Ninth Circuit ruling against the American Arbitration Association.

The Middle District of Florida held that allegations of disparagement of a competitor’s products in service of a profit motive is enough to claim that the speech is commercial, even if there is no proposed commercial transaction.
The District of New Mexico allowed false advertising claims to proceed against the manufacturers of cigarettes billed as “natural,” “organic,” and “additive-free,” and rejected First Amendment defenses along the way.

A magistrate judge in the Eastern District of New York recommended allowing models to pursue false endorsement claims in a case alleging unauthorized use of their images to promote a Long Island strip club. Rebecca Tushnet raises an interesting question about whether standards for determining whether there is a celebrity endorsement should be different in the strip club context.

Advertising that your firm will represent clients in a particular location when it intends to refer such clients to other firms might constitute false advertising and unfair competition, according to a ruling in E.D. Pa. denying a national firm’s motion to dismiss.

EHarmony settled false advertising claims in California for $2.2 million; the site allegedly failed to live up to its promises with regards to refunds for automatically renewed subscriptions.

**Professional Speech**

The Fourth Circuit affirmed a ruling that a Baltimore ordinance compelling pregnancy clinics to post signs if they do not offer or refer for abortions violated the First Amendment as applied to a pro-life non-profit clinic. The court held that the ordinance did not compel or regulate commercial speech in the clinic’s case, because the clinic offered its services for free and proposed no commercial transactions.

The Ninth Circuit upheld the constitutionality of Montana’s campaign-speech rules for judicial elections, finding them to be narrowly tailored and supported by a compelling interest in the integrity of the judiciary.

The Florida Supreme Court has announced that it will decide whether a judge’s Facebook friendship with a lawyer disqualifies her from sitting in the lawyer’s case.

The Idaho Bar Association has approved a new ethical rule that obligates attorneys to avoid speech that creates an intimidating or hostile environment or using offensive, discriminatory, harassing, threatening, or humiliating language while engaged in the practice of law or participating in related social activities. Hmm.
Miscellaneous

Academia

The Trump Administration has filed a statement of interest in case pending in N.D. Cal. between U.C. Berkeley and a group of conservative students over alleged violations of the students’ First Amendment rights. You’ll recall that the case began after talks by controversial speakers were cancelled due to security concerns and, in one case, actual violence; the Department of Justice has, naturally, showed up to support the students.

A judge in S.D. Cal. issued a preliminary injunction preventing a school district from enforcing a policy that would prevent a high school athlete from kneeling during the National Anthem.

A jury in S.D. Fla. held that Florida Atlantic University did not violate the First Amendment rights of a professor who was terminated after he insisted that the Sandy Hook Elementary School shooting was a hoax to support gun control. The school claimed that the timing of the professor’s termination was coincidental, and that he was fired for misusing his university title and facilities for non-university activities.

White supremacist Richard Spencer has filed a new lawsuit in S.D. Ohio claiming that it is unconstitutional for the University of Cincinnati to bill him for the added security necessitated by a planned appearance on campus. The University asserts that such a fee is charged to any speaker not invited or sponsored by a member of the U. of C. community.

The Wisconsin Supreme Court has agreed to hear an appeal from a former professor at Marquette University who claims that he was terminated for exercising his rights of academic freedom. A county circuit judge had earlier held that Marquette had the right to fire him for opening a student up to threats by criticizing her by name on his blog.

Finally, the Columbia Journalism Review is reporting on a new and disturbing trend in blocking journalist access to public college campuses.

Government Licensing & Public Fora

The operator of the “Wandering Dago” food truck—another attempt at reclamation of an offensive term in the tradition of The Slants—won a case against officials in the New York State Office of General Services who, on the basis of the name, denied their application to participate in a state-organized food truck program in a public plaza in Albany. The Second Circuit, citing Matal v. Tam, reversed a district court ruling in favor of the officials and directed that summary judgment be entered for the plaintiff.
The Ninth Circuit ruled that Ventura County vested its officials with too much discretion in the granting of permits for the use of one’s own land, resulting in the violation of the First Amendment rights of a company that wanted to use its land for weddings.

The Tenth Circuit reversed a district court’s grant of an injunction against the enforcement of rules governing spontaneous demonstrations and protests at Denver International Airport. Agreeing with the district court’s characterization of the airport as a nonpublic forum, it held that the rules were reasonable in light of the airport’s purposes.

**Political Speech**

A new bill in South Dakota would criminalize the replication of the state’s seal in a manner that is not “full and complete” and does not include the state’s motto, “Under God The People Rule.” This would be a great hypothetical for a First Amendment law school class to count the reasons why the bill is unconstitutional.

**Threats & Incitement**

An NCAA basketball referee’s lawsuit against Kentucky Sports Radio for inciting threats against him was passed from D. Neb. to Kentucky on a motion to transfer venue, but the judge declined to bounce the suit entirely.

The Supreme Court of New Jersey held that the state’s criminal harassment law must be read narrowly when applied to expression as opposed to conduct, finding that provisions against “seriously annoying” behavior would be overbroad as applied to speech.

The Supreme Court of Virginia heard arguments in the case of a Franklin County man who was convicted of a felony for displaying a noose on his property in order to frighten his black neighbors.

**Hollywood Hijinks**

The Weinstein scandal continues to have wide-ranging repercussions beyond the core issues of sexual abuse and discrimination. For example, in California, a pair of producers who were developing a television series for Amazon under the Weinstein banner sued the Weinstein Co. over the profits they lost when Amazon backed out of the deal. Meanwhile, on the opposite coast the New York Times sued the Weinstein Co. for almost $230,000 in unpaid advertising fees. Can’t blame them for trying to get as close to the head of the queue as possible...
The Seventh Circuit denied a new trial for Brendan Dassey, whose conviction for assisting in a rape and murder was the subject of Netflix’s “Making a Murderer” documentary series. The series had suggested that Dassey and his uncle were set up for the crime in order to avoid a settlement with the uncle for his wrongful conviction on a separate offense.

The lawsuit filed by journalist Anita Busch against Michael Ovitz for allegedly hiring a private investigator to stage an elaborate Hollywood-style threat against her in 2002 settled on the verge of trial. No, seriously, the threat involved a dead fish, a note, a rose, and a smashed windshield – precisely the Hollywood version of intimidating behavior. And to top it off, Ovitz had apparently planned to pin the blame on Steven Seagal at trial.

**Adults Only**

As mentioned as a last-minute update in our last issue, a judge in W.D. Wash. enjoined the enforcement of an ordinance in Everett, Washington, that would have forced bikini-wearing baristas at drive-through coffee stands to wear more clothing. In New Hampshire, three women have brought a First Amendment and equal protection challenge to a city ordinance prohibiting women from going topless to the state’s supreme court. Arguments were scheduled for February 1st.

A new bill in Virginia would impose a state tax on online pornography in an attempt to limit sex trafficking. Can’t see any problems with that at all.

**The True Miscellany**

The Second Circuit affirmed the dismissal of a pro se RICO lawsuit filed against media outlets by a man who alleged that coverage of the 2016 presidential campaign was tainted by falsehoods. Two thoughts: (1) the phrase “pro se RICO lawsuit” warrants an automatic dismissal; (2) at least he didn’t try to head to Atlanta with a gun.

The Sixth Circuit shut down a First and Fifth Amendment challenge by fans of the Insane Clown Posse, a/k/a Juggalos, to their designation as a “loosely-organized hybrid gang” by the FBI in a 2011 gang activity report. The Court of Appeals affirmed a district court ruling that the designation was not a final agency action subject to judicial challenge under the Administrative Procedure Act. [Photo: Mandias, CC BY-NC-ND 2.0]
The Florida Court of Appeals held that a business that \textit{lobbied a county to design its roadways in a particular manner} could not be held liable for negligently causing the injury of a woman allegedly injured as a result of the design. The court called out the potential First Amendment danger in applying penalties based on one’s exercise of rights of speech and petition.

An Indiana legislator wants to \textit{force NFL teams to give refunds to those offended by kneeling players}. This guy should talk to the idiot who submitted the South Dakota bill discussed above.

An baker who \textit{refused to create a cake for a same-sex wedding} (why does that sound familiar?) lost its state court appeal of a $135K penalty imposed by the Oregon Bureau of Labor and Industries; however, the appellate court suggested the result might have been different had the case involved a wedding singer or other performer or artist. (As I’ve written before, I personally don’t think that distinction works.) The court also held that the baker’s statements opposing same-sex marriage \textit{did not arise to the level of threats of discrimination}. Presumably, any appeal of the appellate decision to the Oregon Supreme Court will still be pending when \textit{Masterpiece Cakeshop} is decided by the U.S. Supreme Court, making this one a wait-and-see.

\textbf{Conclusion}

Okay, we’re done. I hope to see some of you in Napa, though my time there will be brief. And don’t forget our \textit{Legal Issues Concerning Hispanic and Latin American Media} conference on March 12!