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

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

February was something of a recovery month for me, both from the Entertainment conference in January and last month’s monster issue of *The Monthly Daily*. I took the opportunity to do a little writing on other topics, including some ideas I’ve been kicking around about hate speech regulations and comparative analyses of U.S. and European law on the topic. But that’s for another time; life rattles on, and soon enough we’ll be diving in on final prep for *Legal Frontiers in Digital Media* in May.

So let’s, as they say, rock on.

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Supreme Court

Pending Cases

It was a big month for the First Amendment at the Supreme Court, with four arguments in speech- and media-related cases all crammed into the last week of February. The early read of the tea leaves:

- Silence by the normally voluble Justice Gorsuch in Janus v. AFSCME, Council 31 on compulsory government union fees from non-members to support advocacy leaves open a slim hope that he will break from the other conservative justices and side with the union;

- The justices appear to be leaning in the government’s favor in U.S. v. Microsoft on use of a warrant to access data stored overseas, though it is possible that they may decide that the government’s problem needs to be resolved legislatively;

- The justices were sympathetic in Lozman v. City of Riviera Beach to a petitioner arrested for his speech at a City Council meeting in defense of his floating home, but expressed concern about the broader implications of holding that a finding of probable cause does not block a claim for retaliatory arrest; and

- The justices asked tough questions in Minnesota Voters Alliance v. Mansky, on bans on political apparel at polling places. Are such bans necessary to prevent interference with the right to vote, and how are poll workers are supposed to make judgment calls as to which message-bearing apparel crosses the line? But at least some of the justices seemed to lean toward finding that establishing a safe space for voters was a protectable interest.

There was one more argument worth mentioning, in a case involving antitrust claims brought against American Express. The justices heard argument on whether the antitrust analysis differs in the case of “two-sided” markets where one company makes money from two separate but related sources (such as a credit card company that charges both retailers and consumers); it is
possible that the result could have an effect on antitrust claims against digital platforms that serve to connect buyers and sellers, or otherwise facilitate connections between different parties.

**Decisions**

The Court ruled on one other media-tangential issue this month, holding that employees seeking to blow the whistle on corporate fraud must notify the SEC about violations of securities laws before they are protected by the anti-retaliation provisions of the 2010 Dodd-Frank Act. As I said, tangential, but it’s something to keep in mind if you’re a journalist working an inside source on Wall Street.

**Petitions**

Several denials of cert to report, including: Josephine Havlak Photographer v. Twin Oaks (8th Cir., ban on commercial activity in public park not unconstitutional as applied to commercial photographer), Caraccioli v. Facebook (9th Cir., dismissal of claims based on Facebook's refusal to remove content posted by third party), Johnson v. Commission on Presidential Debates (D.C. Cir., denial of ability to participate in presidential debate), Yaakov v. FCC (D.C. Cir., holding that FCC lacks authority to require that solicited fax advertisements include opt-out notice), and People v. Golb (N.Y., conviction for online impersonation does not violate First Amendment).

In new petitions, Yahoo! has asked the Court to review a decision from the Supreme Judicial Court of Massachusetts, which held that the estate of a deceased user is not barred by federal law from accessing the user’s e-mail. And in a last-ditch effort, Personal Audio has petitioned for review of a decision that its much-maligned podcasting patent is invalid.

**Reporters’ Privilege**

Reporters’ privilege issues went international this month, with a former client of Dechert LLP asking a judge in N.D. Cal. for assistance in uncovering the source who provided a letter written by the law firm to a British journalist. Meanwhile, ex-spy Christopher Steele has argued to the High Court in London that his sources’ safety and UK national security could be
threatened if he is compelled to provide testimony for Aleksej Gubarev’s lawsuit against BuzzFeed in Florida. (We’ll have more on this case under Defamation.)

The Chicago police officer who shot Laquan McDonald has subpoenaed multiple newspapers for copies of all of their coverage of the shooting, seeking the articles to bolster a motion to transfer his trial out of Cook County, Illinois.

In D.D.C., the baseball players suing Al Jazeera over a documentary on sports doping are growing impatient, moving to schedule a hearing on their motion to compel the organization to turn over material gathered by an undercover investigator.

The County of San Diego took aim at a freelance journalist over her reporting on suicides in county jails, seeking to depose her in a lawsuit in S.D. Cal. brought by the widow of a prisoner. Fortunately, pro bono counsel stepped in and the judge blocked the attempt to depose the reporter.

After a fight in Illinois state court over the identity of the source who provided the Journal & Topics Media Group with a photo of Des Plaines officers viewing porn in the police station, a judge ordered an editor to answer a single question: Was the source police Sgt. Michael Holdman? The one-word answer: No.

**Defamation**

**New Cases**

There’s a new public denial lawsuit in Cal. Super., with a woman who accused actor Robert Knepper of sexual assault suing him over his denial of her accusations. [Photo: Miguel Discart, CC BY-SA 2.0]

A man wrongly identified by alt-right media sources as the driver of the car that killed Heather Heyer during the Unite the Right rally in Charlottesville, VA, in August has sued a number of the outlets in the Eastern District of Michigan.

A businessman sued the Guardian in New York state court over a story allegedly connecting him to an attendee at the infamous Trump Tower meeting in 2016 and to former...
KGB officers. In the same court, three Russian biathletes stripped of silver medals from the Winter Games in Sochi for doping violations have sued the doctor who blew the whistle; the athlètes sans argent are being funded in their quest by the oligarch who runs Russia’s biathlon federation.

A twelve-year-old who appeared in videos supporting Donald Trump’s presidential campaign and was interviewed by The Alex Jones Channel has sued Newsweek in Pennsylvania state court. He is complaining about an article entitled “Trump’s Mini-Mes,” which included comments by a Columbia University professor that the alt-right had “weaponized” the child as cover for its racism and tolerance of sexual abuse.

So, to sum up, this month’s new cases involve: a #metoo defamation case; the alt-right; the alt-right and Trump; Trump and Russia; and Russia. Can’t get much more topical than that. Sadly, to break up the neat pattern, we also have a bog-standard lawsuit against KLTV in E.D. Tex. from a woman who claims she was wrongfully flagged as a burglary suspect.

Plaintiff Wins

A judge in the District of Hawaii denied a motion to dismiss Brett Ratner’s defamation claim against a woman who accused him of rape, but over Ratner’s opposition held that she would apply California’s anti-SLAPP law to a still-pending motion to strike.

Defense Wins

A magistrate judge in M.D. Ala. recommended the dismissal of a defamation claim brought by a religious ministry over its exclusion from Amazon’s charitable “Smile” program due to the ministry’s identification as a “hate group” by the Southern Poverty Law Center; the magistrate found that the ministry’s claims were based on an assumed definition of a hate group different from that used by SPLC.

The Board of Forensic Document Examiners lost a defamation suit in N.D. Ill. over an article in the ABA’s “The Judges’ Journal,” with the judge finding that the article (which was
written by a document examiner certified by a different board) was not of and concerning the plaintiffs and simply stated the author’s opinions on certification standards.

A federal judge in E.D. Pa. reconsidered her decision to remand a libel claim brought by a state judge to the latter’s home court, deciding that the sole Pennsylvania-based defendant was fraudulently joined and dismissing that party from the case.

A tech investor who sued a Republican opposition research firm dropped his defamation lawsuit in California state court. So did a Stanford professor who sued the National Academy of Sciences in D.C. Super. over publication of a paper critical of his work.

The fair report privilege doomed nursing home company Sentosacare’s defamation case against ProPublica in New York state court over an article heavily sourced to government reports. And cheers to John Oliver and the folks at HBO, who scored a win against Marshall County Coal Co. and its CEO Bob Murray in West Virginia state court. If any of our members at HBO are reading this, I would love a picture of Mr. Nutterbutter for my office.

On appeal, the Eleventh Circuit affirmed the denial of a successful defamation plaintiff’s attempt to recover $1.7 million in attorneys’ fees based upon the defendant’s rejection of a pretrial settlement offer. A California appellate panel reversed the denial of News Corp.’s anti-SLAPP motion to dismiss libel and privacy claims brought by a former paramour of the Duchess of York but allowed wiretapping claims to proceed. Oregon’s appeals court reversed the denial of an anti-SLAPP motion in a failed candidate’s lawsuit over an allegedly defamatory campaign flyer. Texas’ Second District Court of Appeals affirmed an anti-SLAPP ruling against a voice professor who sued a former student for posting a critical review on RateMyProfessors.com. And following a paltry fee award under Texas’ anti-SLAPP law in another case, the Court of Appeals for Texas’ Seventh District remanded for another try at calculating the attorneys’ fees due to a blogger who had been to the state Supreme Court and back.
New & Pending Appeals

The First Circuit heard argument this month on whether AIG owes a duty to defend Bill Cosby in libel lawsuits filed by women whom he allegedly sexually abused.

Sarah Palin filed her appellant’s brief at the Second Circuit in her case against the New York Times over an editorial linking her PAC to the shooting in which Rep. Gabby Giffords was injured and six others were killed, challenging the unusual procedure used to adjudicate the Times’ 12(b)(6) motion in the district court.

Miscellaneous

New anti-SLAPP bills were introduced in New Jersey and South Carolina; the former is a continuation of an earlier bill that died in committee at the end of December, while the latter is a somewhat odd duck whose language is ambiguous as to whether it extends beyond petitioning the government.

Finally, the drama around BuzzFeed’s publication of the Trump Dossier rolls onward. BuzzFeed is fighting to compel the Democratic National Committee to turn over information it might have connecting Aleksej Gubarev to the Russian hack of DNC servers. Meanwhile, a judge in D.D.C. has questioned how the DOJ could possibly deny BuzzFeed’s request that it confirm the Department’s possession of the Dossier, following the widely publicized release of the Devin Nunes memo.

Privacy

Rights of Publicity

The Seventh Circuit heard argument on NCAA athletes’ appeal of the dismissal of their misappropriation claims against DraftKings and FanDuel, with two members of the panel suggesting that it might be necessary to seek an opinion from the Indiana Supreme Court on the meaning of exemptions in the state’s right of publicity law.

In New York, Lindsay Lohan and Karen Gravano argued their right of publicity cases against the publishers of “Grand Theft Auto V” before the Court of Appeals. Judge Eugene Fahey pressed plaintiffs’ counsel as to the implications of their claims with respect to avatars in
other video games. The California Court of Appeal affirmed the dismissal of a claim filed by an actor in Goodfellas and The Godfather Part II who claimed that the character Louie in “The Simpsons” was a misappropriation of his likeness.

In S.D. Fla., a group of models obtained summary judgment against a strip club that used their likenesses without permission to promote the club; however, the court found that an expert survey did not support summary judgment on their Lanham Act claims.

**Disclosure of Private Facts**

Fox News is facing a new suit in M.D. Fla. from a man who claims he was outed as gay by the network in the course of litigation over a collapsed deal for a reality show.

**Intrusion**

NFL player Odell Beckham has sued a paparazzo agency in E.D. La. for a host of alleged privacy violations, including intrusive use of telescopic lenses but also sweeping in private facts, misappropriation, and copyright issues along the way.

The Connecticut Supreme Court reversed the dismissal of voyeurism charges against a man prosecuted for making secret video recordings of women, rejecting the defendant’s argument that the applicable statute was unconstitutionally vague. Incidentally, I encountered the very unfortunate combination of advertising and article topic shown at right on the Hartford Courant website. That’s what happens when the AI handling your online advertising isn’t so “I.”

And down in Manhattan, former Fox star Andrea Tantaros was allowed to amend her cyberstalking complaint against Fox News in S.D.N.Y. to include a number of striking claims regarding the alleged videotaping of female Fox employees by the late Roger Ailes via CCTV.
Infliction of Emotional Distress

The mother of Natalee Holloway (who disappeared as a teen during a high school trip to Aruba in 2005) has sued the Oxygen Network in M.D. Ala. for infliction of emotional distress. Beth Holloway claims she was misled into supplying Natalee’s DNA to the network for what allegedly turned out to be “a pre-planned farce” replete with gruesome but fictitious descriptions of Natalee’s fate.

Mickey Rooney’s widow has dropped an emotional distress suit against The Hollywood Reporter in California state court; Jan Rooney had claimed that she experienced mental suffering after journalists for THR questioned her about allegations that she had abused the late actor.

Access/FOIA

New Cases

This month’s new cases in D.D.C. include: a suit against the State Department for documents related to its publication of an article touting Mar-a-Lago as the “winter White House”; a suit against the Department of Homeland Security for the Secret Service’s travel expense records for Donald Trump; and a suit against Jared Kushner’s White House Office of American Innovation for records related to Donald Trump’s $200 billion infrastructure plan. The last one of those will be interesting as to whether an office within the White House will be obligated to comply with FOIA.

Also interesting will be whether the Foreign Intelligence Surveillance Court unseals court records related to surveillance of Carter Page at the request of the New York Times, in light of the voluntary disclosure of confidential information about the investigation by Devin Nunes and Donald Trump.

The high school shooting in Parkland has triggered a pair of public access cases in Florida state court as the media works to piece together what happened. A media coalition has moved to intervene in the prosecution of Nikolas Cruz to keep the proceedings open to the public. Meanwhile, three news organizations have sued the Broward County Sheriff’s Office to
compel the release of security video footage from the exterior of Marjory Stoneman Douglas High School.

Finally, the Wisconsin Supreme Court has been asked to lift the veil of secrecy on a John Doe investigation into the campaign of Governor Scott Walker, from both parties drawn into the investigation (who want to talk about the case) and the state’s Attorney General, who wants to explain the proceeding to the public.

Access Granted

In D.D.C., a judge has agreed at CNN’s request, to release certain documents related to the Starr investigation into Bill Clinton that have been sealed for more than 20 years. The Trump administration has also settled a lawsuit over White House visitor logs, agreeing to post logs of visitors to certain offices on a monthly basis. And finally, Jason Leopold obtained an order that begins to open up sealed pen register/trap & trace requests and Stored Communication Act warrants from the U.S. Attorney’s Office after a multi-year process.

In S.D.N.Y., the court has guaranteed access for at least one media representative at the trial of Islamic State suspect Sajmir Alimehmeti. In the same court, another judge rebuked the CIA for attempting to withhold emails that the agency had sent to members of the press, but gave the CIA the chance to explain why it had not waived any exemptions from FOIA through its voluntary disclosure to reporters.

A Florida judge released a trove of previously sealed documents related to the kidnapping trial of Gloria Williams, after the media intervened in the case. A Missouri judge lifted an order precluding a special prosecutor from releasing inquest records into the death of a 17-year-old; however, the Howard County Coroner’s Office is resisting the release of the documents, arguing that the lifting of the order does not require it, as a law enforcement agency exempt from Missouri’s Sunshine Law, to comply with public records requests.

Access Denied

The Ninth Circuit flipped a district court decision requiring the FBI to release files on its surveillance of Muslim communities in the U.S., ruling that the investigatory exemption under FOIA does not require the investigation to be linked to enforcement of a specific law.
In D.D.C., a judge has denied CNN’s attempt to obtain copies of *James Comey’s notes of his conversations with Donald Trump*. Members of Robert Mueller’s team had provided ex parte testimony to the court on the nature of the Mueller investigation, which led the court to conclude that disclosure could interfere in the investigation.

Pending Cases & Appeals

The Georgia Supreme Court heard argument on whether the state’s public records law applies to correspondence between a professor at Kennesaw State and a payday lending organization that commissioned a study from the university.

The Cook County Clerk of Court has appealed to the Seventh Circuit from a district court order directing her to release e-filed cases to the public without delay. The district court had denied a stay pending appeal, but the Seventh Circuit granted the stay.

Legislation

Kansas’ legislature seems to be bucking a trend on locking up police body cam footage with not one but two bills (a House version and a Senate version) intended to speed up the release of such footage.

Last month I mentioned a pair of competing bills in Virginia on access to court records, with one seeking to restrict access while the other seeks to expand it. I’m pleased to report that the former was withdrawn by its sponsor while the latter has moved forwards.

Finally, Washington Governor Jay Inslee received a record number of calls urging him to veto a bill passed by the state legislature that would exempt the legislature from Washington’s public records law. [Late update: Inslee has vetoed the bill, and the legislature has said that it will not attempt to override the veto. Phew.] [Photo: Office of the Governor]
**Newsgathering**

*Trump Administration*

Donald Trump went a full year without a solo press conference as of February 16th.

*Credentials*

The Georgia state senate press office has threatened to pull the press credentials of a political reporter for CBS46, alleging that her impromptu but cordial interview of a state senator in the halls of the Capitol violated interview protocol. State media organizations and press groups quickly expressed their outrage.

A committee of Utah’s House of Representatives voted to bar the press from the House floor for a period of five minutes before the start of a session, in order to give lawmakers time to get settled. The proposal will go to the full House; press representatives have opposed the ban, presumably because access during a session can be limited and access after a session can involve chasing down a politician who is headed for the exits.

*Lawsuits*

The Ninth Circuit heard argument this month on the constitutionality of a U.S. Customs and Border Protection policy that prohibits photography at border crossings without permission. A lawsuit filed by animal rights groups to have Iowa’s ag-gag law ruled unconstitutional has survived a motion to dismiss in S.D. Iowa. And a journalist who was pepper-sprayed, assaulted and arrested while trying to cover street protests in St. Louis over the 2011 police shooting of Anthony Lamar Smith has sued the city in E.D. Mo. for their excessive use of force.

*Miscellaneous*

Speaking of use of force, U.S. Rep. Eric Swalwell of California introduced the “Journalism Protection Act,” a piece of legislation that would make it a federal crime to assault a journalist while the victim is engaged in newsgathering. (As opposed to, you know, a photo op. I’m looking at you, Gianforte.) Rep. Swalwell explicitly tied the proposal to the dangers faced by reporters as a result of Donald Trump’s creation of a “toxic atmosphere” for the press.
Prior Restraint

As you might recall, Prof. Volokh has been following a prior restraint issue in N.D. Ohio spinning out of a spat between YouTube personalities and a Cleveland bar; a restraining order was superseded by a confidential speech-restrictive settlement agreement that one of the YouTubers was later alleged to have violated by posting a video. Following Volokh’s intervention in the case to seek access to the agreement, the district court released the agreement to the public and denied sanctions against the YouTuber. Hopefully, that should put an end to this mini-saga.

There was also trouble in Las Vegas, where a state judge ordered media organizations to stop reporting on the autopsy of an off-duty police officer killed in the October mass shooting and to destroy their copies of the autopsy reports. (You might recall that the autopsy reports of 58 victims of the shooting, including the one at issue in this case, were released to the public in January following a public records lawsuit.) The Nevada Supreme Court reversed the order before the month was out.

Information Infrastructure

Net Neutrality

The FCC’s Restoring Internet Freedom order was published in the Federal Register on February 22nd, thus officially kicking off the period for court challenges to the FCC’s repeal of the 2015 Open Internet Order. Mozilla and Vimeo were the first out of the gate at the D.C. Circuit on February 23, with at least two other organizations and a coalition of 23 Democratic state attorneys general close behind. Telecom industry groups had already started the process of asking for permission to intervene in any challenges to defend the FCC’s repeal.

Meanwhile, more than half of the states have net neutrality laws in the works. Washington state has already passed such a law, legal scholars are preparing for the inevitable preemption and dormant commerce clause challenges, New Jersey’s new (and not yet embarrassing) governor has followed the governors of New York and Montana in barring state
contracts with ISPs who do not adhere to net neutrality principles, and Democrats on the Hill (with the support of the Internet Association) are just one Senator shy of a Senate vote to void the Restoring Internet Freedom order under the Congressional Review Act.

Whatever happens, one major hurdle to Federal Trade Commission enforcement actions against ISPs has been overcome. The Ninth Circuit, ruling en banc in an FTC action, held that common carriers are immune to FTC regulation “only to the extent that a common carrier was engaging in common-carrier services.” Given that FCC Chair Ajit Pai’s rationale for repealing the Open Internet Order hinged on the FTC picking up some portion of the slack, this was a case that just about everyone not employed by AT&T Mobility wanted the carrier to lose.

Oh, and New York’s attorney general has defeated Charter’s attempt to leverage the Restoring Internet Freedom order to block a lawsuit for allegedly misrepresenting broadband speeds to customers in the Empire State. The court noted that the FCC had stated that state authorities would retain their traditional roles in protecting consumers from fraud. Charter is appealing the ruling.

Federal Communications Commission

In other news, the House Energy and Commerce Committee approved a bill reauthorizing funding for the Commission as well as funds for broadcasters affected by the recent incentive auction. Chair Ajit Pai and Commissioner Michael O’Rielly are facing ethics complaints over their partisan behavior at the recent Conservative Political Action Conference: Pai, for accepting a Kentucky long gun representing the National Rifle Association’s Charlton Heston Courage Under Fire Award; and O’Rielly, for allegedly advocating for the re-election of Donald Trump. [Late update: Following the advice of counsel, Pai won’t accept the gun after all. And right now, don’t you think he was probably looking for an excuse not to?]

Commissioner O’Rielly also received authorization to conduct a review of FCC rules on children’s television, such as requirements around educational programming and limits on commercials.
The Commission is pushing forwards with efforts to encourage the rollout of new technologies, voicing its support of satellite-based internet service, voting to expedite reviews of new technologies, and announcing another spectrum auction in order to facilitate 5G wireless services. Speaking of spectrum sales, the Commission also collected a record $614.3 million in fines from Verizon flowing from its acquisition of Straight Path, a company that held around 1,000 spectrum licenses but never used them; Verizon was covering Straight Path’s obligation to pay the FCC a fine of 20% of the proceeds of a forced sale of the unused spectrum.

The FCC waded into the wild world of bitcoin this month, firing off a warning to a New York City resident after it concluded that his dedicated bitcoin mining rig was emitting signals that interfered with T-Mobile’s wireless network. You see, the processing power required to handle the calculations necessary to identify new bitcoins exceeds that of traditional home computers, and... oh, never mind.

The FCC also settled a dispute with a non-commercial radio broadcaster over illegal advertisements for commercial products, and let DirecTV off the hook on a complaint that it was acting in bad faith in retransmission talks with a Hawaii TV station.

Mergers & Antitrust

The Third Circuit denied a stay of the FCC’s November vote on deregulation of local broadcast ownership, a result sought by the National Association of Broadcasters and Sinclair Broadcast Group. The court’s decision will ease pressure on Sinclair as it attempts to divest stations in advance of its acquisition of Tribune Media. Also of benefit to Sinclair, the FCC is still looking at relaxing the nationwide television audience cap – a move that the Democratic attorneys general of seven states have now opposed. Sinclair is currently working on deals to sell off TV stations across the country, although it might continue operating certain of those stations under agreements with their new owners.

The fact that Sinclair seems to be receiving all the breaks apparently caught the attention of the FCC’s Inspector General; the public has recently learned an investigation was opened last year into whether Sinclair is simply lucky or the recipient of improper assistance from Pai’s team. Pai has refused to recuse himself from the Sinclair review.
Turning to the AT&T/Time Warner merger, a number of House Democrats have asked the Department of Justice for documents related to its decision to challenge the deal, out of concern that the DOJ’s move was instigated by the White House out of Trump’s hatred for CNN. That’s something that AT&T would like to know itself; the company attempted to put that issue into play in its pending court case in D.D.C. by naming the DOJ’s top antitrust enforcer as a witness and attempting to subpoena the Department’s logs of communications with the White House. The latter effort was blocked by the court, which held that AT&T had failed to establish a basis for believing the DOJ was engaged in selective enforcement of the antitrust laws.

The D.C. Circuit attempted to put an end to a twenty-year dispute between Entercom and the former owner of a radio station that was to be sold to the broadcasting giant in 1996, holding that Entercom’s surrender of a different station last year mooted any argument that the sale would result in Entercom exceeding FCC limits on station ownership.

In other news, the DOJ gave Discovery a thumbs-up to acquire Scripps Networks Interactive.

Miscellaneous

Like a bloated harvest moon, Donald Trump has orbited back around to taking aim at funding for public broadcasters. The idea went nowhere the last time he mentioned it, and the attention-challenged chief executive will doubtless see something else that’s shiny soon enough. [Photo: Roadcrusher, CC BY-SA 3.0]

Utah’s House has passed a bill restricting the use of non-competition agreements by broadcasting companies. What do you think – does an industry-specific bill on non-competes violate the First Amendment?

Digital Content

Online Propaganda

The Russians are still at it, apparently; having perceived success in their efforts to push the #ReleaseTheMemo hashtag, they’re following up with efforts to whip up paranoia about “deep state” conspiracies. More information about Russian efforts on Facebook in 2016 was
detailed in the Justice Department’s indictment of 13 Russians and three companies for a plot to shift support to Donald Trump during the 2016 election.

But if you’re looking for propaganda looking to undermine Hillary Clinton by boosting Bernie Sanders, apparently Tumblr was the place to be, with Russian trolls racking up hundreds of thousands of contacts. And the New York Times ran an interesting story on the black market for forged identities used to spread misinformation.

Platforms continue to develop countermeasures, with YouTube announcing that it plans to run notices with videos from broadcasters who receive government funding, Medium blocking three writers for posting misinformation and conspiracy theories, and Facebook stating that it will use postcards to verify the identities of those purchasing ads related to U.S. elections, and both Facebook and Google committing to quash conspiracy theories and exploitative videos about the Parkland shooting (with mixed results so far).

Government officials are losing patience with voluntary measures, though. Seattle has claimed that Facebook is in violation of a city ordinance requiring disclosure of the identities of the purchasers of election advertising, in what is apparently the first effort to exert legal control over online political ads. Meanwhile, U.S. Senator Amy Klobuchar (D-Minn.) has called for the imposition of fines on Facebook and Twitter if they don’t sweep the bots from their systems.

Speaking of which, register now for the Legal Frontiers in Digital Media conference, where we’ll be talking about fighting fake news, propaganda, and attempts to mislead on social media!

Takedown Mania

We’ve got another takedown hero gunning for a Recursive Streisand this month, with Prof. Volokh and Techdirt targeted by takedown notices to Google asking the search giant to de-index articles covering a fake court order used in an attempt to remove other content. Google, fortunately, did not comply with the requests.

Section 230

So, sex trafficking on the internet is a disturbing and complicated phenomenon, as is the role of digital platforms that are wittingly or unwittingly exploited in the course of these crimes.
Responding to this problem requires an understanding not only of who the players are but how law enforcement traces illegal conduct in digital spaces. What it does not require is the House passing a terrible hodge-podge of provisions crammed together from SESTA and FOSTA, over the objection of the Department of Justice to the legislation. Your Congress at work, people. As always, Prof. Goldman has a detailed breakdown of the hybrid bill.

Google racked up another win under 230(c)(1) in a de-indexing case on appeal to the D.C. Circuit, which affirmed a district court decision holding that Google was not liable for refusing to delist a blog post critical of the plaintiff. Grindr scored a victory in S.D.N.Y. in a case seeking to hold it liable for the impersonation of the plaintiff by another user; the court also bounced a “failure to warn” claim.

Facebook was sued this month in N.D. Ohio by a user who claims that the service’s moderation of his posts violates the Fifth Amendment, and has asked the court to declare Section 230(c)(2)’s protection for moderation efforts unconstitutional because he claims that the immunity granted by (c)(1) is a grant of sovereign immunity, and... oh, never mind. I nearly forgot my own first rule of practicing law: Don’t engage with crazy.

Then there’s this new case in California, where a white supremacist has argued that Twitter’s banning him from the service violates his rights under state law. This complaint has somewhat more on the ball than the N.D. Ohio complaint, but I struggle to understand how the case survives a Supremacy Clause/Section 230(c)(2) defense. Sure, Justice Kennedy started painting his prose purple in his discussion of social media in Packingham v. North Carolina, but I don’t see anything there which alters state action requirements under the federal constitution.

Hate, Terror, and Other Internet Nastiness

Following last month’s Ninth Circuit decision holding that to state a claim plaintiffs must prove a direct connection between (1) material support allegedly provided by social media platforms to terrorists and (2) specific terrorist activity, a new claim has been filed in N.D. Ill. by a survivor of the November 2015 Paris attack against Twitter, Facebook and Google. It’s likely an effort to see if the Seventh Circuit will part ways with the Ninth on causation.
Speaking of which, register now for the Legal Frontiers in Digital Media conference, where we’ll be talking about strategies to respond to terrorist activity on digital platforms!

The FBI paid a visit to a Twitter user who, in railing against a CEO he accused of fraud, vowed to “bury the little fella in a shoe box.” Just in case you thought no one was paying attention on Twitter.

Twitch turned some heads this month with a revision to its guidelines that indicates that users might be sanctioned on Twitch for their behavior off the platform. Twitter has updated its policies on the encouragement of suicide and self-harm.

Miscellaneous

Google’s Project Fi data plan was the subject of a new lawsuit in N.D. Cal., with a proposed class action alleging widespread overbilling for data usage.

Sure, Russia; sure, sex trafficking; sure, terrorism. But artificial intelligence is emerging as the digital bugaboo du jour in Washington, D.C., where AI seems to be showing up all over the legislative record.

Speaking of which, register now for the Legal Frontiers in Digital Media conference, where we’ll be talking about machine learning and the moderation of digital platforms!

Digital Privacy

CFAA/Hacking

The high profile hiQ Labs v. LinkedIn data scraping case has a new player, with data company 3Taps (which had its own high-profile scraping scuffle with Craigslist back in the day) scoring an order to relate its own separate case with LinkedIn to the hiQ Labs case.

A former fund manager for Morgan Stanley failed in his attempt to narrow charges pending against him in E.D.N.Y. on charges relating to a scheme to make trades based on hacked access to press releases.
Control of Personal Information

A judge in N.D. Cal. has granted summary judgment to IMDb in its effort to block enforcement of California’s actor age law, declaring the statute unconstitutional.

Facebook’s attempt in N.D. Cal. to mount a Spokeo defense to an Illinois Biometric Privacy Act claim failed to convince the court, which allowed a class action on collection of biometric data to proceed.

The FTC reached a settlement with PayPal over its payments app Venmo, which had been the subject of a complaint regarding its privacy disclosures and handling of the security of customer transactions.

Sen. Ron Wyden (D-Or.) has called on Tinder to fix a security flaw that allows other users to see your dates.

Legislators on the Hill have taken notice of the “deepfakes” face-swapping phenomenon, indicating a desire to get ahead of the issue. Meanwhile, platforms and porn sites are taking voluntary measures to block content that swaps people’s likenesses into porn clips without their permission. (There’s also a rumor I’ve heard that the Screen Actors Guild is seeking to wrap face-swapping into right of publicity laws, because rights of publicity aren’t enough of a rat’s nest.)

Speaking of which, register now for the Legal Frontiers in Digital Media conference, where we’ve just added a session on the legal implications of improvements to face-swapping technology!

Encryption

You might remember that last month we reported on Sen. Wyden asking FBI Director Christopher Wray which “experts” told him that encryption backdoors are a good idea. Just checking in to say there’s still no public answer to that question.
Internet Surveillance

Here’s a shocker: Immigration and Customs Enforcement wants access to unminimized warrantless surveillance. I mean, what cop doesn’t, but domestic law enforcement agencies have no business pawing through this information. Just remember: You're digging for gold/Yet throwing away/A fortune in feelings/But someday you'll pay.

Transatlantic Privacy

Turns out that law firms and reputation firms are responsible for over a fifth of the “right to be forgotten” requests received by Google. Not sure what I would have expected, but for whatever reason I don’t find the number surprising.

Intellectual Property

Has this issue seemed shorter than usual so far? Well, buckle up, because all of the effort seems to have been focused on copyright cases in February.

Copyright – New Cases

If you thought that the fall of Prenda Law would put a dent in copyright trolling, surprise: 2018 is already looking like it will beat 2017 for filesharing cases. Malibu Media leads the troll pack, but there are young and hungry competitors too. For new complaints we have:

- C.D. Cal.: A voice-over actress sued Virgin America for using a rap that she wrote in its airplane safety video without permission. I have to admit, I have a soft spot in my heart for the Virgin video, which I last saw on a red-eye flying back from LA. The gin & tonic might have helped. And ironically, I wrote this paragraph in mid-air (albeit on United, which always finds new ways to ruin “Rhapsody in Blue” for me).

- C.D. Cal.: WB Music has sued streaming company FutureToday over audio channels that allegedly play copyrighted songs without permission.

- C.D. Cal.: Twentieth Century Fox Film will be trying to head off a claim that it lifted the plot a 2003 screenplay for its hit film Kingsman: The Secret Service.
• C.D. Cal.: An artist has claimed that Live Nation Entertainment continued to use his work for the Lollapalooza music festival after the expiration of a license agreement and beyond the uses permitted therein.

• C.D. Cal.: Frank Ocean has filed suit to block a music producer from asserting rights in his hit album “Blonde.”

• C.D. Cal.: There’s at least one every Oscar season. This year, there’s a copyright suit claiming that Guillermo del Toro’s The Shape of Water ripped off a 1969 play by Paul Zindel.

• D.N.M.: Turning from fish people to reptiles, a non-profit in New Mexico that has been using the Teenage Mutant Ninja Turtles in an anti-bullying campaign is being put through the shredder by Viacom, for whom the unauthorized use is proving a splinter in the mind’s eye.

• S.D.N.Y.: Kendrick Lamar and SZA have been accused of lifting a British-Liberian artist’s work for use in their video for “All the Stars” (from the Black Panther soundtrack).

• S.D. Tex.: An insect photographer (coincidentally, the profession for which I was deemed least suitable in high school) has sued a pest control company for the unauthorized use his photos of ants and cockroaches on its website.

God, can you imagine the guy’s studio? My brain would just be screaming “kill it with fire” over and over and over.

Copyright – Plaintiffs’ Victories

A couple of major wins on appeal for copyright plaintiffs in February. The Second Circuit gutted TVEyes’ fair use defense for its TV monitoring service, distinguishing its decision in Google Books and finding that TVEyes’ recording and distribution of video clips was at best minimally transformative. The decision was notable for a strong invocation of the concept that the effect on the market for the original work is the most important fair use factor. (Personally, I still think that the transformative use principle, properly applied in a case with different facts, should still override factor four for
the same reasons that the idea/expression dichotomy doesn’t care about the effect on the market for the original – but I get what the court was trying to say here.)

And then we have the long-awaited decision in *BMG Rights Management v. Cox Communications* on repeat infringer policies under the DMCA. The Fourth Circuit held that Cox’s lackluster efforts to enforce its largely meaningless repeat infringer policy were insufficient to earn DMCA protection against liability for user infringement. However, the court did remand on the basis of a glitch in the jury instructions with respect to the applicable scienter standard for contributory infringement. This case has been worrying for those of us concerned about would-be censors leveraging ISP repeat infringer policies to knock whole sites offline or to block users from the web entirely, and the court’s holding that a repeat infringer does not need to have be adjudicated to be such by a court does not assuage that concern. However, the Fourth Circuit’s decision is so focused on Cox’s lackluster efforts that it will hopefully be confined to its facts. (For more on ISP responsibility for user infringement, we also saw this recommendation from a magistrate judge in W.D. Tex., which would allow copyright claims to survive at least a motion to dismiss based on the allegation that BitTorrent piracy by users equates to unlawful distribution by the ISP.)

Less impressive in principle but still remarkable for its size was a Fifth Circuit ruling affirming a district court decision dismissing an effort by a Chinese company to dodge a $102 million copyright verdict for selling set-top boxes designed to evade copyright protection.

In other cases:

- A case in C.D. Cal. over the unauthorized use of music on the “Steve Harvey Show” settled on confidential terms.
- A judge in N.D. Cal. ruled that a copyright owner could use e-mail serve a complaint on a foreign citizen who had issued a DMCA counter-notification.
- Beyoncé settled a dispute with the estate of a YouTube personality in E.D. La. over Queen Bey’s “Formation” music video.
• In E.D.N.Y., a group of 21 graffiti artists were awarded $6.7 million for violations of the Visual Artists Rights Act after a property owner whitewashed over their work at 5Pointz before obtaining permits. [Photo: Ezmosis, CC BY-SA 3.0]

• Dr. Phil’s production company settled a suit in E.D. Tex. with a former director over her unauthorized use of outtakes from the show in an attempt to prove false imprisonment. Oh, and if you’re wondering whether the IP-plaintiff friendly Judge Rodney Gilstrap had his fingerprints on this one, you’d better believe it – there was even a wacky personal jurisdiction decision in the case right out of his now-obsolete patent litigation playbook.

And we’ll end with a truly surprising decision from the Southern District of New York, where a district court judge broke with the Seventh and Ninth Circuits in holding that news organizations might have violated a photographer’s display right under the Copyright Act by embedding third-party tweets featuring his photo on their sites. It’s long been a cornerstone of online content-sharing that linking, framing and embedding don’t implicate the Copyright Act because they function by allowing you to see content on the original server where it lives rather than by making a copy. That’s why you didn’t need to worry whether the person who posted the content to be embedded had the rights to do so – until now. The court left open the questions of fair use and innocent infringement, but this ruling has the potential to put a serious damper on embedding as an alternative to licensing photos and other content.

Copyright – Defense Victories

The Second Circuit ruled that bare assignments of the right to sue for copyright violations are void and, accordingly, shut down a claim against John Wiley & Sons by a photo agency.

The Ninth Circuit affirmed the dismissal of three copyright cases, holding that (1) HBO’s series “Ballers” lacked substantial similarities to an unproduced TV project, (2) Nike’s “Jumpman” logo was not substantially similar to a 1984 photograph of Michael Jordan in mid-air, and (3) marine artist Robert Wyland’s image of two dolphins crossing was not a copy of another artist’s work but an expression of an event occurring in nature.
There were a whole passel of defense wins this month in the Central District of California:

- Disney experienced a setback in its efforts to obtain an injunction against Redbox’s selling of digital access codes to Disney films, with the court ruling that Disney’s efforts to leverage its copyrights to control such behavior constituted copyright misuse.
- A TV host and his lawyer failed to escape a claim for filing a fraudulent DMCA notice, after a judge held that the alleged infringer did not need hold or register a copyright in the work at issue in order to state a claim under Section 512(f).
- Boing Boing defeated a lawsuit from Playboy Entertainment Group over an article containing a link to a third party’s Imgur account containing an archive of “every Playboy Playmate centerfold.”
- A judge who issued an injunction against online print shop Zazzle relating to its use of infringing images reconsidered his ruling, realizing that the injunction exceeded the scope of issues determined at trial and contained no findings of irreparable harm.
- The BBC won dismissal of a claim for use of clips from “The Cosby Show” in a UK documentary about Bill Cosby, with the court agreeing that there was no jurisdiction over the suit in California.
- Taylor Swift dodged liability in a lawsuit over “Shake It Off” because lyrics about haters hating and players playing were deemed insufficiently creative to support a claim (ouch).
- The son of Marc Bolan of T. Rex dropped a claim against the distributors of Baby Driver over the use of one of the band’s songs in the movie.

And again we end with an interesting decision from S.D.N.Y., this time involving the use of names as copyright management information. Sure, putting your name on copies of a creative work can serve as a form of copyright management information, held the court, and erasing the name from an unauthorized copy can be unlawful removal of CMI under Section 1202 of the Copyright Act. But while the unauthorized use of selections from a copyrighted text might be straight-up infringement, the fact that the selections don’t include a name attached to the work as a whole doesn’t also create a 1202 violation.
Copyright – Miscellaneous

Group registration of image copyrights now costs $55 per 750 images; previously, there was no limit on how many images could be attached to an application. One imagines this is a response to digital photography radically increasing the number of photos that are taken and the consequent burden on the Copyright Office to review them.

Google and Getty Images have entered into a “multi-year global licensing partnership” for Google’s use of images from Getty’s catalog, which might be understood as a thawing in relations between two companies that have had a rocky relationship in the past.

Patent

Yes, I know I said I wasn’t going to bother with patent cases, but this one’s an exception. The suit pending against Disney, Fox and Paramount in N.D. Cal. over the use of unlicensed CGI technology in major Hollywood blockbusters has had copyright claims trimmed, but patent and trademark claims against the studio will be allowed to proceed.

Idea Theft

That dispute over Disney’s Zootopia has reared its head again (seriously, not a good month for Disney in this section – my sympathies, folks). After the copyright claim was dismissed in federal court, the plaintiff has recast his claims as an idea theft lawsuit in California state court.

Commercial Speech

Trademark

Are the colors on a Rubik’s Cube functional? A company called Cubicle Enterprises says yes, and has filed suit in S.D.N.Y. claiming that Rubik’s registered trade dress in the design of the cube was fraudulently obtained by hiding foreign patents detailing the functionality of the color scheme. (Think about it though – the sides need to be distinct, but do they need to be colors? What about this cube? Or this bizarre beast, which I’ve solved myself? Could you argue the selection of colors is an aesthetic choice?) [Photo: Booyabazooka, CC BY-SA 3.0]
In other news, Iron Maiden is clamping down on counterfeit goods bearing the band’s trademarks in a new lawsuit in the Northern District of Illinois. And in New York state court, Google is alleged to have breached a settlement agreement with the holder of the “Googles” trademark for child-oriented multimedia productions; apparently the search giant was supposed to stay out of the Googles sandbox.

Two pending cases from N.D. Cal. that I just have to mention. First, Lucasfilm is locked in a galactic struggle over whether the card game “sabacc,” mentioned in The Empire Strikes Back, has become a trademark. Rumor is ownership of the Millennium Falcon is on the line, as the defendant (a British game company) moves to dismiss. Second, vast fleets of lawyers are trading C-beams, most likely glittering in the dark near the Tannhäuser Gate, over ownership of the classic “Star Control” series of video games. “C” stands for “complaint” in this context, and the fight has warped into trademark space as a new counterclaim seeks to invalidate the registration for the STAR CONTROL mark.

Self-described one-hit wonder Toni Basil lost her trademark case against various retailers who used her hit “Mickey” to promote a Disney line of clothing, after a judge in C.D. Cal. ruled that her claim was preempted by copyright, barred by the nominative fair use doctrine, or both. Meanwhile, stock photos used in short-lived ads were found not to constitute protectable trade dress in a case out of the Eastern District of California.

And if you’re into keyword advertising cases (I mean, who isn’t?), Eric Goldman has a write-up of a few recent ones.

**False Advertising**

Remember that case we talked about up in Defamation about a ministry complaining about Amazon’s use of the Southern Poverty Law Center’s “hate group” designation? There was similar one in E.D. Va., brought by a pro-life/family values group against nonprofit tracking organization GuideStar over the latter’s reliance on the SPLC. In this case the primary claim was filed under the Lanham Act, which the court dismissed finding that profiles published by GuideStar aren’t commercial speech; the court declined to exercise pendent jurisdiction over remaining state claims.
A judge in D. Utah leveled sanctions against a review website sued for false advertising by a manufacturer of bedding products, after he concluded that the defendant had misrepresented that it was independent of one of the plaintiff’s competitors.

A Philadelphia law firm was chastised by a judge in E.D. Pa. for misrepresenting the range of services that it was prepared to provide in its advertising, but a competitor’s claim failed for lack of a connection between the misrepresentations and any loss of business to the plaintiff.

**Professional Speech**

Speaking of lawyers, the Sixth Circuit let a law firm off the hook for sending a letter to a debtor of the firm’s client acknowledging the settlement and termination of the debt. The problem was that the letter technically violated the Fair Debt Collection Practices Act for failing to disclose specifically that it was a communication from a debt collector. No harm, no foul, said the Court of Appeals, invoking Spokeo to hold that Congress’ creation of causes of action did not allow it to create Article III standing.

**Miscellaneous**

The Southern District of New York held that New York City failed to satisfy even the Central Hudson test in defense of its attempt to ban the display of digital ads in ride-sharing services such as Uber and Lyft. Nothing like a little naked protectionism in municipal politics, eh?

**Miscellaneous**

**Academia**

A judge in W.D. Wash. ruled that the University of Washington violated the First Amendment by calibrating the amount of a security fee ($17,000) that it charged to college Republicans based on the anticipated reaction to the controversial message of an invited speaker.

**Government Licensing & Public Fora**

The Second Circuit reversed and remanded the dismissal of a First Amendment claim by a poet from East Harlem over his ban from a public access TV station.
The Ninth Circuit reversed entry of summary judgment in favor of the Department of Homeland Security on a claim that the exclusion of protestors and activity monitors from immigration checkpoints violated the First Amendment, finding that the pre-discovery record before the district court was insufficient to support a ruling as a matter of law.

An anti-gay speaker was improperly ejected from a Pride Festival in Syracuse, held the Northern District of New York, where the festival was open to the public and held in a public space.

**Political Speech**

Citizens United lost at the Second Circuit on a claim that New York’s donor disclosure rules constituted a prior restraint on speech; the court didn’t buy the argument that mandatory disclosure would deter donors and thus chill solicitation of donations.

The Fifth Circuit affirmed a ruling striking down limitations imposed by the City of Austin on when a candidate for city council may start fundraising and how such funds are spent.

The Ninth Circuit affirmed a Section 1983 win for teachers who were forbidden from picketing on school property, ruling that there was no way that their protest against school district policies could be interpreted as speaking as representatives of the district.

The ACLU has filed suit in the Southern District of Florida on behalf of a Homestead, Florida, man who was barred from entering city hall after he demanded that the city institute the use of police body cams. In the Southern District of New York, immigrant rights activists filed suit against Immigrations and Customs Enforcement arguing that they were targeted for harassment and arrest due to their political activity.

**Threats & Incitement**

We had two opinions from the Tenth Circuit upholding convictions for threats this month. First, the court rejected a defendant’s contention that his death threats to the Tulsa Police Department following the police shooting of Terence Crutcher in 2016 were protected political speech. Second, the court upheld the constitutionality of a federal statute criminalizing the intimidation of a flight crew member, upholding the conviction of a drunken airplane passenger
who launched into an extended bout of profanity against a flight attendant who rejected his advances. Between the two defendants in these cases, I’d rather fly with the first one.

Publishing

Milo Yiannopolous has given up on his lawsuit in New York state court against Simon & Schuster for cancelling his book deal. By the way, is it just me, or has the whole “outrageous alt-right pundit” thing become passé following Steve Bannon’s self-destruction and Trump’s eclipsing of other loudmouths?

Adults Only

So, can you commit the crime of indecent exposure in Iowa digitally, by sending someone an unwanted explicit photo via text? No, says the Iowa Supreme Court, looking to both First Amendment precedents and principles of statutory interpretation.

The New Hampshire Supreme Court heard argument in February challenging a Laconia city decency ordinance from three women convicted of sunbathing topless.

The True Miscellany

A California state judge disagreed with judges in Colorado and Oregon, holding that a baker has a First Amendment right not to bake a case for a same-sex wedding. Either way at least one court will be able to claim that it successfully called the result in Masterpiece Cakeshop.

A legislator in Rhode Island has floated the idea of a tax on violent video games, with qualifications for the tax based on the voluntary ESRB rating system. You know, on second thought I don’t think I’ll submit my new first-person shooter for a rating – problem solved!

Conclusion

For those of you who looked for me in Napa and didn’t manage to find me, my apologies. I only made it to the last day of the conference for a variety of frustrating but ultimately uninteresting reasons. Still, I thought the final lunch presentation on supporting gender diversity in the workplace was fantastic – it’s a conversation that the MLRC wants to keep going at the Legal Frontiers in Digital Media conference, where we’ll have a session on the experiences of women in the tech world, and women attorneys in particular. We hope to see you there!