From the Executive Director’s Desk
A New Guest Column

Last month Deputy Director Jeff Hermes inaugurated a new column in this monthly LawLetter entitled “The Monthly Daily: A Roundup of Media Law Developments from the MediaLawDaily.” Simply put, it was terrific. Sadly, it was at the back of the book, and I fear not everyone saw it. In Jeff’s words, it “will step back from the torrent of stories that we cover to get a broader perspective, summarizing activity over the past month...” It was written in a light and breezy style, and should be must-reading for those of you who might have skipped some of the Daily Reports, but also for those of you who read them religiously but who will find Jeff’s personal take and categorizations of the monthly developments to be both informative and entertaining.

So I thought to get you hooked on this new column, wherever it appears next month, I would cede my ordinary space and place Jeff’s column in the front of the book this month. I am sure you will enjoy it.

– George

The Monthly Daily:
A Roundup of Media Law Developments

By Jeff Hermes

As promised in last month’s column (go read it, I’ll wait), we’re back with another review of significant cases, legislative developments, and other events in the world of media law in the past month. As usual, we’ll chew the fat on domestic legal issues and eschew the fat as far as general media business news and events overseas. After all, some of you still read this in print and presumably want room in your mailbox for other things. (I remember print. That’s text without hyperlinks, right? There’s all kinds of stuff hidden in the links, so if you can’t click you’ll miss the fun.)

On with the show.

Supreme Court

The obvious lead for this month is the passing of Associate Justice of the Supreme Court Antonin Scalia. There was a tornado of speculation regarding what the Justice’s passing would do to the Court’s jurisprudence — Ron Collins in particular has an interesting analysis of what (Continued on page 4)
will happen to the Court’s 5-4 First Amendment rulings. Even more sound and fury was directed at the future composition of the Court in light of the upcoming election, including the President and Sen. Chuck Grassley sparring in competing posts on SCOTUSblog. Sigh.

In other Supreme Court news, The Court heard argument in a pair of patent disputes about the proper standard for awarding enhanced damages under 35 U.S.C. § 284, which it last considered over 50 years ago. Pair that argument with the Court’s upcoming consideration of fee awards in copyright cases in Kirtsaeng II, which we mentioned last month, and you’ve got an interesting time for the money side of IP cases.

We’ve got the likes of Man Booker Prize winners JM Coetzee, Margaret Atwood, Peter Carey, Yann Martel, and others with treasured places on my wife’s bookshelves filing an amicus brief -- among many others -- in support of cert in the Authors Guild v. Google copyright dispute. Hmm...the Booker now welcomes Americans, while Commonwealth writers show up in the Supreme Court...? I’m calling it, reunification is nigh.

The Court rejected cert in two cases watched by the media bar. The justices will not hear the appeal of a Mississippi high school student suspended over her rap lyrics (so it looks like Elonis is the Court’s last word on online musical threats for the time being), or the appeal of objectors to a $42 million right-of-publicity settlement between NFL players and the league. Note that the players who opted out of that settlement were worse off – the dismissal of their claims was affirmed by the 8th Circuit this month (see below).

Finally, a new petition to watch (but probably not worry about): Tom Scholz, frontman for the band Boston, petitioned for cert on a ruling by Massachusetts’ top court that comment on the motive for band-mate Brad Delp’s suicide was inherently a matter of opinion. Scholz now argues that ruling was a departure from Milkovich, but, not to put too fine a point on it, duh – Massachusetts has broader protection for opinion under its Declaration of Rights.

Reporters’ Privilege

A&E’s “The First 48” is gearing up its legal defenses in case its footage of a Minneapolis double homicide investigation is subpoenaed; Philadelphia Media Network is asserting the shield law in response to a demand for documents allegedly leaked to the Daily News by embattled Pennsylvania AG Kathleen G. Kane; and the Manhattan DA is attempting to force a New York Times reporter to testify about an interview with the man charged with the murder of Baby Hope.

The antics of the Center for Medical Progress have ticked off another square in MLRC bingo by showing up in this section. This time, we have N.D. Cal. ruling that an anti-abortion blogger doesn’t have to reveal who provided him with videos that CMP shot at the National Abortion Federation’s annual meeting, after CMP staffers denied under oath that they leaked

(Continued on page 5)
the footage in violation of an injunction. That said, the judge – no fool – said he’d revisit the ruling if the folks from CMP turned out to be fibbing. We also saw two other wins in reporters’ privilege cases, with the New York Supreme Court quashing a subpoena to a journalist who wrote a book about the disappearance of Etan Patz, and the Washington Court of Appeals holding that the state’s shield law protects against forcing a domain name registrar to disclose the operators of an online opposition newspaper based in Kazakhstan.

New York’s Joint Commission on Public Ethics is reaching into reporter/source communications with a decision targeting “grass-roots lobbying.” While the intent is to shine a light on indirect pressure on government, the new rule would require any source employed by an entity with a stake in a particular public issue to report contacts with a reporter.

Defamation

New Cases

Fifteen new defamation suits to report. For criminy’s sake, folks, isn’t February supposed to be when we huddle together in the dark and whisper sweet nothings to our loved ones?

Attorneys of various stripes featured prominently as plaintiffs this month, but we’ll start with a patent attorney sanctioned for bad behavior in his own divorce case who filed not one but two defamation claims against media outlets. The first was in federal court in West Virginia, where he alleged a TV station engaged in malicious video editing to make him look bad. The second was a suit in New York state court, where he sued the Post and the Daily News over their coverage of his travails. He hasn’t quite reached Joseph Rakofsky levels of absurdity yet, but give him time.

Speaking of suing the Internet, several plaintiffs suing about online publications are signing up to get schooled as the spring semester begins. In Opinion 101, it’s pop star versus rap star as Ciara sues ex-boyfriend Future in Georgia over the kind of tweets that often attend a bad breakup (ah, closure). In Section 230, a couple in Cook County, Illinois, are taking a crash course by suing TheDirty.com over anonymous user comments. And down in the science labs, a software company is studying the Streisand Effect in S.D.N.Y. by suing an online reviewer over a forum post. Hope you get your tuition’s worth, folks.

(Continued from page 4)

(Continued on page 6)
In broadcast media we have: a Tenn. TV station facing a lawsuit from a DA accused of blackmail; two suits in Florida, with CNN sued by a doctor over a report of child fatalities and A&E sued by two attorneys over an episode of “American Takedown”; and ESPN sued by Little League parents accused of cheating their way to a national title. In print media, the Bitterroot Star of Montana was sued over its report that a politician stiffed the paper on his bill for an ad, and Ebony magazine faces a refiled claim from the parents of two students named as possible murder suspects. Christian Slater is being sued by his father over statements made in an interview last year in the National Enquirer, although the paper doesn’t appear to have been named in the suit. Crossing the media divide, an ABC News story following the Boston Marathon bombings triggered a case that swept in a bunch of other outlets both domestic and foreign.

And a related pair of new cases in Massachusetts shows what happens when local political spats spill into court: city councilor sues newspaper and activist, activist sues blogger — this is not the way, people.

Defense losses

In California Superior Court, James Woods fought off an anti-SLAPP motion over tweets calling him a coke addict and sex offender. (The defense had secured a tentative ruling that the tweets were obvious hyperbole, but the judge changed his mind in a one-page final order.) A jury in Georgia Superior Court awarded a former county official $600K in a lawsuit against a local blogger, and a federal jury in Nevada awarded a businessman compared to Bernie Madoff a whopping $38 million. And a Texas trial court judge yanked back an award of $1.3 million in anti-SLAPP sanctions in a “revenge porn” defamation suit, granting plaintiffs a new trial.

More tragic is the fact that a New Mexico woman has just started a year’s sentence of probation on a criminal libel conviction, based on the content of a complaint she filed against a police officer. New Mexico’s criminal libel law was held unconstitutional in 2006, but a series of procedural missteps prevented her appeal from being heard.

Defense wins

Time for some better news, with several anti-SLAPP wins in the trial courts. On Oklahoma circuit judge knocked out a suit brought by an ex-DA over a failed petition to investigate her conduct. Texas’ anti-SLAPP law defeated a claim against a Beaumont newspaper. California’s law shifting fees for successfully quashing attempts to unmask anonymous speakers led a disgruntled dentist to drop his lawsuit and fork over $12K for Paul Alan Levy’s time.
(Continued from page 6)

Oh, and another Cosby matter — **Cosby and Marty Singer** received a tentative ruling dismissing Janice Dickinson’s defamation claim against them under Cali’s anti-SLAPP law. I’m sure none of us at the MLRC feel weirdly conflicted about that, right? If it helps with your internal conflict, the judge has since **delayed a final ruling** to the end of March and ordered additional briefing.

Also in the trial courts: A libel claim over **sordid business in Kazakhstan** was kicked out of D.D.C., for failure of personal jurisdiction over some defendants and failure to plead actual malice as to the rest. D.N.J. booted a claim over a **book about former Nazis in America**, finding that statements about the plaintiff were not defamatory.

Attorneys can breathe a sigh of relief after a positive result in a pseudo-defamation matter we covered last month: The Michigan lawyer facing a bar complaint that was plainly an end run around libel law was **cleared by the state’s attorney grievance commission**.

**Appeals**

*The Myrtle Beach Sun News* has petitioned the South Carolina Court of Appeals for rehearing on a decision upholding last month’s $650K verdict against the paper. Meanwhile, the Texas supreme court has agreed to hear a dispute between a newspaper and the son of a deputy sheriff that focuses on the **definition of a “matter of public concern.”**

Plenty of good news in the appellate courts. A California appellate court left **Courtney Love’s “twibel” win** intact. The Maryland Court of Special Appeals found that an ex-convict and frequent litigant hadn’t shown that **assorted bloggers’ accusations of pedophilia** were false. And the Ohio Court of Appeals affirmed a defense ruling on the **fair report privilege and innocent construction** rule. The First Circuit paused an appeal in a D. Me. case we mentioned last month, involving accusations of pedophilia against the owner of a Haiti orphanage, to let the district court consider **whether diversity jurisdiction was proper**. The Second Circuit found that it had no jurisdiction over a plaintiff’s **interlocutory appeal from a partial anti-SLAPP victory** below. The 3rd Circuit affirmed two defendants’ wins, finding in one case that the **use of a stock photo** didn’t make the associated article “of and concerning” the photo’s subject, and in another that an **“energy healer”** had failed to prove falsity and actual malice. Meanwhile, the D.C. Circuit kicked out, for lack of personal jurisdiction, a suit arising out of **controversy surrounding the “Ground Zero Mosque.”**

A few plaintiffs had wins on appeal. The Texas supreme court held that the state had jurisdiction over a claim by a **Mexican pop star against Mexican broadcasters**, finding that the broadcast had been targeted across the border. In Maryland, an appellate court held it was error...
to apply a “clear and convincing” standard to a question of abuse of a conditional privilege. The Massachusetts Appeals Court reached a mixed decision in a case against a hospital, holding that the case could continue but that certain statements were protected by the commonwealth’s anti-SLAPP law. Anti-SLAPP arguments ran aground in both Oklahoma’s appellate courts, which held that the state’s 2014 anti-SLAPP law did not apply retroactively to an ex-DA’s 2013 complaint (the same Oklahoma ex-DA who had a different suit dismissed, as discussed above), and Louisiana’s Fifth Circuit Court of Appeal, which held that the defendant didn’t establish that its reporting on a local convenience store was protected by the First Amendment.

Miscellaneous

Let’s end this section with Trump. I was going to be outraged about his recent comments on libel law, but his contempt for free speech other than his own is really nothing new and I can’t pretend that it’s any worse than expected. I haven’t heard someone talking more about the restoration of a country’s glory with less of an intent to preserve its values since Augustus Caesar.

At least he settled his defamation and other claims against Univision arising out of the networks’ decision to drop the Miss Universe and Miss USA pageants. The terms of the settlement are confidential, but if we have one less reason to see this particular name in the news, it’s a good thing. Yes, it’s like bailing out the ocean with a thimble, but still.

Privacy
Right of Publicity

The big news in privacy this month is the Ninth Circuit’s long-awaited ruling in the Hurt Locker case, involving right of publicity claims over elements of the film drawn from the life of Army bomb disposal expert Jeffrey Sarver. The opinion has left the folks in the MLRC office scratching our heads a bit; we agree with Prof. Volokh that the court’s attempt to reframe its past right of publicity rulings by rewinding all the way back to Zacchini doesn’t quite hang together.

There was also a less controversial but still important decision from the Eighth Circuit in Dryer v. NFL. The case involved ROP claims arising out of game and interview footage that the NFL repackaged and used in various ways; the Court of Appeals affirmed summary judgment for the NFL, finding the claims to be preempted by copyright law.
We reported on the end of several other right of publicity cases this month. The holder of a world record for consecutive hacky sack kicks sued over an ad depicting a person “beating the record for hacky sack” under an energy drink’s influence. The court (N.D. Ill.) kicked out the case. In the Middle District of Florida, Hasbro settled with choreographer Deney Terrio over the toymaker’s cartoon gecko “Vinne Terrio.” (If you clicked that last link – yes, there is a wiki for everything.) And Reese Witherspoon settled a claim in California state court over the use of her name to sell jewelry — but did they use her stunt double? (With Leo’s Oscar win, how could I resist? Thanks to ace librarian Marie Cloutier for tracking down the link – librarians rock.)

Never fear, though, we have four new ROP claims to keep things interesting. A young woman sued CBS News over a retweeted meme with the woman’s picture over the caption “Everything that’s wrong with America.” Living 90’s meme Carmen Electra sued a Queens strip club in E.D.N.Y. for using her photo. In Illinois state court, we’ve got a putative class action against online lawyer website Avvo, alleging that the site misappropriates attorneys’ professional identities. Finally, in S.D.N.Y., a potential class action has been filed on behalf of models against Getty images, alleging a photographer misrepresented the models’ consent.

Private Information

An NBC station is facing suit in D. Colo. after it — am I reading this correctly? — allegedly aired a picture of a 14-year-old’s genitals and identified him in the accompanying news story. It seems the station was reporting on the teen’s being blackmailed with the image. Guess the blackmail’s not a problem anymore. A new lawsuit was filed in Florida state court by Giants defensive end Jason Pierre-Paul against ESPN, after his medical records relating to a fireworks mishap and a missing finger were posted online. In another medical privacy case, NY’s highest court heard argument that it should reinstate claims over an episode of ABC’s “NY Med” that depicted a man’s medical treatment and death.

Meanwhile, in the Eastern District of Michigan, two magazine companies reached different results: The court approved a $7.5 million class settlement with Meredith over the state’s Video Rental Privacy Act claims in one case, but dismissed a separate class action against Time, which had been accused of illegally selling subscriber information to
marketers. Speaking of video privacy, the Eleventh Circuit denied Dow Jones’ motion for summary affirmance of the dismissal of a VPPA class action.

Lastly in California Superior Court, claims against Errol Morris related to his documentary Tabloid went out with a whimper, dismissed for lack of prosecution.

Access/FOIA

New cases

There’s a head-scratcher of a FOIA matter being fought in California, Pa., where an attorney is fighting to gain access to video of an officer roughing up a jailed suspect. The Chief of Police claims that the video could compromise security, but he’d already let one reporter review the video and another examine the cell in person.

Four new federal access fights also came to our attention. In D.D.C., a watchdog nonprofit is suing for CIA records regarding the prosecution of John Kiriakou, the former agent who leaked the agency’s use of waterboarding to the press. In the same court, the Washington Post is fighting to unseal records related to an investigation of ex-D.C. mayor Vince Gray’s 2010 campaign. In D.N.J., news outlets are trying to lift the seal on court records in the Bridgegate criminal case. And in a battle that started last month but that we only noted recently, seventeen news organizations challenged the retroactive censorship of the transcript of a public hearing held at Guantánamo in 2015.

We also saw the Hollywood Reporter and Los Angeles Times oppose a motion to seal civil court records dealing with Sumner Redstone’s health, and Iowa’s Public Information Board decide to prosecute the Des Moines County Attorney over her failure to release law enforcement reports relating to a police shooting.

Current cases

In the win column: The Florida Supreme Court held that the City of Jacksonville owes the Times-Union $174K in connection with open meetings violations. Not to be outdone, the Kentucky Appeals Court whacked a state agency for $1 million for its failure to turn over records on child-abuse deaths and injuries. A Colorado Springs judge unsealed an affidavit for the arrest of a man who traded gunfire with cops. E.D.N.Y. lifted the seal on a report filed as part of a money-laundering case involving HSBC. A judge in S.D.N.Y. indicated that she would release redacted documents in the Sheldon Silver corruption case, subject to a delay to allow appeals. Finally, a D.D.C. judge in the ongoing Clinton e-mail case ordered the release of all non-exempt e-mails by the end of February (the government announced at the end of
January that it will withhold 22 “top secret” e-mails, and allowed discovery to go forward with respect to Clinton’s private e-mail system.

In the pyrrhic/questionable column: the DOJ released the text of a transatlantic privacy agreement to end a lawsuit in D.C., a mere six months after the agreement was publicly released in Europe. An Oklahoma court held that video of a college running back punching a female student is a public record, but copies of the video seem to have mysteriously gone missing. Meanwhile, a county judge in Michigan awarded ESPN a portion of its fees and costs for access to police reports on student-athletes from Michigan State University, but a hefty bill remained. And after more than a decade of litigation, the ACLU has secured the release of around 200 photos showing the abuse of detainees in U.S. military custody; but this is no more than 10% of the responsive documents.

In the loss column: In D. Wyo., a journalist was denied access to Yellowstone National Park to witness a gathering of bison for slaughter. In D.C., a judge who had originally decided to declassify documents related to the CIA’s role in the death of Pablo Escobar vacated his earlier order. In N.D. Cal., a pair of reporters were denied access to racist emails written by former federal judge Richard Cebull. In N.J. Superior Court, a judge has held that only New Jersey residents may take advantage of the state’s public records law. Good lord, McBurney v. Young sucks.

We’re waiting on a ruling from the 7th Circuit on the release of grand jury transcripts related to an attempt in 1942 to indict the Chicago Tribune for its Battle of Midway reporting. At the recent oral argument in the case, the key issue seemed to be setting precedent for other grand jury proceedings rather than anything sensitive in the transcripts themselves. After all, if it’s more or less all right by now to discuss plot points in The Force Awakens, I think we’re probably good to talk about World War II. (Spoiler alert: Enigma? Not so secure.)

Legislation

The water crisis in Flint, Michigan, fueled new calls for the governor’s office to be subject to public records requests. A bill in California would require the government to provide more information about withheld documents; another Cali bill would open up records on police misconduct and use of force. The Massachusetts senate passed a bill to improve response times, reduce costs, and reimburse attorneys’ fees; government entities have ramped up their objections as the bill moves forward. And in Kansas, we have bills to improve access on a number of issues, including transparency for government employee collective bargaining and private e-mails on government business.
In the face of criticism, a New Jersey legislator has said that he intends to water down a pending bill blocking access to 911 calls and police video — but a new bill in Missouri would circumscribe access to body cam footage, while a Utah senate panel recently approved a similar bill. Meanwhile: the Utah House approved a bill to limit public access to school district records; Washington state has put the brakes on legislation to speed up record requests; there’s momentum in the Florida legislature to make the award of attorneys’ fees in public records cases discretionary; a Wisconsin bill would give those exonerated for wrongful convictions the right to seal all records in their cases; an Indiana senate committee approved a bill that would exempt PD’s at private colleges from the state’s public records law; and the Colorado senate killed a bill to improve digital access to public records (but the opposition is apparently looking for a compromise position, so there’s still hope).

A Virginia senate committee passed two bills on public employee salaries, one raising the dollar threshold for disclosing salary amounts to the public and one (yikes!) to withhold the names, agencies, and employment dates of all public employees. Because terrorism, apparently. Luckily, the latter bill was tabled by a House committee, killing it for this year.

**Bonus Puzzler**

So, the Seattle Police Department holds an online Q&A session on a NextDoor community website. NextDoor is a platform for neighborhood and regionally-oriented forums. The Seattle NextDoor site and terms of service impose certain restrictions on access: only users who can confirm their address within the city can join, and users are barred from publicly reposting anything said on the site. A reporter who broke the rules and reported some of the comments during the session was kicked off the site.

**QUESTION:** Did Seattle’s selection of the NextDoor site as a forum for its meeting violate the state’s open meetings law, or otherwise violate the First Amendment? Responses to jhermes [at] medialaw.org; best answer, as judged entirely subjectively by George, will be reposted in next month’s MediaLawLetter.

**Newsgathering**

Fear of drones falling out of the sky at the Super Bowl might just have been the most exciting thing about the game, but since then, the noise around drones has receded to a faint buzz. However, a late-breaking amendment to the FAA reauthorization bill would free up news organizations to use low-risk “microdrones” in most circumstances, so watch this space.

The Ninth Beatitude: “Blessed are the sources, for they shall lead us to the light.” And, like the others mentioned in the Sermon on the Mount, they’re likely to find themselves in hot water
in the meantime. In the Ohio Court of Common Pleas, a Cleveland attorney was whacked with $11K in highly questionable sanctions after he alerted the press to upcoming arguments in a case. Meanwhile, the two hospital workers who leaked medical information to ESPN about the Giants’ Jason Pierre-Paul were fired. Well, yeah.

Not, of course, that reporters (and reporter-like people) are immune from prosecution. The host of an online talk show found himself swept up in the arrests at the Malheur Federal Wildlife Refuge in Oregon; he argued that his activities at the Refuge were in connection with his “Internet news show”. A bit further south in California, the trial of a news photographer’s false arrest claim against the California Highway Patrol has recently started. And a terrible decision from the Eastern District of Pennsylvania this month on recording the police; the court held that there is no First Amendment right to record the police except while one is engaged in expression. The usual commentators have pointed out the obvious flaw, i.e., that the First Amendment is implicated by newsgathering as well as actual publication.

In happier news, a Texas grand jury has recommended a criminal trespass charge against a Galveston cop who arrested and searched the vehicle of a civil rights activist filming at the police station. Also, Bahrain followed suit with Iran’s actions last month, and released four American journalists who had been accused of participating in an illegal assembly. Welcome home.

Prior Restraint

As mentioned above, the Center for Medical Progress was questioned over the leak of video that a judge in N.D. Cal. had enjoined from distribution. The preliminary injunction in question had issued earlier in the month. We saw also saw a more direct form of prior restraint in Chicago, where a witness to a police shooting was detained so she couldn’t talk to reporters; she’s suing the police department. Jeez, usually they just grab your phone.

And in N.D. Ind., an archery company sued a LARPer over the patent for foam-tipped arrows; more troublingly, they’ve fired off (sorry) a motion for a gag order to prevent the would-be Legolas from commenting on the case. “LARP” is Live-Action Role Playing, for those of you who have never wandered around the Pine Barrens with a wizard’s staff. Hey, you had your fun in college, I had mine.

A bill introduced Illinois that would outlaw the posting of video of a crime being committed with the intent to promote that activity. Introducing bills that obviously fail Brandenburg? Alas, still not a crime.

Twitter is continuing to fight for the right to disclose information about government requests it receives in national security investigations, and now it has picked up some support from Medium, Reddit, Wikipedia, BuzzFeed, and the Washington Post. Remember, there’s a world
of difference in saying you’ve received “between 0 and 999 requests,” and saying you’ve received “between 1 and 999 requests.”

Broadcast/Cable/Satellite

The top story for the FCC in February was its decision to force competition in the market for set-top boxes, moving forward with a proposal to compel cable companies to make programming available through third-party devices and software. The National Association of Broadcasters likes the measure; needless to say, the cable industry does not.

In other FCC news, Google has announced that it will not participate in the upcoming spectrum auction, to the relief of incumbents – except the low-power TV stations that are likely to be collateral damage in the effort to overhaul the airwaves. Several LPTV operators asked the D.C. Circuit to force the FCC to let them participate in the auction. Meanwhile, the FCC is facing an upcoming argument in the 3rd Circuit on its decision to treat TV joint sales agreements as ownership interests.

Internet/New Media

Before we start with the substance, congratulations to Judge Lucy Koh, who has been nominated to the 9th Circuit. It seems like every major tech decision from the Northern District of California in recent years has had Koh’s name on it.

Section 230

Section 230 turned 20 years old this month. Just imagine what will happen when it’s old enough to drink. That said, it’s not a perfect defense: it hasn’t stopped Backpage.com from facing a contempt vote this month in the U.S. Senate; it hasn’t stopped this case in D. Utah over summaries of third-party complaints; and it doesn’t do anything to stop contract claims under consumer non-disparagement clauses, like this case from Texas. That last one is why we need the Consumer Review Freedom Act.

Net neutrality

The controversy over zero rating is heating up. T-Mobile’s “Binge On” program was described as “likely illegal” in a new report from Stanford, and Verizon’s decision to exclude its own video platform from its data caps is causing an uproar.
Hate, threats & terror

The drumbeat around social media and terrorism continues, and not all of it was about Apple (more on that later). The Obama administration gathered tech and entertainment executives for a meeting at the Department of Justice to ideas on counterterrorism efforts, while the Department of Homeland Security is building tools to vet the social media presence of visa applicants. Twitter reported the deletion of 125,000 ISIS-related accounts since mid-2015, although there’s no way to know how many of those were accounts re-opened by serial offenders. Nevertheless, a new report suggests the site’s efforts are actually working, and has irritated ISIS supporters enough that new death threats have been made.

In regular old domestic nastiness, the Washington Court of Appeals held that a teenager’s “mean-spirited hyperbolic expressions of frustration” via tweet couldn’t support her cyberstalking conviction. And the North Carolina Supreme Court heard argument this month on whether the state’s cyberbullying statute, which prohibits the posting of personal or sexual information “with the intent to torment,” is constitutional.

That last one in particular is one to watch – the mid-level appellate opinion in the case was a mess. Emotional impact is a non-speech element of communication? Really?

Fantasy Sports

The hubbub over fantasy sports also appears to have settled down a bit, now that the various federal lawsuits filed against FanDuel and DraftKings have been consolidated in D. Mass. by the Judicial Panel on Multidistrict Litigation. Still, we had Rhode Island’s AG announcing that the games are legal there, and Indiana’s bill to regulate the field passed the state senate. But none of this might matter, given that a key payment processor has announced that it’s getting out of that business. As Backpage learned, legal rights are great, but they’re not worth much if your customers can’t pay you.

Miscellaneous

A potpourri of other matters digital:

The U.S. Congress passed a law making permanent the federal ban on states and localities taxing Internet access.

The 2nd Circuit upheld a $450 million settlement by Apple in an antitrust suit over e-book price fixing. Speaking of which, did we mention that the MLRC’s 50-State Libel Survey is now available in an attractive e-book format?

(Continued on page 16)
N.D. Cal. held that Google doesn’t unjustly enrich itself at users’ expense by presenting them with two CAPTCHA words. You know, these things:

![CAPTCHA Image]

The plaintiff had argued that asking a user to type in two words was just Google’s attempt to get some extra assistance with its optical character recognition. The court basically said “Whatcha gonna do?” and booted the case.

The Appellate Division of the New Jersey Superior Court, home of the *Dendrite* decision itself, held that defamatory plaintiffs had satisfied their burden to learn the identity of a Doe defendant tossing around online accusations of an extramarital affair.

Facebook has banned person-to-person firearm sales across the site, in response to charges that the site was being used to avoid background checks. At the risk of encouraging another stupid stunt by a South Carolina legislator, I approve.

Oh, and on top of all of this, it’s been discovered that Amazon Web Services is legally prepared for the zombie apocalypse. Because if there’s one thing you don’t want to happen while you’re holding off the ravaging hordes with a hockey stick in one hand and a shotgun in the other, it’s a lawsuit.

**Internet Privacy**

Let’s start with the story that has been flooding this section with updates since it first broke. The House Judiciary Committee announced that it is finally ready to take up long awaited reforms to the Electronic Communications Privacy Act in March.

Oh, wait – there was something about Apple, wasn’t there?

The basics: About a week after a bill was introduced in Congress to kill state bills requiring manufacturers to weaken smartphone security, a magistrate judge in C.D. Cal., invoking the All Writs Act, ordered Apple to assist the FBI to gain access to a locked iPhone in furtherance of executing a search warrant. For reasons complex and disputed, this would require Apple to create a new version of its operating system. Apple has flatly refused, citing the privacy

(Continued from page 15)

(Continued on page 17)
interests of its users and the dangers of allowing a tech company to be co-opted in this fashion. Did I mention that the phone was used (but not owned) by one of the San Bernardino shooters?

So, cue a firestorm of confused information, with Apple and the FBI waging the personal privacy vs. national security battle in the public eye and commentary all over the map. The parties are raring to go in court, too: the FBI filed a motion to compel Apple to comply with the order before Apple had a chance to object, and Apple filed its motion to quash ahead of the deadline. Complicating matters, at the very end of the month Apple succeeded in fighting off another All Writs Act order in E.D.N.Y. to unlock an earlier version of the iPhone that is, if anything, easier for Apple to access.

Prof. Orin Kerr has a careful three part analysis of the situation. Also worth a read is Prof. Yochai Benkler’s commentary, where he argues that the fundamental issue is that distrust of the government led us to turn to technology to protect our rights. For what it’s worth, my perspective is that the government should no more be able to compel a manufacturer of communications software and devices to become its forensics department than it should be able to compel a reporter to function as its investigator. See U.S. v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988) for some interesting language on point. The impact is very much the same: a layer of the communications infrastructure is shifting resources away from facilitating speech to hiding speech, and that’s a problem.

In any event, this case will inevitably have an effect on the broader encryption debate and ongoing calls by law enforcement for Congress to prevent online surveillance from “going dark.” For example, confirmation that the federal government subpoenaed Carnegie Mellon for information about Tor users, a revelation that takes on new meaning in light of the Apple fracas, it has also been confirmed. (Speaking of Tor, kudos to New Hampshire for its new bill that would allow public libraries to run Tor relays – as I said before, librarians rock.) A new congressional commission has been proposed to manage this mess; good luck with that.

A brief note on transatlantic data privacy -- on February 2nd, transatlantic negotiators announced the “EU-US Privacy Shield,” an agreement in principle that will keep the Article 29 Working Party at bay in Europe while the details are figured out. The text of the agreement has been released, and it appears the U.S. will continue bulk surveillance in certain circumstances while its compliance will be overseen by an administration official. Initial responses from Europe are predictably skeptical, but it might help that President Obama signed the Judicial Redress Act this month.

Intellectual Property

Copyright – new cases

New York wins the bi-coastal battle for new copyright suits this month, with infringement claims in S.D.N.Y. over: the appearance LeBron James’ tattoos in the “NBA 2K” video game...
(did we learn nothing from The Hangover Part II?); illustrations on the cover of a unique Wu-Tang Clan album owned by Martin Shkreli; music on Jay-Z’s Tidal streaming platform; a photograph of Willie Nelson used by Boston Red Sox (the Red Sox in a New York court...will they install bleachers?); and Justin Timberlake and Will.i.am’s “Damn Girl.”

But my favorite new copyright action is a lawsuit in E.D.N.Y. over fonts and ponies. Yes, you read that correctly. Hasbro is being sued over its unauthorized use of a proprietary font called “Generation B” in connection with cartoon megahit “My Little Pony: Friendship is Magic.” It’s pretty clear that Hasbro isn’t just using a look-alike font, but the font itself was inspired by the titles of Disney’s 1961 movie “The Parent Trap.” Is the font original? You be the judge.

We have just one new suit in C.D. Cal., over a photo of Carlos Santana. Suits elsewhere included those in: W.D. Tex., against NBCUniversal over photographs used on “The Today Show”; D. Or., by the producers of the film “Queen of the Desert”; N.D. Ga., over the right to publish the Georgia Administrative Rules and Regulations; and M.D. Tenn., where sci-fi/fantasy authors are squaring off over elements of two book series that each follow “an elite band of warriors that must protect the human world from the unseen paranormal threat that seeks to destroy humans as they go about their daily lives.” A lot like First Amendment lawyers, in other words.

Copyright – pending cases

In S.D.N.Y., a holder of rights in Run-DMC’s music was awarded $1.4 million in costs and fees after fighting off an infringement suit. In C.D. Cal., a case against Jay-Z over “Big Pimpin’” was dismissed for lack of standing, while Warner/Chappell Music paid $14 million to settle the “Happy Birthday” case. In N.D. Cal, we got the final order dismissing the monkey selfie case, and a ruling that Oracle cannot add new copyright claims against Google in its long-running case. In D. Mass., a complaint over the design of Iron Man’s armor was dismissed for lack of personal jurisdiction. And in N.D. Ill., a judge granted summary judgment against porn company and serial copyright plaintiff Malibu Media, because it could not link a Doe defendant or his IP address to the alleged infringement.

We saw only three plaintiffs’ wins in the trial courts. First, a judge in S.D.N.Y. held that a gossip site could not invoke fair use to protect its use of leaked Playboy nudes. Second, Dish Network settled its fight with Fox by agreeing to disable ad-skipping on Dish Hopper for a week after programs are first aired. Third, the RIAA got a $22 million default judgment against music link service MP3Skull; the judgment invokes the All Writs Act in ordering domain registrars to turn over control of the relevant websites to the record labels.
Meanwhile, on the eve of trial in S.D.N.Y., Fox and North Jersey Media settled a closely-watched case over the Facebook posting of an iconic 9/11 photo.

Copyright – appeals

The Ninth Circuit upheld a ruling that Superman co-creator Jerry Siegel transferred his rights to Warner Bros., and heard argument on whether a merchandise company willfully infringed photographs of Run-DMC (seriously, what is it with photographs of musicians this month?). Meanwhile, the sports, music, television, film, and creative industries all piled on Alki David’s FilmOn streaming service, arguing the court should overturn a district court ruling that FilmOn might be eligible for a statutory license.

Even worse luck for David in the Second Circuit: the court affirmed a finding of civil contempt and sanctions for violation of an injunction. Also in the Second Circuit: the full panel of the court denied en banc review of a panel ruling that EMI’s rights in “Santa Claus Is Comin’ to Town” will expire later this year; a different case against Jay-Z over “Big Pimpin’” and other songs was held to have been filed 10 years too late; and it looks like an appeal over performance rights in pre-1972 sound recordings will be referred to the New York Court of Appeals for comment on the state’s copyright law.

Patent

Two doozies this month for plaintiff’s wins. In the Eastern District of Texas, a jury ruled that Apple owes patent troll VirnetX $625.6 million for infringement of patents used in Apple’s FaceTime and VPN services. But Apple got off easier than Marvell Technology, which agreed to pay $750 million to Carnegie Mellon University to settle an infringement action. A more mixed result in S.D.N.Y. for Barnes & Noble, which failed to overturn a jury finding of infringement on two e-book patents, but won a new trial on damages after one of the patents was invalidated.

A few clear defense wins as well. TiVo had three patents, including a core targeted-advertising patent, declared invalid in S.D.N.Y. in an infringement action. Facebook, Google, and other major tech firms got a ruling in the Western District of Texas that an e-mail patent asserted against them was invalid. Facebook also scored a win in the Federal Circuit, with the court upholding a jury verdict of non-infringement on patents related to online diaries; so did Samsung, which received a ruling that it didn’t infringe one of Apple’s patents and that two others were invalid (and there goes a $120 million verdict for Apple).
Trade Secret

We don’t see many trade secret claims come through the Daily. This month, we have such a claim in California in a case over an unauthorized biopic about boxer Chuck Wepner, who inspired the film “Rocky.”

Commercial Speech
Trademark

At issue in this month’s new trademark complaints: the name of the “Krusty Krab” restaurant, also used by a fictional restaurant in Viacom’s SpongeBob SquarePants universe; the term “Verge,” used by both Vox Media and another tech blog since 2011; and the term “Buzzr,” used by a social media site and by the production company behind American Idol. In Oscar news, the Academy has objected in court to the use of its marks on unauthorized Oscars “gift bags” containing some, shall we say, adult items. And Michael Jackson’s estate has sued over the launch of popcorn website KingOfPop.com.

In C.D. Cal., Fox has defeated a lawsuit by record label Empire over its hit TV series of the same name, with the judge ruling that Fox’s use was protected by the First Amendment. (So now can we get the rest of season two? I’m dying here!) Uber was ordered in N.D. Fla. to limit the reach of its online presence to avoid infringing the local trademark of Uber Promotions. And S.D. Fla. killed another keyword advertising lawsuit, rejecting the initial interest confusion theory and finding that keyword buys are now standard business practice.

The Ninth Circuit heard argument this month on whether it should revive a suit by Gibson Guitar over use of its “Flying V” mark on a SpongeBob SquarePants ukulele. (Who knew that the Pineapple Under the Sea was such a hotbed of trademark controversy?) The Court of Appeals quickly reinstated the claims against the manufacturer of the uke, but let Viacom go, finding the media company didn’t control that aspect of the design.

False advertising

In the federal Courts of Appeals, the 7th Circuit upheld a 10-year sentence for infomercial huckster Kevin Trudeau, following his conviction for fraud in connection with the sale of weight loss products. The 9th Circuit reinstated a potential class action over advertised features in video game “Grand Theft Auto V” that weren’t immediately available. In the District of Utah, a judge allowed a case over astroturfing Amazon reviews to proceed, noting that this could violate the FTC’s online endorsement guidelines as well.
There was a defense win in the Eastern District of Pennsylvania, where Maine Antique Digest avoided Lanham Act claims over a review of a concluded auction. Oddly, as Rebecca Tushnet points out, the case was dismissed for lack of competition between the parties, not for the obvious reason that the review was in no way commercial speech.

Advertising Restrictions

The Ninth Circuit upheld a California law that banned depictions of handguns on gun store advertisements. Because that would be...what? Informative?

Professional speech

The Eleventh Circuit has vacated its recent decision on whether Florida can restrict doctors’ speech to patients about guns – the “Docs v. Glocks” law – and will rehear the case.

Turning from doctors to lawyers, the California state bar has cautioned attorneys that their personal blogs can be subject to professional conduct restrictions, if used to tout their legal skills. Doesn’t seem too surprising, but I can see questions coming up as to whether a blog in which a California attorney comments on legal matters (see, e.g., Naffe v. Frey) will be interpreted as showing off their lawyer-fu.

Miscellaneous

Academia

Battles over free speech on campus found their way to the courthouse this month. The University Daily Kansan filed a federal suit against the school, alleging that it allowed the student senate to slash the paper’s budget in retaliation for an editorial. Campus groups sued the University of South Carolina in federal court over the school’s speech policies, after students faced questioning for holding a university-approved event at which other students felt “triggered.” Headed up to the Eighth Circuit is an appeal by Iowa State University, which is seeking to overturn a ruling that the university violated students’ speech rights by barring them from using the school logo on marijuana-themed T-shirts.

Oh, and Melissa Click was fired. Want more? The Foundation for Individual Rights in Education has released its 2016 list of the worst schools for free speech; check it out here.

Signage & Public Display Regulations

The Fourth Circuit held that a Norfolk, Va., sign ordinance was a content-based restriction on speech. The Middle District of Pennsylvania held that a case brought by an atheist

(Continued from page 20)
The Sixth Circuit held this month that an Ohio ban on knowingly or recklessly false statements about candidates was unconstitutional. The opinion relied on my favorite Supreme Case case, *U.S. v. Álvarez*. In state court, Texas’ highest criminal court held that the state’s political coercion statute was vastly overbroad, negating charges against Gov. Rick Perry for threatening to use his veto power to force the resignation of a rogue county DA.

* * *

Aaaaand….breathe.

That’s it for February (or at least as much as I can fit in this article). Thanks for reading, and e-mail me if (1) you’re seeing trends that you think we should be watching in future issues, (2) you want to jump in on any of the pleas for audience participation I’ve included, or (3) you want to comment on anything you’ve read here. Again, that email address is jhermes [at] medialaw.org.

Otherwise, I’ll see you next month, when we’ll have Gawker/Hogan trial stories to discuss!