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

This month, I want to start with a pitch for *Legal Frontiers in Digital Media*, our annual digital law conference at the Computer History Museum in Mountain View, CA, on May 18-19. This is the tenth anniversary of the conference, and good gracious has digital media law changed in that time.

As always, thanks to the participation of our members on the conference planning committee we’ve got some exciting sessions lined up. I also can’t stress enough how much hard work and creativity our MLRC Staff Attorney, Michael Norwick, puts into both the substance and procedure at this conference. If you’ve enjoyed the consistent quality of this conference year after year as I have, you have Michael to thank for it.

To sweeten the invitation, we’re offering a 10% discount off of the registration rate for our 10th anniversary – but only through April 17th. So sign up now, and we’ll hope to see you there!

Supreme Court

Opinions

Sporadic warm weather and interesting Supreme Court opinions are some of the surest signs that Spring is upon us. The fact that I’ll still keep my boots handy until Tax Day is the surest sign that I grew up in New England. Well, that and the fact that I can’t pronounce a short “o” to save my life.

The ruling in *Star Athletica* came down this month, letting us know that designs on functional articles might be copyrightable if they have sufficient conceptual independence from the article – even if the removal of the design impairs the original’s functionality. We also got *Expressions Hair Design*. 
with the Court easily recognizing a hidden restriction on speech within a New York law permitting retailers to offer discounts for cash but not surcharges for use of credit cards.

We’re still waiting on the other two big First Amendment cases this term (Lee v. Tam and Packingham v. North Carolina), but we did get a ruling for those of you who care about patent law. In SCA Hygiene Products, the Justices rejected the application of laches in patent cases just like they did in copyright cases three terms ago.

Hearings

And if you can’t get enough of patents, we had hearings in TC Heartland v. Kraft Foods Group Brands, in which a defendant tried to break Judge Rodney Gilstrap’s domination of the nation’s patent cases in E.D. Tex., and Impression Products v. Lexmark International, delving into the wilds of patent exhaustion. In the first, the Justices seemed indifferent to the numerical oddity of the Texas court’s docket, instead focusing on Congressional intent with respect to jurisdiction in patent cases. The second was a more subdued affair, leaving commentators without many tea leaves to read.

Petitions

And yet more patent cases in the petitions hopper, with Cox Communications looking for a review of a ruling that it infringed VoIP patents held by Sprint, and Affinity Labs seeking to revive two patents on streaming media technology that it had claimed were infringed by Amazon, DirecTV, and others.

We also saw a petition from cert from Power Ventures in its Computer Fraud and Abuse Act case with Facebook. Lots and lots of eyes on that one. And a student expelled from his nursing program for inappropriate Facebook posts sought review of an 8th Circuit ruling against him – but the Court promptly denied cert.

The Court also declined to take up the 2nd Circuit’s ruling that the Digital Millennium Copyright Act safe harbors apply to pre-1972 sound recordings in Capitol Records v. Vimeo. Other denials included: McKay v. Federspiel (use of electronic devices in courtrooms); M2 Software v. M2 Technology (binding effect of TTAB rulings on likelihood of confusion); Perez v. Florida (conviction for threatening behavior); Google v. Arendi S.A.R.L. (standard of obviousness in patent cases); Holtzman v. Turza (junk faxes in violation of Telephone Consumer Protection Act); and CSB-System International v. Lee (patent claim construction).
Miscellaneous

Well, Neil Gorsuch’s confirmation hearings went more or less as expected, with the judge not providing a whole lot of fodder for criticism but plenty of theater nevertheless. The hearings touched on media law a couple of times, with Gorsuch seemingly inclined to accept Sullivan as the “law of the land,” and stating that he has an “open mind” with respect to cameras in the Supreme Court. If you want yet more commentary on Judge Gorsuch, media, and tech, we had a few latecomers to the frenzy: the Stanford Law Review, SCOTUSblog, and Lawfare. Hey, first isn’t always best when it comes to these things. [Late update: No surprise, Gorsuch was confirmed. More on this in next month's issue.]

Reporters’ Privilege

The Pennsylvania Court of Common Pleas held that the blogger behind Beaver County blog “BeaverCountian” fell within the protection of the Commonwealth’s journalism shield law. Reading the law expansively, the court held that the blogger did not need to reveal the identities of commenters who allegedly posted defamatory statements in response to his comments about the plaintiff.

Defamation

Yes, Donald Trump once again commented about changing libel laws. No, it’s no more possible than the last time he said it. Meanwhile, he’s trying to figure out whether the Supremacy Clause insulates him against having to defend libel suits while in still office. That one will be percolating for a bit, so let’s talk about some other matters.

New Cases

James Woods, whose *ahem* indecorous behavior last year as a defamation plaintiff raised quite a few eyebrows, finds himself on the other side of the v. this month. Allegedly, Woods repeated a Twitter rumor that a woman photographed giving a Nazi salute outside a cancelled Trump rally was actually a known Bernie Sanders supporter acting as an agitator. The Sanders supporter claimed that she was defamed by the misidentification, and sued the actor in S.D. Ohio.

In other tales from social media, we have tech company Cemtrex suing a financial blogger in E.D.N.Y. for comments that allegedly sent the company’s stock price tumbling, and
an oil company pursuing a PR strategist in Colorado over an allegedly defamatory Facebook comment.

In Louisiana, the former public works director of Plaquemines Parish claimed he was defamed by a media report about an earlier lawsuit, in which the director was alleged to have engaged in self-dealing with parish purchase orders. In Pennsylvania, the DA for Lehigh County sued an Allentown blogger over accusations of corruption the blogger allegedly made in a local radio interview; the radio host was also named. And for a corruption hat trick we’ll look to Colorado, where a former club ski coach at the University of Colorado sued the Daily Camera over a report on his alleged misappropriation of student dues.

In Michigan, a concertgoer has sued TMZ, claiming the outlet got the wrong end of the stick in reporting on a scuffle that broke out while the man was attempting to get Iggy Pop’s autograph. Finally, in New York a plastic surgeon has claimed that a report that aired on WPIX ruined his practice.

Defense Wins

Dr. Oz is off the hook in that case in Georgia Superior Court involving the TV host’s comments about olive oil, with the judge finding his comments were not disparaging of imported oil and kicking the case out as a SLAPP. The former general manager of a golf club in Kansas City lost his defamation suit against Time Inc. in D. Kan. over an article referring to him as “Vlad the Impaler”; the court pithily remarked, “Hyperbole and the game of golf are not strangers to one another.”

Diane Sawyer was let out of the ABC “pink slime” case in South Dakota, although the other defendants are still headed to trial.

In a follow-up on an issue that we’ve been following for the last few months, a search engine optimization company that was caught filing four dummy libel suits to generate judicial takedown orders settled claims brought by Myvesta, the target of the scam; the SEO company agreed to pay Myvesta $71,000 in damages and attorneys’ fees. Apparently a plea agreement on federal criminal charges is also in the works involving at least two dozen other dummy cases.

And if making up a defendant is problematic, what about making up an entire case? Another scammer was caught trying to get Google to deindex an article in the New Britain Independent by forging a court order in a non-existent case. Ironically, the order he used was one from the Prenda Law saga.
On appeal, the Ninth Circuit rejected billionaire Steve Wynn’s claim against investment manager Jim Chanos, agreeing with the district court that Wynn had failed to plead how Chanos’ statements in a 2014 talk were facts rather than opinions. In Michigan Supreme Court, MSNBC escaped liability on the misidentification of a limousine thief thanks to the statute of limitations; the show in question named “Keith Todd” rather than actual suspect “Todd Keith,” illustrating the perils of having two first names. (I can totally see how that one happens, especially if there was a phone call involved. “Who was the suspect again?”/“Says here, ‘Keith, Todd.’”/“Keith Todd, got it.”)

Plaintiffs had a rough time in the Texas Courts of Appeals this month, with anti-SLAPP rulings in favor of a blogger, who wrote about a multi-level marketer’s dietary supplements, and the Austin American-Statesman, which wrote about a doctor’s prescription of opioids for patients who later died. And we have a rare case from Hawaii, where two county officials were cleared by an appellate panel of allegations of libel, with the court holding that the officials’ comments in a Big Island newspaper about terminated employees were not false.

**Defense Losses**

Baseball players Ryan Zimmerman and Ryan Howard will be allowed to proceed with their defamation claims against Al Jazeera over a film about the supply chain of performance-enhancing drugs, with a judge in D.D.C. holding that the complaint adequately alleged falsity and actual malice.

A woman’s suggestion on Facebook that an acquaintance killed her child under the influence of alcohol resulted in a lawsuit in North Carolina and a $500K settlement. In California, a jury awarded a hazardous waste contractor $1.1 million in damages for a 2012 Cal Coast News article accusing him of illegal activity. Former NFL QB Kordell Stewart walked out of Georgia Superior Court with a $3 million verdict against a blogger who claimed he had a sexual relationship with the football player. But this month’s big winner is a heart surgeon to whom a jury awarded $6.4 million on a claim that Memorial Hermann Health System trashed his reputation to protect its business.

An Ohio appeals court told a county judge to take another shot at calculating damages suffered by a man who was held to have been defamed by his girlfriend on Facebook; the lower court had awarded nominal damages on the basis that the effect of the defamation was local and insignificant, but the appeals court found that the post on Facebook was not geographically confined. A Florida appeals court revived a
former Cold Stone Creamery franchisee’s defamation claim arising out of a dispute with the company, holding that it was premature for the trial court to dismiss the complaint based on Florida’s \textit{absolute privilege for statements in the context of litigation}. 

Finally, the Texas Supreme Court told the state’s Court of Appeals that it \textit{erred in relying solely on Wikipedia for a definition of “welfare queen”} in a defamation case, reversing an anti-SLAPP win for the defendant. Too right – clearly this was a job for Urban Dictionary, which offers eight crowdsourced definitions for the term, all offensive. (No link, you'll have to find that one on your own...)

\textit{New Appeals}

An Irish citizen appealed the February dismissal of his lawsuit in New York state court against Bloomberg Businessweek, claiming that the trial court erred in kicking out his claim over a report implicating him in \textit{trafficking rhino horns and Chinese antiquities}. The fact that the rhino horns turned out to be fake is just the icing on this particular cake.

\textit{Miscellaneous}

A bill has been introduced to \textit{pare back Texas’ anti-SLAPP law dramatically}, limiting its protection to “participation in the government by the exercise of the constitutional right to petition, to speak freely, or to associate freely.” It looks to be an attempt to revert Texas’ law to the first-generation of anti-SLAPP laws that focused on petitioning activity.

Oh, and cats and kittens are something of a theme this month for some bizarre reason. With all due respect to our friends at BuzzFeed, \textit{I have to include this one}, which quite a few of you clicked on when it was in the \textit{MediaLawDaily}. Oddly, given the nature of the case, the kitten at left does not appear to be either a Siberian or a Russian Blue.

\textit{These} are Siberians:
Photos courtesy of my wife Marie, who spent years in the wild to capture the image of the legendary Pimento Cat.

**Privacy**

*Rights of Publicity*

Anheuser-Busch is facing a misappropriation lawsuit in E.D.N.C. (filed in February but only reported in March) from a woman whose photo, depicting her wearing a false mustache and drinking a Natural Light, was used in a promotional campaign. The photo was submitted to Anheuser-Busch through Facebook, but it’s an open question as to whether it was submitted by the photographer or the subject. There’s another new photo-based publicity lawsuit in M.D. Fla., where 20 models are suing over use of their images to promote a swingers club in the Tampa area.

Meanwhile, there’s a new suit in W.D. La. in which the heirs of Wiley College professor Melvin B. Tolson are asserting post-mortem publicity rights against Oprah Winfrey’s production company, The Weinstein Company, and MGM over a 2007 film based on Tolson’s life story. This will be worth watching to see if the Ninth Circuit’s analysis in *Sarver* makes it over to the Fifth Circuit.

Finally, Huntington Learning Centers defeated an ROP claim at the Second Circuit. A group of actresses had claimed that the company used their likenesses without permission because they printed their names on release forms but never signed them. This cynical move didn’t impress the judges.

**Disclosure of Private Information**

The California Court of Appeal ran through an interesting evaluation of the newsworthiness of entertainment-related content, arising out of a claim filed against boxer Floyd Mayweather by his former girlfriend over social media posts about their breakup. The appellate panel reversed a lower court’s denial of Mayweather’s anti-SLAPP motion with respect to explanations of the reasons for the breakup, finding those to be newsworthy, but affirmed the ruling as to a sonogram image of a fetus that Mayweather posted. Ancillary defamation and false light claims were also kicked out, with the panel holding that some of Mayweather’s statements might have been false and some might have been defamatory, but none were both.
Intrusion

A class action in N.D. Cal. against Facebook over unsolicited “status update” text messages was scaled back a bit; TCPA claims will go forward but Facebook persuaded the court to dump state unfair competition claims.

Access/FOIA

So, many of us have suspected that the FOIA game has shifted from being a primarily journalistic pursuit to a role played by other parties. A new study bears that out, finding that news organizations were behind only 7.6% of FOIA requests to 85 federal agencies who reported requester data in a database of federal FOIA logs.

But not to worry, BuzzFeed’s Jason Leopold is trying to change that. He has filed so many FOIA requests and lawsuits against the federal government that in March the DOJ cited his prolific activity as a reason to delay responding to his requests. Leopold’s counsel, of course, rightly suggests that requesting government records to report on issues on public concern isn’t abuse of the system, regardless of the scale of the effort.

New Cases

Speaking of suits against the federal government, we saw two new lawsuits in D.D.C., with the brand-new Knight First Amendment Institute seeking records from Customs and Border Protection about searches of electronic devices, and a D.C. lawyer asking for more information about the incumbent President’s personal debts. Meanwhile, the New York Times filed a FOIA lawsuit in S.D.N.Y. looking for Secret Service records on the price tag for charter jets during the 2016 presidential race.

The Electronic Frontier Foundation, along with Profs. Eugene Volokh and Rebecca Tushnet, jumped into the ZeniMax/Oculus copyright dispute in N.D. Tex. in an attempt to unseal portions of the trial transcript leading up to the $500M infringement verdict.

Because letting people assume the worst is always better than fact, two universities have filed reverse-FOIA actions seeking to keep records out of the hands of the press. Western Kentucky University sued its student paper for a declaration that they don’t have to release records on sexual misconduct by university employees. Meanwhile, my own alma mater, Princeton University, is in D.D.C. trying to keep U.S. Dept. of Education records on a closed
civil rights investigation into Old Nassau’s admissions practices out of public view. Dei sub
numine viget, sed noli respicere sub rosa.

Access Granted

The D.C. Circuit held that the “reading room” provision of FOIA enabled the court to
order broad injunctive relief directing the Department of Justice to disclose opinions of the
Office of Legal Counsel available on a prospective basis. The Sixth Circuit held that FOIA
exemption b(5), for inter-/intra-agency communications, does not apply to communications with
agencies of foreign countries, though it remanded the case in question to determine the
applicability of other exemptions. In D.D.C., Professor Tushnet’s lawsuit against Immigration
and Customs Enforcement for records related to ICE’s detection of counterfeit goods survived a
motion for summary judgment, with the court ordering ICE to search for more documents and
review its redactions in produced documents.

It’s not really a surprise, given the national trend, but California’s Supreme Court held this month that emails and text messages about
public business on officials’ personal devices are fair game under the state’s public records law. Also in California, an appellate panel upheld a
trial court ruling that plaintiffs are entitled to discovery under the Civil
Discovery Act in cases filed under the state’s public records law;
however, the panel gave the city of Los Angeles another shot at filing objections to the specific
production requested. (I’m still calling that one a victory.)

The Washington Supreme Court refused to take up an unusual First Amendment
challenge to the constitutionality of the state’s public records act, after the argument failed twice
below. The city of Puyallup is contemplating taking the case involving—guess what—emails in
private accounts related to public business up to the U.S. Supreme Court; the requester seems
more than happy to let the city dig itself in deeper.

Media access to criminal proceedings cropped up in a couple of cases, with a pool camera
allowed into O.J. Simpson’s parole hearing in a prison hearing room in Nevada, and a judge in
Oregon denying a defense motion to exclude the press from proceedings in the prosecution of
alleged murderer and rapist Edwin Lara.

There are some technological improvements to note as well. The Third Circuit has begun
recording video of oral arguments, although there are several hurdles a recording must make it
over before being made publicly available. The Judicial Conference of the United States has
announced that financial disclosure reports for federal judges will be made available to press and
public on thumb drives at no cost. (The cynic in me wonders how long it will be before a virus
makes its way onto one of those drives.) And the FBI’s new online FOIA portal has gone live, though not without some controversy.

**Access Denied**

Citing national security concerns, the D.C. Circuit denied access to videos of a prisoner at Guantanamo Bay being force-fed during a hunger strike. A judge in D.D.C. held that presidential privilege applied to a request for DOD and CIA memoranda prepared to guide Pres. Obama’s planning for the raid that killed Osama bin Laden. Another judge in the same court held that while a public official’s private emails can be subject to FOIA, in the case at hand such emails need not be produced because the agency (the Office of Science and Technology Policy) conducted a reasonable search and turned up only duplicative records. And a judge in N.D. Cal. held that the DOJ could withhold records on its procedures for warrantless surveillance of journalists.

NASA has shut out FOIA service MuckRock, because the service doesn’t provide personal mailing addresses with its requests – a requirement that has no basis in law. Meanwhile, the University of California at Berkeley has removed a large collection of video and audio lectures from online public access following a DOJ order on accessibility for the disabled; compliance would be prohibitively expensive for the university, so it is restricting access to those resources instead.

**Pending Cases**

The Illinois Supreme Court heard argument this month on whether records of the Illinois High School Association are subject to the state’s FOIA law. The specific case involved contracts entered into by the Association.

**Legislation**

Well, Sunshine Week was in March, and right on cue there’s another bipartisan Senate bill to allow cameras into federal courtrooms, including the Supreme Court. One day maybe we’ll be able to move that one out of the “If wishes were horses” column.

In the states, South Dakota passed a law making mug shots public records. That’s 49 out of 50; we’re looking at you, Louisiana. Wisconsin Gov. Scott Walker signed an executive order improving access to state notices and meeting minutes, and asking state agencies to post commonly requested documents and response times to requests online.
There are a number of other pending efforts at letting the sunlight in, with: Colorado working on a public records modernization measure that might be hampered by last-minute tinkering; Michigan’s House unanimously voting to expand state FOIA to the legislature and governor’s office (though resistance is expected in the state Senate); a panel of the South Carolina House stalling a bill that would exempt information on nonprofits’ use of government funds; Texas senators contemplating requiring Baylor University, a private institution, to comply with state FOIA after a recent sexual assault scandal; and Utah’s House passed a bill that could speed up release of police body cam video.

But while this was a month to celebrate transparency, remember that when you look toward the light, the darkness is right behind you. Arkansas’ Senate passed a bill allowing law enforcement officers to request their tax and property records to be exempt from state public records laws. Iowa is looking at a bill to exempt 911 calls from those injured in crimes or accidents. And a bill in the Texas House would scuttle plans for a statewide database of court records.

As someone who has frequently struggled to locate Texas court opinions to provide them to you, our loyal readers, in the MediaLawDaily, a unified database sounds like a mighty good idea.

**Newsgathering**

*Trump Administration*

Secretary of State Rex Tillerson was following the Trump Manual on Media Relations this month. On Tillerson’s first trip to Asia, the only press representative was a single reporter hand-picked from the Independent Journal Review, a conservative news website. On a trip to the Korean Demilitarized Zone, he excluded a pool reporter for U.S. networks and brought along a Fox News team instead. While he did allow two regular-rotation pool reporters to accompany him on a trip to Turkey and Belgium, with the expectation that type of access would continue, it’s still a smaller group than past Secretaries have permitted. And on-camera press briefings from the State Department have been sporadic, to say the least.

In other Trumpian antics, the White House has cancelled open press events with Trump, allowing him to avoid any uncomfortable questions (for example, about evidence backing up the things he says). A Louisville TV station was told that it wasn’t allowed to ask the incumbent about Russia or his wiretapping claims in an interview before a rally in Kentucky. Softballers
and conservative media outlets get privileges. Those that don’t toe the line find themselves threatened with being shut out, and not only from White House access: Univision has claimed that its confrontational approach to Trump has cost it access to Republicans in Congress.

Oh, and Trump’s tax returns were back in the news after The Rachel Maddow Show disclosed content from Trump’s 2005 return. Commentary on the legality of publishing returns ensued. Prof. Volokh also had an interesting discussion of the legality of soliciting IRS employees to leak returns.

**Lawsuits**

Two journalists, one a freelancer and the other a former Al Jazeera bureau chief, sued the U.S. government in D.D.C. this month over their inclusion on a "kill list" of individuals targeted with drone strikes by the Obama (and now Trump) Administration.

In New Mexico, the Santa Fe Reporter went to trial this month on its claims that Governor Susana Martinez shut the paper out following critical coverage; written closing arguments will follow in April. We'll be watching that one closely for obvious reasons.

Several developments with respect to recording police and public officials this month. The National Press Photographers Association led a coalition of more than 60 press organizations in filing an amicus brief in support of recognition by the Second Circuit of a right to record the police in public. A judge in D. Mass. declined to preliminarily enjoin the enforcement of the Commonwealth's ban on secret recordings, but held that James O'Keefe's Project Veritas Action Fund had standing to challenge the constitutionality of the law. And a photojournalist in Maryland obtained a $45,000 settlement after he was put in a choke hold and thrown to the ground while photographing police officers on a public street.

**Prosecution of Journalists**

Prosecution of journalists who publish classified information was a theme at a House Intelligence Committee meeting this month. A recent report from the Congressional Research Service (published in February) identifies some of the laws at issue.

In California, two anti-abortion activists were charged with criminal violations for secretly filming Planned Parenthood workers without their consent while posing as representatives of a company looking to buy fetal tissue. I'd imagine there's a Food Lion-style trespassing charge in there as well, though I can't tell from the reporting—if anyone happens to know, drop me a note.
Punishment of Sources

The FBI has a lot on its plate these days, including investigating whether far-right news sites had any role in Russia's interference with the 2016 election, but they've made room for hundreds of interviews with anyone who had access to the CIA documents that showed up on WikiLeaks in March. Speaking of which, I never expected my extensive knowledge of Doctor Who lore to come in handy professionally, but it does help when interpreting CIA code names like "Weeping Angel" (like the Doctor Who monster, the CIA hack activates when you're not watching it) and "Sonic Screwdriver" (the title character's all-purpose door opening tool).

Oh, and a bill to allow a private cause of action against whistleblowers has been signed into law in Arkansas. Sigh.

Drones

The "drone slayer" case in W.D. Ky. involving a man shooting down a drone operated by his neighbor was kicked out of federal court, with the judge holding that the complaint did not implicate federal law simply because it anticipated a defense based on FAA jurisdiction of U.S. airspace.

Credentialing

Breitbart might be welcome at the White House, but its attempt to obtain U.S. Senate Daily Press Gallery passes has been held up for an inquiry into the site's links to the conservative Government Accountability Institute as well as Rebekah Mercer's involvement in the site.

Miscellaneous

The city of Langley, Washington, has decided that its city attorney's time is too valuable to give away to the press for free, so the mayor has started billing the media for access. The words "ludicrous," "unusual," "absurd," "bizarre," "ridiculous," "far out," "wow," and "absolutely not OK" have been heard in response.
Prior Restraint

NSL gag orders went before the Ninth Circuit this month, with an oral argument in a case over the constitutionality of the FBI's use of the orders. Tech companies Cloudflare and CREDO Mobile were finally identified as the plaintiffs in the case, which had previously gone by the title of Under Seal v. Sessions.

The Ninth Circuit also upheld an injunction against the distribution of video that was allegedly illegally recorded by the Center for Medical Progress in the Planned Parenthood sting. A significant factor in the decision was the defendants' execution of confidentiality agreements in the course of infiltrating a meeting of the National Abortion Federation, which one must admit makes a First Amendment argument tricky. Meanwhile, the Fifth Circuit denied rehearing en banc on its affirrmance of a preliminary injunction against the publication of computer files for 3D-printed firearms.

A bill in Montana would force media outlets to delay publication of accident photos on social media, which sounds like another one of those ideas that should have been thought through a bit more before it was made public.

There were some victories too. A New Jersey Superior Court judge vacated that prior restraint against the Trentonian's publication of information about a confidential child-abuse case, vindicating a reporter accused of obtaining the complaint in the case illegally. And in the District of Utah, a judge killed a ridiculous ex parte TRO that he issued against a mattress review site.

Information Infrastructure

Net Neutrality

With the FCC's broadband privacy rules defunct (more on that under "Digital Privacy"), the Trump Administration has signaled that its sights will fall on net neutrality next.

The open internet isn't going down without a fight, however, with more than 170 organizations writing to the Senate and the FCC calling for preservation of the 2015 rules. A bit of a surprise in that regard is Netflix's apparent change of tune on the fate of net neutrality, with Reed Hastings now singing "Que Sera, Sera."
Meanwhile, New York's AG is trying to move a lawsuit against Charter Communications over its alleged throttling of Netflix back to state court, after Charter removed to S.D.N.Y. on the basis that the Open Internet Order (among other federal laws) preempts state claims.

**Federal Communications Commission**

No surprise, FCC Chair Ajit Pai was renominated by President Trump for another term. Disturbing but also not too surprising is Trump's pulling of the nomination of Democrat Jessica Rosenworcel, suggesting that the traditional five-commissioner structure isn't high on the White House's priority list.

Pai faced tough questioning from Democrats on his independence from the White House, and his position on Trump's attacks on the media. He claimed of course that he was his own person, largely deflecting the "fake news" controversy as a political debate while rejecting the idea that the media are the "enemy of the people."

Nevertheless, Pai continues to move quickly, advancing new agenda items including fighting robocalls, updating rules for video relay services, and helping prisons to block calls from contraband cellphones. Also on the table: loosening up ownership of TV stations, accelerating 5G network deployment, relaxing rules over rebroadcast of AM radio signals, and turning control of the Lifeline affordable internet program over to the states.

Chairman Pai also probably lost little sleep over a decision of the D.C. Circuit this month that Tom Wheeler's FCC had exceeded its authority with an order on opt-out rules for faxed advertising. But to be sure his rest is untroubled, he's seeking a staff legal review of his initial opinion that the planned structure of the AT&T-Time Warner merger leaves no room for an FCC public interest review.

**Antitrust & Media Consolidation**

Don't expect the same hand-wringing from the Justice Department, though; Trump's nominee for chief antitrust enforcer has said he sees no major hurdles to the AT&T-Time Warner deal. Meanwhile, the DOJ has settled a case against AT&T and DirecTV in C.D. Cal. over their allegedly illicit sharing of information in their bids to carry Dodgers games in the Los Angeles area.

Meanwhile, the Federal Trade Commission granted early termination to its antitrust review of Gray TV's purchase of two Diversified Communications TV stations in Maine and Florida.
Miscellaneous

As predicted, the Trump Administration’s new budget would cut all funding for the Corporation for Public Broadcasting. Of course, Congress passes the budget, so CPB took to the Hill to fight for support. There has already been extensive commentary on the potential impact on public radio and television; expect more as the fight ramps up.

Bloomberg is facing a new lawsuit in S.D.N.Y. from a former African media partner, Optima Media, which alleges that the U.S. company terminated its relationship with Optima on a pretext after critical press commentary on Bloomberg’s activities in Africa. Verizon has been sued by New York City in the state’s courts over its alleged failure to deploy FiOS in more than 1 million NYC households.

Finally, a development that truly belongs under “Infrastructure”: A House bill that would require the laying of fiber conduits as part of any federally funded highway project (a so-called “dig once” bill) is gathering momentum in Congress.

Digital Content

Section 230

More surprising (and disturbing) Section 230 activity this month, brought to us courtesy of Prof. Goldman.

In D. Del., a judge broke with the general trend of allowing Section 230 (though nominally an affirmative defense) to support a motion to dismiss, holding that the plaintiff’s silence on the defendant’s role in creating the allegedly offensive content could not warrant judgment on the pleadings. The judge did, however, order the plaintiff to file an amended complaint to fill in that blank – an unusual if logical move.

In N.D. Miss., the court was deeply troubled by the idea that Section 230 protects the mere forwarding of e-mail, despite the relatively clear statutory language and judicial precedent to that effect. Denying a motion for summary judgment, the court found that the defendant was publicly known to be in a position to know whether a particular statement about the plaintiff’s termination as a high school football coach was accurate. Thus, when the defendant forwarded without comment an email speculating as to the reasons for the termination, the court found that he
added an imprimatur of truth to the speculation. This additional meaning, held the court, was not
protected by the CDA. And we all say "hmm...."

Finally, Prof. Goldman flagged a new draft federal bill targeting online sex trafficking. It
hasn't hit the floor yet, but as with early drafts of the SAVE Act of 2015, it would punch big
holes into Section 230 (including opening up the field to state regulation).

**Hate, Terror, and Other Internet Nastiness**

Well, this will end well. Utah has passed a law outlawing mentioning people's names
online with an intent to "abuse" or "harass." Nice going, guys. Georgia, meanwhile, is looking a
bill that would require networked devices to include automatic blocking of obscene material,
because computers are just fantastic at testing compliance with contemporary community
standards and redeeming social value.

A Maryland man has been arrested and charged by the FBI with cyberstalking for
sending Newsweek writer Kurt Eichenwald a tweet designed to trigger an epileptic episode. It
would be interesting to see what arguments might be made in the case, but my gut says this one
will end in a quick plea bargain.

And platforms' efforts to combat online misery continue. Check these links if you want to
see what Twitter, Google, YouTube, Instagram, and Facebook were up to in March.

**Terms of Service**

A quick hit to end the section: The District of New Jersey held that Lush Cosmetics blew
the implementation of its online terms of service and included several provisions in conflict with
New Jersey law; however, the plaintiff lacked Article III standing so the case was dismissed.

**Digital Privacy**

**Control of Personal Information**

This month's big news is the Congressional override of the Wheeler-era FCC’s broadband privacy rules (which never actually had a chance to come into effect). There's been a lot of commentary on exactly what Congress' decision means for internet users, and a lot of suggestions for how to protect yourself. A lot of them are nonsense. State legislatures know a hot-button issue when they see one, though, and we've already started to see local efforts to impose privacy requirements on ISPs. It will be interesting to see how these play out, and whether they run into Commerce Clause problems.
Speaking of local issues, our members in the Empire State were briefly shocked in March when a bill to create a European-style right to be forgotten cropped up in the New York legislature. It took harsh criticism as soon as it was brought to light, and the Senate sponsor of the bill struck the enacting clause, rendering it moot.

There was a fair amount of activity in data tracking lawsuits as well, including: Facebook reaching non-monetary settlement terms in a class action in N.D. Cal. over the mining of private messages for use in advertising; a judge in the same court rejecting a class action settlement with Google over email scanning, in which the lawyers were handsomely paid but no money went to plaintiffs; a narrowing of claims in C.D. Cal. against smart TV manufacturer Vizio over sharing viewing habit data, with fraud and federal privacy claims allowed to move forward; a $3.75 million settlement in N.D. Ill. over a claim that the manufacturer of internet-networked vibrators collected usage data; and a settlement in New York state court, with health app manufacturers paying $30,000 and changing their privacy policy disclosures (while also fixing some issues with allegedly misleading advertising).

Anonymity

In the California Court of Appeal, employer-review site Glassdoor fended off an effort to uncover the identity of one of its users. The employer had successfully persuaded the court below that the user had disclosed trade secret information in his review, a finding the appellate panel held was both incorrect on the facts and Kafkaesque in its logic.

Hacking

Thanks to WikiLeaks, we learned about some older hacks that the CIA has used to spy on folks. Tech companies rushed to assure folks that most of the exploited vulnerabilities have long since been patched.

The DOJ indicted four people, including two members of the Russian Federal Security Service, on conspiracy charges linked to hacks at Yahoo! and other webmail service providers. A federal draft bill is floating around that would authorize victims of hacks to take retaliatory measures against attackers (a/k/a "hacking back"). It's a cute idea, but given that hackers worth their salt hide their tracks, there's a substantial risk of damage to innocent bystanders whose networks might have been compromised en route to the target.
We’ve also got another incident this month of female celebrities’ phones being hacked for photos. This hack doesn’t seem as extensive as prior incidents, but expect to see a variety of legal action soon.

Encryption & Data Security

The Third Circuit ruled against a man who has been imprisoned for contempt for more than 17 months after refusing to decrypt hard drives alleged to contain child pornography. The man invoked his Fifth Amendment right against self-incrimination, but the Court of Appeals held that the Fifth Amendment was not an issue because the man’s ability to unlock the drives and their contents were a foregone conclusion.

And this kind of thing is what happens when courts don't understand encryption: After a minor pleaded guilty to a nonviolent sexual offense with his minor girlfriend, the trial court imposed probation conditions including prohibiting him from engaging encrypted online communications so that his internet use could be searched. The California Court of Appeal struck those conditions, correctly pointing out that the vast majority of internet activity is encrypted in some way, shape or form, and that the conditions were therefore wildly overbroad.

Internet Surveillance

Speaking of judges who have no idea what they're doing when it comes to the internet, a judge in Minnesota issued a search warrant requiring Google to divulge any and all subscriber information for everyone who used Google to search for four variations on a particular name during a period of a little over a month. That name happens to belong to a victim of financial fraud worth less than $30,000, a crime which is being investigated by the stalwart police of Edina, MN; however, he almost certainly isn't the only one with that name. Google is resisting the warrant.

Meanwhile, a Washington state judge has issued a warrant allowing local police to search a Facebook page run by a group protesting the Dakota Access Pipeline. The ACLU has intervened and filed a motion to quash. But Amazon has ceased efforts to quash an Arkansas subpoena for data gathered by one of its Echo smart home devices that might shed light on a suspected murder, after the defendant dropped his objections to production. Unfortunately, this means we won't get a ruling on some of the interesting First Amendment issues around speaking to, and receiving information from, voice-activated networked devices.

Following a similar move by Twitter last year, Facebook has forbidden developers from using data from Facebook or Instagram to create surveillance tools.
The White House announced its support of the reauthorization of the Foreign Intelligence Surveillance Act without modification. Portions of the law—including Section 702, which enables the PRISM and UPSTREAM programs revealed by Edward Snowden—will sunset at the end of this year if Congress does not act. Meanwhile, new data shows that electronic device searches at the U.S. border have spiked dramatically, quintupling between 2015 and 2016, and more in February 2017 than all of 2015.

Transatlantic Privacy

With everything else going on, let’s not forget that the ink is barely dry, relatively speaking, on the EU-U.S. Privacy Shield. While the deal seems to be holding for now, there are rumblings on both sides of the Atlantic suggesting that mutual trust is still a long way off.

Intellectual Property

Did you fall for the KittenFeed hoax? Did you care if you did, or did you just enjoy batting Donald Trump’s head around online with virtual kitten paws? Bottom line, though, there’s enough going on right now to be upset about without needing fictional emendations.

Copyright – New Cases

This one is great: Stanley Gebhardt, a poet whose lyric work "But You Didn't" appears in "A Second Helping of Chicken Soup for the Soul," has sued Violent J of the Insane Clown Posse in E.D. Mich. for copying and performing his work. Which, believe it or not, appears to be the case. Also in music, the founder of a deathrock band sued a label and a digital distributor in N.D. Ill for licensing his music to streaming services without his permission.

In photography cases, Breitbart was sued in S.D.N.Y. for allegedly unauthorized use of a photo of Mexican immigrants crossing the border, and a Dallas photographer is suing in the same court for unauthorized copying of his photo of Texas Rangers player Rougned Odor slugging Jose Bautista of the Toronto Blue Jays.

In film and TV: A short story author sued Cartoon Network in S.D.N.Y. for allegedly ripping off his work to create its series "Black Jesus." In E.D. Va., the author of a book about paranormal investigators has claimed that Warner Bros.' The Conjuring franchise infringes his
work. In C.D. Cal., Disney is facing claims that Oscar-winner Zootopia infringed the work of well-known Hollywood writer and producer Gary L. Goldman. Also in C.D. Cal., the fight over the rights to produce a Buckaroo Banzai TV series has entered a new phase, with counterclaims alleging that MGM infringed the creators' rights by shopping the potential series.

And in software and video games: King.com, the publisher of time-waster/demise of civilization "Candy Crush Saga," sued a Chinese company for ripping off its products.

Copyright – Plaintiffs’ Victories

Quite a few this month, and yikes we're already on page 21, so:

- C.D. Cal.: A confidential settlement was reached in the lawsuit against Kris Jenner over the creation of mobile video game "Kim Kardashian: Hollywood." Okay, I take back what I said about "Candy Crush."
- C.D. Cal.: Riot Games, producers of video game "League of Legends," won $10 million and an injunction against the defendants' software for cheating in the game; Riot had claimed that the defendants’ product enabled players to violate the DMCA.
- N.D. Cal.: Twitch obtained a stipulated injunction against the creator of bots used to inflate viewer numbers on its streaming service. Yes, there is indeed big money in watching others play video games.
- N.D. Ga.: Sure, the Official Code of Georgia Annotated might be the official reference for the law of the state, but reproducing the annotations could net you a copyright lawsuit -- as it did Carl Malamud's Public.Resource.Org, which lost a fair use argument this month.
- N.D. Ga.: Don't close the accounting books on the physical media era quite yet: a sentence of 5 years and $71,000 in restitution was handed down for a man convicted of participating in a CD/DVD pirating operation.
- S.D.N.Y.: Marvel Entertainment might have avoided a lawsuit into the appearance of Iron Man's armor in Iron Man 3, but a judge allowed the lawsuit to continue over Robert Downey Jr.'s appearance in the poster for the film.
• S.D.N.Y.: Kanye West settled on undisclosed terms with a Hungarian band over accusations of illegal sampling.

• S.D.N.Y.: Publisher Rodale Inc. settled on undisclosed terms with that fellow in California who inadvertently live-streamed his son's birth.

• D. Or.: The holder of rights in the film Dallas Buyers Club won spoliation sanctions against the operator of a Tor exit node who shut the node down after being sued for a third party's alleged infringement. You and I, of course, know that a Tor exit node almost certainly doesn't log evidence of third party infringement, but what was that we were saying about judges not understanding online activity?

• 9th Cir.: That ray of hope that Aereo-alike FilmOn X saw out in sunny California was eclipsed by a cloud this month, as the Ninth Circuit reversed the district court and held that streaming services are not entitled to compulsory licenses under the Copyright Act.

• 9th Cir.: The Court of Appeals upheld the calculation of a $450,000 judgment in favor of a sculptor whose works were knocked off by a Chinese manufacturer at the defendant's request.

Copyright – Defense Victories

Not nearly as many defense victories, though we've got a couple of interesting ones. Infamous copyright troll John Steele of Prenda Law has pleaded guilty in D. Minn. to a wide-ranging scheme to defraud courts and extort money from supposed infringers. If you read the indictment when we covered it previously, you'll have a sense of the massive scope of the scheme; it's replicated in the plea agreement.

A judge in S.D.N.Y. scratched a case over Warner Bros.' allegedly infringing use of the lyrics for the 1930's song "Warm Kitty" in The Big Bang Theory. The judge found that renewal of the song's copyright under the 1909 Copyright Act was fumbled, releasing the song to the public domain.

And there was a significant decision from the Fifth Circuit, which dealt another blow to content creators seeking to stem online infringement by targeting platforms with a holding that a web forum could not be held liable for infringing images uploaded by its users without proof of volitional conduct.

Copyright – New & Pending Appeals

The Second Circuit held oral argument in the TVEyes case over the inclusion of Fox News clips in TVEyes' news search database, with media haruspices leaning in favor of the
networks. Meanwhile, in the Eleventh Circuit rapper Rick Ross is trying to stop pop pair LMFAO from, well, LTFAO, arguing that the duo's alleged infringement wasn't excused by errors in his copyright registration for "Hustlin'."

But as usual, the Ninth Circuit was the place to watch for copyright action. Jared Leto appealed the dismissal of his claim against TMZ for publishing a clip of the actor criticizing Taylor Swift. To be fair, Swift's fans are pretty hardcore, and can't be mollified by a little schmaltzy poetry like the Juggalos; one wonders if Leto will claim threat to life and limb like Cindy Lee Garcia. Screenwriters who claimed their work was infringed by HBO's Ballers have appealed a loss below, arguing that the district court whiffed on the similarity analysis. The fight over "Stairway to Heaven" also made its way upward, with the plaintiff alleging that the jury's similarity analysis in that case was contaminated by evidentiary errors and mistakes of law. And as the Second Circuit did in New York, the Ninth Circuit certified a question to the California Supreme Court about the scope of state law music copyright in one of the Flo & Eddie cases.

Copyright – Miscellaneous

One company more than any other has been responsible for development of copyright law in the digital realm. Google and YouTube? No. Perchance Facebook, or those folks at Vimeo? Not even close. Then surely, I hear you say, it must be those digital music hooligans at NapLimeGrooveSharkWireSter? I chortle at your naïveté, umlaut and all. No, I speak of none other than Perfect 10, the adult website whose shoot-from-the-hip, no-claim-too-tenuous approach to litigation has helped to ensure that copyright does not interfere with basic internet architecture. But alas, we must now look to others to take up that cause, after Perfect 10 vanished into the mists of receivership this month after one frivolous copyright claim too many. Ave atque vale, Perfect 10, and may flights of scantily-clad angels sing you to your rest.

Oh, and perhaps farewell to the Copyright Office as part of the Library of Congress. A new bipartisan bill would make the Copyright Register a presidential appointment; the House Judiciary Committee approved the bill 27-1. More on this as it develops.

Patent

So, you know that Section 230 doesn't cover intellectual property claims (and if you're in the Ninth Circuit and just said "federal intellectual property claims," then yes, fine, you're very lucky, excuse me for a moment while I tweet some spoilers for TV that won't be on out there for
three hours yet). You know that copyright is covered by the DMCA, and for trademarks, well, at least there's Tiffany v. eBay. But what about intermediary liability patent claims?

Well, the Northern District of Alabama has now given us Blazer v. eBay, in which the court found that it was not eBay but eBay's users that offered to sell infringing products; contributory infringement and inducement liability theories were also rejected. I seem to recall a couple of district court cases from Washington and California that didn't turn out so well on that point, hmmmmmm?

Just kidding, all y'all on the West Coast. Y'know I love ya (and besides, I know you all stream your TV anyway).

But sticking with California for a minute, CBS Interactive defeated a second patent infringement suit in N.D. Cal. over audience participation technology (specifically, the voting system for "Big Brother"). Also in N.D. Cal., Comcast has run into a few snags in an action it filed seeking a declaration of non-infringement on 13 set-top box patents; the court dismissed the action as to 10 of the patents at issue, finding that the cable company had failed to plead reasons why its actions did not infringe.

In the Federal Circuit, Alice was taking down software patents left and right. Pixar and others won a ruling affirming that a plaintiff's asserted patent in graphics technology was invalid as abstract. Intellectual Ventures (a holding company that likes to eat goats under bridges enforces a long list of patents) lost two cases, with six "basic business method, but on a computer" patents declared invalid. And another holding company's $533M verdict against Apple over data access control patents vanished like the Cheshire Cat after meeting Alice.

Seriously, someone should really rewrite the Supreme Court's decision in Alice in the style of Lewis Carroll:

‘Did you say choir part, or prior art?’ said the Cheshire Patent.

‘I said prior,’ replied Alice; ‘and I wish you wouldn’t keep abstracting and vanishing so suddenly: you make one quite giddy.’

‘All right,’ said the Patent; and this time it abstracted quite slowly,
beginning with the dependent claims, and ending with the specification, which remained some time after the rest of it had gone.

Before we leave Wonderland, one more update from the other side of the mirror: the Commerce Department has confirmed in response to FOIA requests that Michelle Lee is still the Director of the U.S. Patent Office. Mystery, such as it was, solved.

Trade Secret/Misappropriation

A reminder from the Ninth Circuit: If you're going to claim that the NFL stole your idea for a show about undrafted football players, don't pitch your idea without first getting an agreement that you'll be paid if the pitch is used. The more you know, kids.

Oh, and while Facebook and Oculus are stillsmarting from the ZeniMax verdict, they did manage to avoid liability on a breach of NDA claim purportedly filed by Total Recall Technologies in the Northern District of California. Turns out, the party filing suit didn't have authority to do so on behalf of the company.

Commercial Speech

Trademark

See, this is what happens when your dog gets out of your yard: A company that claims it took over the character of "Spuds MacKenzie" when he was allegedly abandoned as a mascot by Anheuser-Busch has filed suit in S.D.N.Y., saying the brewery committed trademark infringement when it revived ol' Spuds in a Super Bowl ad. Something tells me a long list of post-"abandonment" appearances by Spuds will be appearing in a counterclaim in the near future.

But trademark hasn't just gone to the dogs; the mice and the cats are in on the fun too. After electronic music icon Deadmou5 tried to register a trademark for the name of his cat, Professor Meowingtons, he...wait just a second.

*Jeff gets up and shouts from his office door*

JEFF: Jake! Is this one real? Or am I being punked?

JAKE: Yeah, man. It was in the Hollywood Reporter. And we found the complaint.

JEFF: We already got burned once with a kitten-themed story this month...you're sure?
JAKE: Yeah, man.
JEFF: You're sure you're sure?
JAKE: *rolls eyes and walks out of Jeff's office*
*Jeff shrugs and returns to typing*

As I was saying, after Deadmau5 tried to trademark the name of his cat, he drew a trademark lawsuit in S.D. Fla. from a woman who was already using the mark "Meowingtons" for her website selling cat-related goods. Apparently there's a complaint and everything.

That lawsuit over a Walking Dead-themed diner in the District of New Jersey will be withdrawn, after the comic's creator was granted leave to drop the suit (over the defendants' objection). The suit will shamble on to the USPTO instead.

The Marshall Tucker Band had a trademark claim against its publishing company dismissed in D.S.C., after the judge found that the band had failed to allege commercial use of its name by the defendant. A judge in W.D. Wisc. smacked down a software company alleging initial interest confusion. In N.D. Cal., Dropbox picked up $2 million in attorneys' fees after defeating a trademark infringement suit from a company that allowed its "Thru Dropbox" mark to lie dormant until Dropbox sought a declaratory judgment.

In S.D.N.Y., ridiculously complex litigation over intellectual property rights associated with the Marilyn Monroe Estate took an interesting turn when a federal judge held that it was possible that the name "Marilyn Monroe" had become either generic or functional as a trademark. And in the Eleventh Circuit, a founding member of The Commodores appealed a preliminary injunction against his use of the band's name, claiming that the original members were unfairly being cut out of their proper role in the band's history.

**False Advertising/Deception**

Audible and Amazon were sued in C.D. Cal. for false advertising over the sale of "credits" for e-books that allegedly expire after six months or upon cancellation of a user's account; the plaintiff claims that the credits are the equivalent of gift cards whose expiration is governed by state and federal law.
Dr. Oz might be off the hook for the olive oil, but he's still facing a suit in C.D. Cal. over his statements about diet pills after his motion to dismiss was denied; Sony Pictures Television escaped, however, due to its tangential relationship to the incident.

A couple of notable settlements in N.D. Cal., with Google receiving preliminary approval of a $22 million deal on claims that its ad business placed customers' ads on dead websites, and DirecTV reaching terms with the FTC on claims over how it advertised pricing of two-year contracts.

Affirming the dismissal of a potential class action, the Ninth Circuit didn't believe any reasonable consumer would be confused into thinking that some infernal concoction known as a "Bud Light Lime Lime-A-Rita" was actually a low-carb/low-calorie product. As opposed to a bottle where dreams go to die. Meanwhile, the Eleventh Circuit held that a small creamery had the First Amendment right to call its skim milk "skim milk," despite the fact that it didn't fortify its milk with Vitamin A as required for milk to be labeled as "skim" under Florida law. Which makes you wonder what strange definitions other words might have in the state of Florida.

**Professional Speech**

Okay...see if you can spot the First Amendment issue here: A New York law firm sued to block enforcement of laws and regulations banning it from accepting capital investments from non-lawyers, asserting that the ban infringed its freedom of speech. The answer: Because with more money, the firm could expand its services to communicate with more clients. Convinced? The Second Circuit wasn't either.

**Miscellaneous**

**Academia**

A University of New Mexico student assigned to critique the 1985 film Desert Hearts responded with an essay replete with anti-lesbian commentary; her professor refused to grade the paper and suggested she rewrite it, leading her to withdraw from the class and sue the school for viewpoint discrimination. The Tenth Circuit held that legitimate pedagogical concerns motivated the professor's action, and upheld summary judgment for the University.
Meanwhile, on state campuses in Colorado, restrictions of protests to oxymoronic "free speech zones" might soon be a thing of the past if a new bill approved by the state's House becomes law.

Government Licensing & Public Fora

A judge in E.D. La. has blocked a law that would change the minimum age for exotic dancers in Louisiana from 18 to 21, finding it overbroad in relation to the interest of the state in preventing women under 21 from transitioning into prostitution and sex trafficking.

Under a new ruling from the Ninth Circuit, a tattoo shop owner's First Amendment challenge to zoning laws in Long Beach, California, will move forward despite the fact that the owner did not exhaust the process of applying for and being denied a permit by the city.

Political Speech

The Eleventh Circuit held that a city council can enforce rules limiting the subject matter of speech by members of the public at a city council meeting to city business. Accordingly, the Court of Appeals affirmed the dismissal of a First Amendment claim by a man who was arrested when he refused to stop using a city council meeting as a forum to accuse county-level officers of corruption.

Hollywood Hijinks

The Second Circuit held that federal prosecutors did not prejudice the jury in a trial of three men charged with the robbery of a check-cashing store in Queens when they played short clips from 2010 crime drama The Town. The prosecution's theory was that the robbery was so close to the action in the Boston-based film that the film served as the inspiration for the real-life crime. I don't know, in my experience folks from New York can do some funny things when they hear a Boston accent.

Threats & Intimidation

A judge in W.D. Ky. denied Donald Trump's motion to dismiss a civil lawsuit alleging that he incited violence against protesters at a 2016 rally in Louisville, finding that the complaint adequately stated the elements of an incitement claim. It's tough to prove a claim under Brandenburg, especially the intent requirement; even odds as to whether Trump goes with "I didn't say it" or "I didn't mean it" as a defense.
But if you actually threaten the President, your fate is likely to be much clearer. The Seventh Circuit affirmed the conviction and three-year sentence of a man who posted his intent to kill Barack Obama on Facebook.

The True Miscellany

A California lawmaker briefly flirted with a bill to ban "fake news," however we're defining that today. Not to worry, the plug was pulled on the bill after the predictable backlash.

Conclusion

I know this issue was a little late this month, my apologies. My feline masters have been keeping me busy playing fetch. Yes, Siberian cats play fetch. No word yet on whether they played a role in influencing the election, but the FBI wants to interview them and I think the CIA has been watching them through my TV.

Farewell for now, and remember – register for the Digital Media Conference while rates are still low!