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

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

You know, I’ve realized that when this election is over, we as media lawyers will have one – and only one – thing for which we should be grateful to Donald Trump: namely, giving us such an amazing opportunity to explain First Amendment law to the general public. I mean, have you seen how many times Floyd alone has been in the press lately? Bartnicki is better known these days than Miranda. And what about all of those times we’ve had to patiently tell people why Trump’s racism, lies and menacing statements haven’t landed him in prison?

But for all that, I’m looking forward to November 9th – because that’s the date of the MLRC Forum and Annual Dinner! Of course there was going to be a plug, folks; I work for these people. Whether we’re all breathing a sigh of relief that it’s finally over or crawling across the face of a planet blasted overnight into a Mad Max-esque hellscape (those are the only two options, according to the emails I batch delete twice a day from the Clinton campaign, and no, I don’t want to donate another $30 for a “free” sticker), it will be a great time to come together and congratulate one another about surviving the season.

At least until the mutants come for us.

Supreme Court

We’re into the October Term! So far the Court has heard Samsung Electronics v. Apple, in which the Justices debated whether infringement of a design patent in the Apple iPhone warrants disgorgement of the entire profits from the sale of a particular product. There was also Star Athletica v. Varsity Brands, in which the Justices’ discussion of copyright in cheerleader uniforms took an entertaining turn through the history of decorative dressing.

Cert was also granted in a few other First Amendment (and related) cases to be heard this term. The Court decided to take Lee v. Tam, on whether the statutory ban on
registering “scandalous or disparaging” trademarks is unconstitutional. The Slants will go it alone against the USPTO, as the Justices denied the Washington Redskins’ attempt to leapfrog the Fourth Circuit to appear before the Court at the same time. The Court will also hear Packingham v. North Carolina, a challenge to a law banning registered sex offenders from using social media sites that allow underage users, and Ziglar v. Turkmen, a non-media case on the proper level of abstraction in determining whether a constitutional right is clearly established, which might have implications for First Amendment cases against public officials. And if you like commercial speech cases, the Court took a twisty little one from the Second Circuit on credit card surcharges and discounts for paying cash, and whether states can punish one while permitting the other. The Court might also be thinking about taking Lenz v. Universal Music, if a request for comment from the Solicitor General is any sign.

Though the Court flirted with intervening in the tussle between the Senate and Backpage.com over compliance with a subcommittee subpoena, it eventually decided not to block the demand for information on the site’s screening processes. The Court also denied cert on Sheriff Dart’s appeal of the Seventh Circuit’s scathing rebuke to his efforts to frighten away Backpage’s payment processors. However, a petition for cert in another Backpage case from the First Circuit (in which the court held that a civil cause of action set forth in a federal criminal statute does not fall within the federal criminal law exception to Section 230) is pending, and the Supreme Court has called for a response. State AGs and child protection organizations have jumped in to support the petition, calling for broad rollbacks of long-established protections under the CDA – including asking the Court to revive the distributor liability theory that died out a decade ago.

Plenty of other petitions for cert failed to clear the hurdle, including: Armstrong v. Thompson (on whether all police officers are public figures in libel cases, a case I’d been worried about); O’Bannon v. NCAA (rights of publicity); Gourley v. Google (website cookies as violation of privacy); Geotag v. Google (patents in online advertising); EMI Feist Catalog v. Baldwin (termination of copyright grant in “Santa Claus is Comin’ to Town”); and K.D. v. Facebook (use of user likenesses to promote sponsored posts).

But more cases are lining up, with requests that the Court consider the following: whether the First Amendment provides immunity for defamatory statements in a religious setting; whether a defamation case between a Mexican pop star and Mexican broadcasters was properly brought in
Texas state court; and whether the 3rd Circuit erred in booting VPPA claims against Google and Viacom over tracking children’s online and video habits.

Reporters’ Privilege

Two quick victories to report. First, the Minnesota Court of Appeals held that the Star Tribune didn’t have to give up its source for a 2013 article on nursing home neglect. Second, New York Times reporter Frances Robles was let off the hook by the N.Y. Appellate Division on a demand for her notes relating to the “Baby Hope” case. Surprised we don’t have more going on in this section, since it’s been such a busy couple of months in other areas.

Defamation

Okay, I’ve decided I’m not going to cover all of the Trump-related defamation threats over the last few months. Suffice to say: David McCraw’s takedown of Trump was great; kudos to the First Amendment bar for stepping up to defend Trump’s accusers; and if you want to read about Trump’s track record on libel, go read Susan Seager’s article in the MediaLawLetter if you haven’t already.

Actually, the only Trump-related libel suits that were actually filed in the past two months were Melania Trump’s lawsuit in Maryland state court over a Daily Mail article suggesting she had a past as an escort, and Cheryl Jacobus’ suit in New York state court against the Trump campaign for social media attacks against her. I know, it feels like those were in the dim and distant past, right?

New cases

Quite a few others, so here goes. In federal court: in D. Ariz., a game developer sued 100 users who left bad reviews on videogame platform Steam (which, in turn, kicked the developer off the platform for treating its users badly, leading to the dismissal of the lawsuit); in C.D. Cal., a businessman alleged that a report by a Pakistan-based TV station was retaliation for a business dispute; in S.D.N.Y., Kim Kardashian sued MediaTakeOut.com for accusing her of staging a robbery in her own apartment and fabricating a report of an armed assault (but she withdrew the suit after the site apologized); also in S.D.N.Y., a Kentucky lawyer filed a class action defamation complaint over grades given to attorneys on Lawyer.com; in W.D. Tenn., Jerry Lee Lewis sued his son-in-law over posts on Facebook; and in E.D. Va., gun rights advocates sued Katie Couric and the creators of the documentary “Under the Gun” for making them out to be blithering idiots.
In state court: in Illinois, a man sued his ex-wife over his portrayal in a book she wrote; in Louisiana, Rep. Charles Boustany sued the author and publisher of a book connecting him to murdered prostitutes; in Michigan, Burke Ramsey sued a forensic scientist who accused him of killing sister JonBenét in a CBS documentary; in Oklahoma, a defendant charged with drug offenses sued the Duncan Banner for its report on the details of his arrest; in Pennsylvania, a Philly cop claimed an ABC affiliate’s allegations of domestic abuse leading to the suicide of his fiancée were false; in South Carolina, the daughters of Rep. Kenny Bingham sued the Post and Courier over articles about an academic cheating scandal; in Texas, the parent of the Dallas Morning News was sued over its reporting on the murder of lawyer Ira Tobolowsky; also in Texas, Fox News and The Blaze are among the defendants in a lawsuit filed by the father of Ahmed Mohamed (the kid who was arrested for tinkering with a clock while named “Mohamed”); and for a Texas hat trick, we’ve got a suit against Fox News for reporting on a Child Protective Services investigation against the plaintiff under the heading “Sex Crime.”

We’ll end with a weird one in Washington, where Seattle’s alt-weekly The Stranger was sued over its “Drunk of the Week” photo feature, by a woman who claims she was sober (and on the other side of the country) when the photo was taken. The paper claims that the photo was actually of a different woman.

**Defense Losses**

The Nebraska Supreme Court handed the City of Lincoln a libel defeat this month, upholding a $260K judgment in favor of a woman accused of theft by the city in the media. Ouch.

But it gets worse. Main Line Media News was smacked with $1.5 million in damages and a takedown order by a Philadelphia judge, in the case of an attorney who sued over claims that he diverted funds from the Pennsylvania Convention Center to his firm. Other outlets, including the Philadelphia Inquirer and the Daily News, settled on undisclosed terms before the hammer fell.

That’s not as bad, though, as the $5.3 million jury award in Texas against a labor union sued by a commercial cleaning company over its hardball tactics. That, in turn, is not as painful as the $7.3 million verdict against Penn State for defaming Mike McQueary, the whistleblower in the Jerry Sandusky case. And even worse than that is the $9 million jury verdict -- $1.5 compensatory, $7.5 million punitives -- in North Carolina against the News & Observer on
claims that the paper defamed a state employee (though the *N&O’s* owner, McClatchy, did escape the case).

But the happiest plaintiff of all is apparently actor James Woods, who won $0 but took to Twitter to glory in the death of the defendant in his libel case over allegations of cocaine use. In the words of the defendant’s attorney, “Have a nice day and stay classy!”

In interlocutory matters: *Rolling Stone* is still headed to trial in Virginia state court in the lawsuit brought by Phi Kappa Psi over the “A Rape on Campus” article, after a judge rejected the magazine’s argument that the article was not of & concerning the UVA chapter of the fraternity; a Pennsylvania judge threaded a path between opinion and fact in holding that former Penn State president Graham Spanier could proceed to trial on certain statements in his case against former FBI director Louis Freeh, who was hired by the school to investigate the Sandusky crisis; and a judge in N.D. Ga. trimmed but did not dismiss claims over a Viacom biopic about R&B group TLC, holding that some of the challenged statements were capable of a defamatory meaning.

Finally, Glenn Beck reportedly settled the D. Mass. case with the student he implicated in the Boston Marathon bombing, on undisclosed terms (thus resolving lingering confidential source issues as well). But the fight might not be over; the defendants were accused of reneging on their side of the deal after they withheld taxes on the settlement amount, which could trigger a new lawsuit.

**Defense Wins**

Now for the good news. On the appellate level, we have wins in: the First Circuit, where a police officer was held to be a public figure who hadn’t established actual malice, and Harvard was found not to have defamed a former law school student with a finding of plagiarism; the Third Circuit, where the press defeated a claim by a woman who complained about media reports of her attempted divorce from David Lee Roth (without marrying him first); the Ninth Circuit, where a plaintiff in an anti-SLAPP case was unable to limit a fee award by voluntarily dismissing portions of his case not covered by the motion; New Jersey, where the Appellate Division held that minor changes to a web post don’t restart the limitations clock; New York, where the Court of Appeals held that a CBS report about mafia activity was not “of and concerning” the plaintiffs, and the Appellate Division held that a man’s false identification as an attempted rapist was protected by the fair report privilege; and
Texas, where appellate panels granted anti-SLAPP wins to a magazine editor who called a Houston City Councilor a “Vietnamese Communist,” and to a law student who accused conservative blogger Donald May of sexual harassment.

In S.D. Ala., the court held that there weren’t sufficient allegations of actual malice to allow claims against a citizen group protesting a landfill to proceed. In N.D. Ill., the fine folks at Team Prenda were smacked with $600K in fees and punitive damages in an anti-SLAPP order, after they sued a man and his lawyer for accusing them of identity theft. In D. Mass., Bill Cosby dodged liability for his representatives’ statements to the press about his accusers. In N.D.N.Y, the fair report privilege protected the Brattleboro Reformer’s report of police activity. In E.D.N.Y., the New York Post won two cases over its headlines, the first versus an NY Transit employee who sued the Post for describing his employment beef with the Transit Authority as “SATANIC MTA OUT TO KILL,” and the second against a retired police officer referred to as a “THUG COP.”

Also in E.D.N.Y., Donald Trump defeated a defamation claim by an accused cybersquatter after the defendant voluntarily republished the alleged libel. Those seeking irony in this item probably won’t find it; the case apparently turned on some basic pleading failures and a quirk of N.Y. libel law, and not an invocation by Trump of the constitutional protections he despises.

In Arizona, Amber Heard dropped her suit against ex-husband Johnny Depp’s friend Doug Stanhope. In California, a sex offender’s suit against his victim for calling him a rapist on Facebook was dismissed. In Florida, a contractor was whacked with an anti-SLAPP ruling after filing suit over a truthful Ripoff Report post that caused no damage. In Georgia, Atlanta’s Fox affiliate avoided liability on a claim by a veteran who allegedly lied about receiving the Purple Heart. And finally, in Massachusetts, a city councilor dropped a claim against the InCity Times over allegations of racism.

Pending Cases

The presentation of the evidence in UVA Associate Dean of Students Nicole Eramo’s jury trial against Rolling Stone in W.D. Va. just concluded. A post-trial decision threw out claims of defamation by implication (though claims of explicit defamation still remain); the magazine also has the benefit of a ruling that Eramo is a limited-purpose public
figure, and a ruling that limited the evidence that Eramo could offer at trial after video depositions were leaked to ABC News by the plaintiff’s team.

On appeal, one of Bill Cosby’s accusers argued at the Third Circuit for the revival of her defamation claim against the actor. In Texas, the state Supreme Court heard argument on whether a newspaper article about the arrest of a deputy’s son related to matters of public concern. And in Massachusetts, the Supreme Judicial Court will consider whether the governor enjoys absolute immunity to defamation claims.

Miscellaneous

Something’s rotten in the courts of the nation. An investigation by Prof. Eugene Volokh and Paul Alan Levy has revealed a troubling pattern of 25 suspicious defamation cases in various courts. From their article:

- All involve allegedly self-represented plaintiffs, yet they have similar snippets of legalese that suggest a common organization behind them. (A few others, having a slightly different profile, involve actual lawyers.)
- All the ostensible defendants ostensibly agreed to injunctions being issued against them, which often leads to a very quick court order (in some cases, less than a week).
- Of these 25-odd cases, 15 give the addresses of the defendants — but a private investigator ... couldn’t find a single one of the ostensible defendants at the ostensible address.

The theory is that these are bogus lawsuits filed against fake defendants by reputation management companies in the names of their clients, in order to obtain court orders that can be used to persuade or force online intermediaries to remove disparaging comments. However, two of these orders have already collapsed, and PissedConsumer.com – a frequent target of shady reputation management tactics – has sued two attorneys alleged to be filing similar “sham lawsuits.” Yet another variation on these schemes involving abuse of the DMCA is covered under Intellectual Property below.

Let’s end this section on a high note, with the passage of the Consumer Review Fairness Act by the House of Representatives. Now, all we need is the Senate to sign off (it passed a parallel bill last December, so fingers crossed) and a president who isn’t looking to tighten up those libel laws. And if we get those things, who knows? Maybe there’s a federal anti-SLAPP bill in our future.
Privacy

Rights of Publicity

Well, Hasbro settled with Fox News anchor Harris Faulkner in N.D. Ill. over its hamster toy of the same name, bringing to an end one of the stranger right of publicity cases we’ve seen in a while.

Otherwise, plaintiffs have been getting nowhere this month. Lindsay Lohan and ‘Mob Wives’ reality TV star Karen Gravano bombed out on their respective claims over the alleged use of their personas in Grand Theft Auto V, with the N.Y. Appellate Division reversing lower court rulings on motions to dismiss. It’s a good result for the videogame industry, with the court holding that the plaintiffs’ actual names, portraits, or pictures were not use, that use in a videogame was not use in “advertising” or “trade” under N.Y. law, and that the First Amendment would protect the use in any event. At least now Lohan’s and Gravano’s names will no longer be linked in coverage of the case, which probably comes as a relief to one or both of them.

Also losing ROP claims were technology reporter “Kurt the CyberGuy,” who sued the TV station that formerly employed him for continuing to run material using his on-air persona, and attorneys who filed a claim in N.D. Ill. challenging networking site Avvo’s creation of profile pages for lawyers without their permission.

Disclosure of Private Information

From the Northern District of Illinois, we have the latest ruling in the Dahlstrom v. Sun-Times Media saga. The judge granted the plaintiffs judgment on the pleadings as to their claim that the Chicago Sun-Times violated the federal Driver’s Privacy Protection Act by publishing personal information about five police officers from motor vehicle records. However, the judge denied the plaintiff’s motion with respect to the claim that the Sun-Times violated the DPPA merely by obtaining the information.

In the same court, Barnes & Noble escaped liability for a data breach with respect to customer information, with a holding that while the purported class might have standing, there was insufficient monetary damage.

In California Superior Court, Ozzy Osbourne’s former mistress Michelle Pugh has opened a new front in a lawsuit filed in August against the Godfather of Metal’s daughter Kelly, adding a claim for publication of private facts (apparently, Pugh’s unlisted phone number).
And in Ohio, there’s a new revenge porn bill to watch. The penalties on this one (first degree misdemeanor, 180 days in jail, $1K fine) are a bit more modest than is typically the case, and the exemptions for First Amendment activity are pretty broad; there’s a civil cause of action as well.

**Access/FOIA**

Let’s get the election-related developments out of the way. On the Trump side; Vice sued the IRS in D.D.C. for records related to law enforcement requests for Trump’s tax returns; the D.C. Superior Court agreed to release video of Trump testifying about his comments on Mexicans and Latinos; and the N.Y. Supreme Court denied the *New York Times’* request to unseal Trump’s divorce file, with a frankly ridiculous explanation that to do so would inject the court into the decision of what information is relevant to determining a candidate’s fitness for office.

No, your honor, the press decides what’s potentially relevant and the people make up their minds for themselves. By rejecting the request, you’re deciding what *isn’t* relevant.

Anyway, on the Clinton side, all of the action was in D.D.C.: Judicial Watch filed another suit against the FBI looking for records in connection with the e-mail investigation; Vice and the State Department came to terms to release up to 1,850 pages of e-mails by November 3; the AP and State agreed to production of Clinton’s schedules by October 17; Hillary provided some relatively unilluminating answers under oath to written questions about her e-mail practices; and a judge held that drafts of the Whitewater indictment would remain sealed to protect grand jury secrecy.

Of course, all of these access cases become irrelevant when someone just slides blockbuster documents under your door (or dumps them on Wikileaks, or drops hints about them in a pathetic attempt to feel important after looking like an idiot in the debate on encryption), but we’ll talk about that later.

**New Cases**

In the Second Circuit, 26 news organization joined together to argue that an independent monitor’s report on HSBC’s attempts to fight money laundering should remain public. There were a couple of non-Clinton e-mail cases, with NY1 suing to obtain NYC Mayor de Blasio’s correspondence with his outside advisors, and the Charlotte Observer suing for N.C. Gov. Pat McCrory’s emails on the controversial HB2. In Florida, the executive director of PINAC
(Photography is Not a Crime) News is suing Miami Beach and the mayor for information about the mayor’s social media use. The Northern Kentucky Tribune has objected to gag and impoundment orders in an E.D. Ky. case brought by a Northern Kentucky University student against the school for its handling of a rape complaint.

We also saw quite a few cases involving the federal government this time around, even apart from the Clinton cases. The Reporters Committee is attempting to unseal documents in D.D.C. about the federal investigation that caught Fox reporter James Rosen’s source on North Korea. A media coalition sued the FBI in the same court for details on the agency’s hack of the San Bernardino iPhone, while a former CIA employee sued in D.D.C. for the right to receive CIA documents in electronic form and a Miami Herald reporter sued the DOD for documents about plans to spend $340 million at Guantanamo. A defense lawyer is suing ICE in D. Colo. for records withheld on the basis that they might aid the defense of her client (can’t have that, can we?). The ACLU has moved to unseal decades of Foreign Intelligence Surveillance Court opinions, and in a separate case sought a D. Md. docket sheet for a case in which a search warrant was issued to the FBI allowing the agency to hack users of secure email service TorMail. Finally, in N.D. Cal., a coalition based at Stanford filed a petition to unseal records in a series of cases in order to learn how judges grant surveillance authority.

Access Granted

So, it turns out there are limits to withholding of public records in the name of national security, although it can take a while. Sometimes a great while; in September, the Seventh Circuit upheld the disclosure of records from a 1942 grand jury investigation of the Chicago Tribune for a story about U.S. decryption of Japanese wartime codes, in response to a request from a modern journalist. (No one actually argued that the records were still sensitive; the release of the documents was hung up on procedural hurdles.) We might not have to wait so long for information about the Trans Pacific Partnership, after a judge in S.D.N.Y. rejected the U.S. Trade Representative’s invocation of national security in withholding responsive materials – though other justifications for denying access remain at issue. And in D.D.C., a district court judge announced the release of previously secret docket numbers from 2012 for cases in which federal prosecutors sought surveillance authority.

In other matters: the Montana Supreme Court held that author Jon Krakauer had standing to seek access to disciplinary records relating to former U. Mont. QB Jordan Johnson; a New York appellate panel held that names and addresses of gun owners were not exempt from disclosure if
they had failed to take advantage of a statutory grace period in which to justify withholding their particular information; a Louisiana appeals court upheld a fine against a city official for an insufficient response on a request for e-mails; a Cal. Superior Court judge denied a motion to close a preliminary hearing in a double homicide case; a Colorado District Court judge held that school bus driver disciplinary records are public; a New Jersey Superior Court judge held that Gov. Christie’s personal emails had to be searched to comply with a FOIA request, given evidence that the governor used private email for public business; and another N.J. judge held that the Trenton Police had to disclose documents about their social media policies and pay the requester’s fees.

There were a couple of notable decisions on fees, with the General Services Administration holding that the Obama administration wrongly reclassified Judicial Watch as non-media in order to increase the cost of its numerous records requests, and the Oregon Department of Justice overturning an agency decision to charge the Statesman Journal full fees for records. The DOJ Office of Information Policy also released new guidance on limitations on charging fees under the FOIA Improvement Act of 2016.

Access Denied

Some tough rulings from the federal Courts of Appeals this month. The Third Circuit held that the names of the unindicted co-conspirators in the Bridgegate scandal could remain under wraps. (One wonders if they might have reached a different decision had they ruled after the federal prosecutors’ comments about Chris Christie at trial.) The Seventh Circuit held that the Department of Homeland Security did not have to disclose the organizations on its “Tier III” list of terrorist groups. And the Ninth Circuit held that the Department of Defense didn’t have to identify the Latin American military leaders who are alumni of the School of the Americas.

The New Hampshire Supreme Court upheld the sealing of documents and closing of proceedings to protect the sexual history of a murder victim, reconsidering a ruling made by the same court over the summer. A judge in D. Colo. sealed a photograph allegedly showing Taylor Swift being groped at the Pepsi Center, but released many other photographs and records from a case in which the accused groper, a radio personality, sued Swift for defamation. And in a puzzling turn of events, a federal judge in N.D. Ill. has denied the media access to photographs and other exhibits shown to the jury in open court in a street-gang trial.
Pending Cases

The D.C. Circuit heard argument in September on the public’s right to see video of a Guantánamo prisoner being force fed during a hunger strike. Meanwhile, Pennsylvania’s Supreme Court is weighing whether to release police dash-cam video, and Wisconsin’s Supreme Court will decide whether law enforcement training videos must be public (despite arguments that they’d reveal the cops’ playbook to criminals).

Miscellaneous

Speaking of video, let’s just note the remarkable number of instances of law enforcement delaying or refusing to release police video in the last couple of months. Hiding the ball isn’t going to calm anyone’s fears and outrage, folks.

Oh, and what’s this nonsense from Iowa about news orgs being threatened with prosecution for publishing information in public records? Where do they get their legal guidance, Chris Cuomo?

Newsgathering

Okay, so. The tax returns. The Access Hollywood tape. The Podesta Archive. Except for the aforementioned Chris Cuomo (seriously, I haven’t laughed so sarcastically since the infamous “YouTube Copyright School”), and perhaps the unfortunate folks at NBC who had to try to reconstruct what took place in a bus eleven years ago containing Billy Bush and Donald Trump (that’s a hell of a time capsule right there), the biggest questions in newsgathering recently have been less about whether journalists could publish information, and more about whether they should.

While I tend to avoid commenting on journalistic ethics (as I’ve told my associates and students over the years, the job of outside counsel is to advise our clients what’s permitted, not what’s proper, and make sure they realize the judgment is ultimately theirs), on this point I’ll throw in with the folks who say that the motives of the source shouldn’t matter so long as a news organization is making an independent determination of newsworthiness. I’m not a fan of the idea of true and newsworthy information being tainted by the method of acquisition; the “fruit of the poisonous tree” is a constraint on government power, not a principle for informing the public.

Lawsuits by Journalists

We’ve got a cop recording lawsuit with a twist from N.D. Tex., with a Dallas photographer seeking an injunction against Dallas Area Rapid Transit employees to prevent them from
interfering with documenting of police and medical activity at transit stations and centers. The inclusion of medical personnel in the case reminds me of *Shulman* in California, and I’m not quite sure how that will affect the analysis.

WaPo reporter Jason Rezaian sued Iran in D.D.C. for damages stemming from his detention and psychological torture for 18 months. No comment on this one, other than best of luck.

*Prosecution of Journalists*

The arrests of journalist Amy Goodman, documentarians Deia Schlosberg and Lindsey Goodwin-Grayzel, and cameraman Carl Davis in North Dakota during protests over the Dakota Access pipeline has triggered a wave of criticism in the press. The charge against Goodman was dropped, though the state is still deciding whether to file new charges and the other arrestees are still facing prosecution.

Thing is, for all the outrage, from the reporting it does seem like Goodman followed protesters across a fence onto private property without permission. And we all know how well journalists do when they argue that the First Amendment allows them to trespass to gather news.

We also have a murkier case from Georgia, where a videographer faces charges of obstructing an officer at a political rally when she refused to put down her camera. The Eleventh Circuit recognizes the right to record the actions of public officials in public spaces, and the speakers at the rally included the state’s governor and attorney general, but the rally appears to have been held at a private venue and it is not clear what conditions might have been put on access to that space.

And it can apparently be tricky even to ask whether it’s possible to cover a Trump event, as VICE News reporter Alex Thompson learned when he entered an Omni Hotel in Texas to ask about whether the press had access to an event held there for the candidate. Thompson, while waiting for a response from an event staffer to his inquiry, was asked to leave by hotel staff; his producer and camera operator left while he remained to hear from the event. He was arrested a few minutes later. In retrospect, he probably should have departed when the hotel told him to go, but in the moment one can understand if he got confused about who was controlling permissions.

*Credentialing & Access to Places/Events*

Speaking of obtaining permissions, the Trump campaign announced in September that it was ending its “blacklist” of media organizations. That didn’t stop the campaign from getting into hot
water when it excluded a pool camera producer during a tour of a Trump hotel; the major networks erased video of the event in protest.

Meanwhile, U.S. Senator Richard Burr has blacklisted The News & Observer from receiving details of his re-election campaign appearances. On a smaller scale, Mayor Stephanie Rawlings-Blake of Baltimore excluded public radio station WYPR’s regular City Hall reporter from her weekly press conferences.

**Drones**

Not too much to note this month, as the industry continues to explore its options under the new UAS regulations from the FAA. But the News Media Coalition is keeping an eye on the future, trying to get ahead of FTC regulations; NMC filed a comment urging the Commission to limit its role to enforcing companies’ existing privacy policies rather than creating new layers of regulation.

**Other Developments**

The U.S. Inspector General’s office dealt press credibility a blow with a report ruling that an FBI agent’s impersonation of an AP reporter in 2007 did not violate policy. Oddly, that’s more generous to the FBI than the agency was to itself following the event.

Finally, after last year’s fracas over the secret Planned Parenthood recordings, California added new penalties to its wiretap law that specifically punish the dissemination of confidential communications with a health care provider. In order to avoid Bartnicki issues, the law does require that the offender have been the one to illegally record the conversation. But as my former colleagues and I argued in 2013, there are still problems with enhanced or separate punishments based on the dissemination of newsworthy information.

**Prior Restraint**

Okay, I’m going to talk directly to the judges here: When you say something in open court, the media can report on it -- even when you realize after the fact that you’re discussing sealed information, or that the courtroom isn’t quite as vacant as you thought it was. We had this problem twice in the last two months, once in California (where a judge didn’t realize that a reporter was in the nearly-empty gallery) and once in Colorado (where a judge read aloud in open court the text of a written order that was under seal). In both cases, the judge tried to engage in a little toothpaste-reinsertion by ordering the press not to disseminate the information gathered.
Look, we’ve all read *Oklahoma Publishing*, and it applies even to your “whoops!” moments. The California order was later retracted when the court’s presiding justice got wind of what had happened, while the Colorado order was *retroactively limited* to apply only to the contents of the written order and a related arrest-warrant affidavit (but not until after the news outlet in question had yanked its report of the oral statement in response). Basically, your respective honors, don’t be these folks. If you want a case directly on point that lays out how the First Amendment applies to blurts and mistakes, check out *Commonwealth v. Barnes* from the Mass. Supreme Judicial Court.

Oh – and for you judges in Mercer County, N.J. – if the press legally gets hold of a court document that was supposed to be sealed, *you can’t order them not to report on it*.

Now, back to the report. Two cases to watch at the Ninth Circuit, as EFF’s challenge to the *gag orders embedded in National Security Letters* reaches the court, as does the challenge to the injunction *barring the publication of the Planned Parenthood videos* secretly recorded by the Center for Media Progress. An often overlooked issue in the latter case is that the CMP folks actually signed an agreement to keep the discussions at Planned Parenthood confidential in the course of their sting operation, so there are some hefty waiver issues here.

Meanwhile, dozens of press, tech, and policy organizations turned out in W.D. Wash. with amicus briefs in support of Microsoft’s *challenge to gag orders under 18 U.S.C. § 2705(b)*; these orders prevent tech companies and others from telling customers about government demands for data.

California dodged a ruling from E.D. Cal. that its law banning the use of video from the state assembly for political purposes was unconstitutional, by *repealing the law* between the court’s issuance of an injunction and the release of an opinion supporting that ruling. Arkansas wasn’t so lucky, with a ruling from D. Ark. that its *ban on robocalling for political purposes* failed strict scrutiny. Let me just say: When you take a look at your draft bill and it talks about banning speech related to political activity, that’s a great time for a rewrite, and probably for second thoughts about whether, you know, public office is really your thing.

I’ll close this section with a ruling from the 5th Circuit on State Department limitations on the *distribution of computer files used in the 3-D printing of firearm parts*. The Court of Appeals upheld the denial of a preliminary injunction against the enforcement of the State Department rules, holding that even if the plaintiffs suffered a First Amendment injury they hadn’t met their burden under the balance of harms or public interest elements of the PI standard. But no matter how you feel about 3-D printing instructions as speech, cabining the strict scrutiny/compelling interest question to the likelihood of success element *and then bypassing that question because*
the plaintiff didn’t satisfy an ad hoc balancing of harms is just plain wacky. Judge Jones agrees with me in a lengthy dissent.

Information Infrastructure (formerly Broadcast/Cable/Satellite)

I’ve decided to retire the earlier designation for this section (in my articles at least). It doesn’t seem to make sense to segregate ISP-level internet developments into other sections, when so many of them involve the FCC and the major cable companies. So, from now on news on issues like net neutrality and top-level internet governance will appear here, while more content-related issues will be covered in the new Digital Content section below.

It looks like one way or another Tom Wheeler’s stint as FCC Chair will be coming to an end after the election. It’s been a wild ride, with just about everyone upset with him in one way or another. Which brings to mind the old line, “A good settlement is when everyone walks away unhappy.”

There are likely to be a few things left on the table when he leaves, though. The FCC pushed through its privacy rules for ISPs, but no telling whether a new regime will defend them against the inevitable legal challenges. The set-top box plan keeps evolving, swinging from a compelled license to STB manufacturers to a new app-based plan that is still triggering copyright concerns; the objections were significant enough that Wheeler backed off a vote on the proposal in favor of further rounds of review.

Perhaps more likely to stick is the FCC’s decision in September to drop the 50% UHF discount for calculating audience reach for the purposes of compliance with the national cap. Current owners won’t have to dump stations, but acquisitions may fall off as a result. On the other hand, the agency made it easier for broadcast licensees to seek approval for foreign ownership, streamlining the process. And while the ultimate success of the FCC’s spectrum auction is a matter for debate, the agency’s right to conduct the auction was affirmed in court as the D.C. Circuit denied rehearing en banc of low-power TV stations’ challenges to the process.

In other news:

- The Second Circuit affirmed TWC’s win on antitrust charges, holding that cable boxes and premium cable service aren’t separate products for the purposes of a tying claim.
- The Eighth Circuit flipped a district court decision against DISH Network, dismissing a class action over temporary suspension of particular channels; meanwhile, DISH dropped
its own lawsuit against WGN America in N.D. Ill. over harsh advertisements calling the provider “dishgusting” in connection with its negotiation tactics.

- DirecTV sued the owner of several local stations in New York state court for allegedly breaching an NDA with respect to its pricing structure.
- Comcast forked over over $2.3 million to the FCC to settle overcharges to consumers for services and equipment they didn’t want.
- Separately, Comcast defeated a race bias claim in the Central District of California. But Charter couldn’t escape a similar bias claim in the same court; the judge noted that the Comcast case didn’t feature allegations of racist statements by company officials.
- Charter sued the city of Louisville in W.D. Ky. over the incentives that the municipality extended to Google in order to foster competition in broadband, claiming that the city is favoring “one similarly situated member of the press or other speaker over another without special justification.” The FCC threw its support to Louisville in the case.

Speaking of broadband, there’s a new bill in the House of Representatives that would override state bans on municipal broadband – a longshot, but worth watching. Meanwhile, Netflix has filed a comment with the FCC asking the agency to reject data caps on broadband services. And it looks like the FTC is getting serious about the net neutrality fight, petitioning for en banc review of a 9th Circuit decision limiting its ability to pursue complaints about Internet throttling. The FCC has offered its sister agency support in the case in the name of interagency cooperation.

And we’re all relieved but not really surprised that the internet survived the transfer of control over ICANN from the U.S. government to a global non-profit committee of stakeholders. The U.S. didn’t want the responsibility for the clerical functions involved, and it’s probably better for governments not to have the temptation to manipulate core architecture for their own ends. That didn’t stop a group of state AGs with no standing and even less understanding from trying to stop the transfer in court, but a judge in S.D. Tex. quickly shut the case down. (Particular kudos to Andrew Bridges and the team at Fenwick & West who drafted a very quick and very important amicus brief on behalf of the Internet Association.)
Digital Content (formerly Internet/New Media)

Section 230

Does anyone else think that Kamala Harris’ arrest of Backpage.com’s executives is just a stunt designed to encourage Congress to amend or repeal Section 230? The charges for “pimping” were headline-grabbingly lurid, but she can’t think she’s going to win this one. The argument that Backpage.com shaped the sex trafficking ads in question by setting up a system that rejected ads with certain terms is kind of mind-bending, but would seem to run smack into § 230(c)(2) even if it weren’t too tenuous to defeat protection under (c)(1). And there are the First Amendment rulings that Backpage.com racked up in those various cases around the country to contend with as well.

Indeed, Harris has already admitted that she has no authority to pursue charges against Backpage.com because of the CDA. After all, that was precisely the import of that letter the state AGs sent to Congress a few years ago. But a spectacular loss, spun properly, might be the catalyst for change; Section 230 itself was initially inspired by the implications of Prodigy’s loss in Stratton-Oakmont.

Other Section 230 news has been all over the place. The California Supreme Court has decided to review Hassell v. Bird, which is good news. The Ninth Circuit smacked down an attempt to plead around Section 230, demonstrating that conclusory allegations don’t work under the Iqbal/Twombly standard – so if you can remove CDA cases from Washington State (where they still follow Conley), do so.

But the Ninth Circuit also applied its “failure to warn” logic from Model Mayhem in another case involving Match.com, suggesting that the exception could have some legs. And the Second Circuit upheld the FTC’s win over ad network LeadClick, demonstrating that fuzziness on the content creation question will be tolerated when it’s the FTC that comes a-knockin’.

Finally, Airbnb has filed an affirmative Section 230/First Amendment suit against New York’s AG over the state’s new law targeting the company’s advertisements. Seems to me like the company’s got a point.

Hate, Terror, and Other Internet Nastiness

In the Central District of California, blogger Peter Ronald Wexler was acquitted of several charges in a 20-count indictment for making criminal threats about FBI agents online; he was
released after the jury hung as to the remainder. And a high school student in Sarasota County won his appeal of a threats conviction; his statement that he “can’t WAIT to shoot up my school” was held not to constitute a crime under Florida law. But everyone’s least-favorite hip-hop artist Anthony Elonis is back in prison, after the 3rd Circuit held that the Supreme Court’s ruling in his case didn’t affect the validity of his underlying conviction.

Miscellaneous

The usual bits and pieces:

- The Sixth Circuit affirmed a ruling that LexisNexis Screening Solutions violated the Fair Credit Reporting Act when it allowed an employer to run a check on David Smith using only his first and last name. Surprise, it turns out there are several David Smiths, and the plaintiff wasn’t the one that Lexis identified as having a criminal background.

- A judge in D.D.C. declined to enjoin enforcement of the SAVE Act, a federal anti-sex trafficking law, against Backpage.com, on the basis that there was no credible threat of prosecution. Even though Backpage lost the case, the judge’s holding was based on a restrictive reading of the statute’s scienter requirements that should help to foreclose future prosecutions against the site.

- Next year is the 20th anniversary of Reno v. ACLU, and it’s nice to see that a judge in M.D. La. remembered the case as he nixed a Louisiana law imposing the same kind of age-verification requirements for adult content that the old Communications Decency Act demanded.

- I mentioned the dispute between PINAC News’ executive director and the mayor of Miami Beach up above in Access/FOIA; that case arose out of claims that the mayor is blocking critics from posting to his official Facebook page, which is in turn the subject of a separate First Amendment lawsuit in Florida court. As it happens, a federal judge in E.D. Va. noted in September that deleting comments on a county-operated Facebook page could indeed violate the First Amendment.

- A judge in N.D. Cal. authorized service of process via Twitter, in a case where the plaintiff in a terrorism financing case had been struggling to tag the defendant financial organization by other means.

- For those of you looking for a law exam question on defamation and online personal jurisdiction, look no further than this ruling from Delaware (courtesy of Eric Goldman)
involving a blogger who misattributed self-damaging statements to a speaker at a conference. Spoilers: There were insufficient contacts with the plaintiff’s home state.

**Digital Privacy (formerly Internet Privacy)**

**Hacking**

In M.D. Pa., the hacker behind the massive 2014 leak of celebrities’ private photos was **sentenced to 18 months in prison**.

Still no word on whether the Ninth Circuit will grant rehearing en banc in *Facebook v. Power Ventures*, though the Court ordered Facebook to file a response and the EFF and ACLU submitted an amicus brief in support of rehearing.

We do now have the DOJ’s internal policy memo on pursuing CFAA cases, but it leaves a lot open to interpretation.

**Control of Personal Information**

Yet another California-generated law governing the Internet was passed in September, this time prohibiting “commercial online entertainment employment service providers” from **publishing the birth date or age of their subscribers** if the subscriber asks for that information to be withheld. The measure targets age discrimination in the entertainment industry, with a focus on widely used platform IMDb Pro. I’m of two minds about this one, given that it only applies to people with whom a site has already chosen to enter into a subscription relationship (sort of like the VPPA).

In addition, we have: Yahoo facing suit in both N.D. Cal. and S.D. Cal. following the massive data breach of more than 500 million user accounts; Facebook successfully fighting off certification of a class in a suit in N.D. Cal. over its information-sharing practices; Gannett stuck in a lawsuit in D. Mass. over collection of video viewing data through the USA Today app, after an attempt to bounce the case for lack of concrete injury (a la Spokeo) failed; Yelp losing a motion to dismiss on an intrusion claim based on its uploading of Apple device users’ data; Viacom, Hasbro, Mattel and Jumpstart settling N.Y. claims over tracking users on children’s websites for $835,000; and the FTC indicating that it will review WhatsApp’s plan to share user data with its parent Facebook.
Anonymity

(Following a gradual shift in how we categorize these cases in the MediaLawDaily, I’m moving “Anonymity” here, where it probably belonged all along.)

Some recent wins for online anonymity in Kentucky, where the state Supreme Court held that a defamation plaintiff had to at least be able to prove falsity before unmasking a Doe, and in the Northern District of Florida, where a federal judge enjoined enforcement of a new law compelling registered sex offenders to disclose all of their “Internet identifiers” to law enforcement. But the Illinois Supreme Court reached precisely the opposite result from the Florida case on the same issue in a decision in October.

Meanwhile, an appellate panel in Michigan heard argument over whether a scientific peer review platform could be compelled to reveal the identities of post-publication reviewers.

Intrusion

A weird case we’ve reported previously about a Kansas couple inadvertently targeted by geolocation devices will proceed, with a judge in the District of Kansas ruling that they stated a claim against the company that misidentified their farm as the physical location of over 600 million IP addresses.

Encryption & Other Security Measures

The Burr/Feinstein anti-encryption bill is rearing its ugly head again. Expect James Comey to voice his support when he’s done interfering in presidential elections. Meanwhile, the Third Circuit heard argument on whether compelled decryption of a criminal defendant’s hard drive violates the Fifth Amendment.

Internet Surveillance

The big news was the media report that Yahoo was scanning its users’ email for terrorism-related activity pursuant to a secret court order obtained by the federal government. Yahoo sent an open letter to the Director of National Intelligence asking for “clarification” of this matter, but tellingly neither confirmed nor denied whether it was engaged in such scanning (which kind of screams “gag order”). Other major Internet platforms were quick to deny that they were engaged in such activity, though Facebook, Instagram and Twitter drew heat for supplying feeds to a third-party company that analyzes social media posts for law enforcement.

The U.S. Government has sought reconsideration of the Second Circuit’s ruling in favor of Microsoft in July. No surprise there. The Eighth Circuit made it a bit easier for plaintiffs to state
a cause of action for abuse of government databases by public officials, identifying several factors suggesting that such use is improper. And in the District of Oregon, the state’s top civil rights lawyer has sued the state for surveilling his Twitter account after detecting that the lawyer might have been a supporter of Black Lives Matter.

Transatlantic Privacy

There’s been a new lawsuit filed in the EU challenging the newly-effective EU-U.S. Privacy Shield, which was only to be expected. The Yahoo email-scanning flap probably won’t help EU judges feel comfortable with the deal.

Intellectual Property

Beware, everyone who relies upon the protection of the Digital Millennium Copyright Act. The Copyright Office has issued a new Final Rule that will render all existing copyright agent registrations invalid as of the end of 2017, and require renewals of registrations at three-year intervals. Expect a wave of copyright suits against digital platforms who don’t update their registrations in time and thereby lose the benefit of the safe harbor; and it’s too early to tell whether the sudden exit of Maria Pallante as Register of Copyrights will result in a change of heart on her administration’s policies.

Copyright – New Cases

A bunch of new photography suits this month, with the Trump campaign being sued over its use of a photo of a bowl of skittles in an infamous advertisement (N.D. Ill.); Time Inc. sued by a New York Post photographer over its use of his photos of John Kasich eating pizza with a fork at the White House Correspondents’ Dinner (S.D.N.Y.); Forbes, Vox and Gannett sued over publication of set photos from Woody Allen’s “Café Society” (S.D.N.Y.); and Glenn Beck’s website sued by Barcroft Media for use of photos of a plastic surgery subject (S.D.N.Y.).

Music suits continue to roll in, if at perhaps a reduced rate compared to previous months. The major labels sued an online service that allow users to rip music tracks from YouTube videos in C.D. Cal.; as is becoming habitual, they’ve also sought SOPA-like remedies against third party
advertisers and vendors. Bruno Mars was accused of ripping off the bass line in “Uptown Funk” from an 80’s band in another C.D. Cal. suit. A Pennsylvania man who claims he co-authored Bob Marley’s “War” alleges he was defrauded by a record label that falsely recorded the copyright as a work for hire; he’s suing in E.D. Pa. for a declaration that he’s the proper owner. Latin Grammy winner Luny sued Sony Music and reggaeton musician Yandel in S.D. Fla., alleging that the defendants lured him in with promises of collaboration then misappropriated his work.

In film and TV cases, NBC was hit with an infringement suit in C.D. Cal. over its new series Timeless, with the plaintiffs alleging that the show is a ripoff of Spanish show El Ministerio del Tiempo. Note that the concept of a team dedicated to stopping interference in established history is a hoary old trope, though this could be due to time travelers retroactively editing history to that effect. Warner Bros. sued a talent agency in C.D. Cal. for allegedly setting up a streaming service for screener copies of major films. Boxer “Sugar” Shane Mosley’s promoters are suing in the same court over the unauthorized sale of foreign broadcast rights in one of his bouts. The artist who created the logo for a chicken joint featured in Breaking Bad has sued Sony over merchandise using the image. The estate of rock’n’roll promoter Sid Bernstein is suing Apple Corps Ltd. in S.D.N.Y. over the rights to footage of The Beatles’ 1965 concert at Shea Stadium. Conan O’Brien and TBS are facing an amended complaint in a joke copyright lawsuit in S.D. Cal. (that is, a suit about copyrights in jokes, no comment on the merits intended).

Finally, there’s a new suit in S.D.N.Y. from a man who accidentally broadcast 45 minutes of footage of the birth of his son on Facebook Live, and has been using copyright claims to try to lock down the video. Whoops.

Copyright – Plaintiffs’ Victories

In S.D.N.Y., Sony settled a case alleging that two Ghostface Killah songs infringed the theme song for the 1960s Iron Man cartoon, which proves that triteness is not a defense to a copyright claim. In the same court, Gannett settled a suit over its allegedly unauthorized use of a Florida jewelry company’s video of a dog diving into the ocean and catching a lobster, which is in the running for most random copyright claim of the year. Photographer Carol Highsmith survived a motion to dismiss in her claims against Getty over its sale of images she had offered to the public for free; though her federal claims were dismissed, her state law deceptive practices claims survived.
Over in C.D. Cal., we saw a potentially upsetting case for attorneys who rely on model pleadings, with a ruling that a lawyer’s minor modification and filing of another lawyer’s draft brief did not constitute fair use. In the same court, the ex-studio employee who leaked The Revenant and The Peanuts Movie online won’t go to jail, but does face $1 million in fines. And this one has to be classified as a plaintiff’s victory of a sort: after fighting off an infringement claim, Madonna was awarded $720,000 in defense fees – but the judge has now reversed his earlier award. HBO was also denied its fees after defeating a copyright lawsuit over its series Ballers.

The Second Circuit reversed a defense win in a music publisher case against (defunct) website MP3tunes, holding that the site wasn’t entitled to summary judgment on its DMCA defense due to evidence of red flag knowledge or willful blindness regarding third party infringement. The Ninth Circuit reversed the dismissal of a copyright claim over the decorative design of a USB drive, holding that questions of originality should have gone to a jury.

Copyright – Defense Victories

In C.D. Cal.: Two screenwriters had their infringement claim against the producers of indie film God’s Not Dead dismissed for lack of substantial similarity. TMZ and Warner Bros. defeated Jared Leto in a claim over an allegedly stolen video of the actor making unkind comments about Taylor Swift, with the court ruling Leto didn’t hold the copyright. Ad network Cloudflare knocked out secondary liability claims based on its providing ads to an alleged pirate website. Sirius XM trimmed its exposure in one of the Flo & Eddie cases on pre-1972 sound recordings, with a ruling dismissing punitive damages and unfair competition claims. And a judge dismissed a questionable lawsuit by Gene Kelly’s widow over interviews given by her late husband as unripe, but not before the dispute killed the publication of a book gathering those interviews.

In S.D.N.Y.: Beyoncé quickly defeated the lawsuit alleging that her “visual album” Lemonade infringed an independent short film. Her husband Jay Z walked away with two victories: first, the dismissal of a case involving the design of the logo for his Roc-A-Fella Records; and second, a $160K fee award against a sound engineer who sued the rapper for infringement.

A jury in S.D. Fla. rejected a filmmaker’s claim that a Miami TV station’s unauthorized airing of his film cost him a distribution deal worth
millions. Getty Images defeated a case filed by two sports photographers, with a ruling in W.D. Wis. that the plaintiffs were bound by an arbitration clause. An unusual case in W.D. Tex. involving nested photo copyright licenses was dismissed, with the court holding that if you grant a broad license, you might not have standing to sue for conduct that breaches a narrower sublicense but falls within your original grant of rights. And the never-ending API case between Oracle and Google has entered a new phase, with Oracle losing its bid for another new trial in N.D. Cal.; the case now moves to the Federal Circuit, as Oracle channels Commander Peter Quincy Taggart.

The Ninth Circuit affirmed an award of $90K in attorneys’ fees in favor of news website Indybay, after the site fought off a bogus use of copyright to censor negative articles about the plaintiff. The Ninth also upheld the dismissal of a claim over Jessie J’s “Domino,” while the First Circuit held that a claim against Sony over Ricky Martin’s “Livin’ La Vida Loca” had to go to arbitration. The Seventh Circuit held that new claims by Syl Johnson over sampling from “Different Strokes” should have been included in an earlier suit.

And the Second Circuit knocked out three copyright cases, affirming the dismissal of claims against: Broadway production Hand to God, in a suit brought by Abbott & Costello’s heirs over a puppet version of “Who’s on First”; Teflon-coated copyright defendant Jay Z, over “Made in America,” with a ruling that any similarities with the plaintiff’s song were not protectable; and Barnes & Noble, in a case over e-books saved in online storage lockers where the Court dodged any knotty issues about cloud computing.

Copyright – Miscellaneous

On June 30, the DOJ decided that its consent decree with ASCAP and BMI (which sets forth the parameters within which those organizations can operate without antitrust problems) prohibits either group from licensing rights in a musical work unless it can license all permissions necessary for the desired use (so-called “100% licensing”). Less than three months later, a judge in S.D.N.Y. has rejected that interpretation, holding that the consent decree permits fractionalized licensing.

We’ve also got a lawsuit filed by consumer review website PissedConsumer.com that alleges a conspiracy among people offering reputation management services to abuse the DMCA takedown process. The alleged scheme involves creating fake news websites using PissedConsumer reviews, with falsified dates that predate the original reviews; these fake sites
then serve as the basis for fraudulent DMCA notices sent to search engines and others to obtain delinking of the original content.

What does “noncommercial” mean in a Creative Commons license? Creative Commons itself wants a chance to opine on that matter, seeking to intervene in a case in E.D.N.Y. about college coursepacks that could impact those who have relied upon the standardized license terms.

**Patent**

Digital video is big in the patent world this month. In E.D. Tex., a newly formed patent troll has sued 14 major media companies over a 1997 patent covering "a method of automatically changing from a first TV program to an alternate TV program"; the plaintiff claims that the patent is infringed by any website that queues up another video to play after the user is done watching an initial selection. In the same court, patent troll VirnetX brought home another verdict against Apple over FaceTime, this time for $302 million with a potential for punitives. On the other hand, a coalition of streaming video companies succeeded in having a patent for the transfer of media files declared invalid before the PTAB.

Lots of interesting activity at the Federal Circuit as well, as the court showed heightened concern over the validity of software patents that can be used to restrict communication – with one judge going so far as to say that such patents threaten First Amendment freedoms. The Court of Appeals also invalidated database patents being asserted against Facebook and other social media sites, and affirmed dismissal of a patent claim involving real-time audience participation asserted against CBS. But it’s too early to say all media-related software patents are dead; the Court revived a case involving software for lip-sync animation, holding that the patent didn’t claim abstract ideas.

And while the Supreme Court considers a design patent dispute between Apple and Samsung, the Federal Circuit held en banc in a separate suit that a district court judge should not have tossed out a $119 million verdict for Apple involving its slide-to-unlock system and other iPhone features.

**Trade Secret & Misappropriation**

God’s Not Dead racks up a second appearance in this issue, as the producers of a film entitled Proof failed to establish sufficient similarity to back up a state-law idea theft claim in California Superior Court.

And in the Southern District of Mississippi, Oprah Winfrey has been accused of misappropriating a woman’s reality television concept for Iyanla: Fix My Life. But the idea of a
reality series following the adventures of a life coach seems like one that could have been independently conceived, no?

**Commercial Speech**

**Trademark**

Well, this is a bold move. A company that sells personal security tools under the name “ROBOCOPP” doubled down and filed a declaratory judgment action in N.D. Cal. when the owners of the RoboCop movie franchise predictably showed up at their door. But they might find that it’s not so easy to drop the lawsuit if they change their minds... Meanwhile, if you want to learn your Jedi skills, it had better be from a Disney-approved training center, according to another suit in N.D. Cal. filed against the operator of New York’s “Lightsaber Academy.” Who needs Order 66?

Valhalla Entertainment (producer of The Walking Dead) has sued Valhalla Studios, a company building its own production facilities, in N.D. Ga. for trading on its name. Snapchat was sued in S.D.N.Y. to prevent it from changing its name to Snap Inc.; the plaintiff, which provides dating apps for social media sites, goes by Snap Interactive. And in S.D. Fla., NBC Universal has sued a company calling itself NBCU Productions in an alleged attempt to dupe investors.

NBC also showed up on the other side of the v. recently, narrowing a trademark claim in C.D. Cal. over its hit show The Biggest Loser. The court held that the plaintiff’s trademark for fitness training wasn’t famous enough to be diluted by the show’s logo, though an infringement claim remains.

The Eleventh Circuit denied a preliminary injunction to the operators of adult streaming service “FyreTV,” who were seeking to stop Amazon’s use of “Fire TV”; the Court held that the plaintiff’s delay in seeking the PI doomed its showing of irreparable injury.

Oh, and continuing a micro-trend in this issue about Oprah and life coaches, the media maven won her case over the phrase “Own Your Power” at the Second Circuit. The Court held that the plaintiff, a life coach, had no protectable mark in the phrase inasmuch as her use was merely descriptive and lacked secondary meaning.
False Advertising/Deception

There’s a new master complaint in the multidistrict false advertising case against DraftKings and FanDuel, asserting that the companies lied about their legality and their ability to pay out cash. Facebook has also been accused of misrepresentation; a proposed class action in N.D. Cal. alleges that the company lied about the duration of user views of sponsored video in order to sell placements.

Here’s a questionable one from S.D. Cal. on the line between editorial and commercial content: A non-profit fitness education and certification organization publishes a journal, among other activities. That journal runs an article about CrossFit training, which praises its effectiveness but mentions data that might indicate a risk of injury. CrossFit (which also certifies fitness trainers) sues under the Lanham Act, and the court allows the claim to proceed, holding that if the data were falsified it could constitute commercial speech intended to improve the defendant’s credentialing business at CrossFit’s expense. And we all say, “hmm...”

Less puzzling is a ruling from D. Utah that upvoting positive online reviews of your own products as “helpful” is potentially deceptive (if entirely predictable). And if your market is small enough that press releases are an effective method of reaching your customers, they might constitute advertising, says the Western District of Texas.

The press fired up their pun generators for the Seventh Circuit’s hearing on the validity of Subway’s settlement of the “footlong” subs case. I’ll let you make up your own. There was also good news for Joe Theismann, whom the 9th Circuit let off the hook as a celebrity spokesperson for prostate supplements that are the subject of product liability claims. And more good news from the Ninth if you’re concerned about defamation claims recast as Lanham Act claims – the Court of Appeals just made it easier to obtain defense fees in these cases.

Compelled Commercial Speech

The Eighth Circuit bypassed a chance to opine on pharmaceutical companies’ right to anonymous commercial speech under the First Amendment, in a case seeking the identity of suppliers of lethal injection drugs. The Court held that the disclosure would not help the requesters, who were parties asserting Eighth Amendment claims.
**Professional Speech**

Your rights as an citizen to freedom of speech do not guarantee access to military bases to meet with potential clients as an attorney, says the Tenth Circuit, holding that an Army base was not a public forum where one has a right to speak.

**Miscellaneous**

**Academia**

The Eight Circuit held that the First Amendment did not prohibit a public nursing school from adopting professional behavior standards, or prevent the school from imposing discipline on a student for off-campus Facebook posts that violated those standards.

**Government Licensing & Public Fora**

You know, one of my earliest First Amendment matters involved ordinances regarding mobile billboards. A recent decision of the N.J. Supreme Court brought that back to me, with a holding that municipalities could not constitutionally ban digital billboards that changed their messages while permitting the traditional static kind.

A case over Chicago’s ordinance restricting the attachment of posters to city light poles will proceed, with a judge in N.D. Ill. denying a motion to dismiss. The ordinance applies only to “commercial speech,” raising content discrimination questions.

The Court of Appeals of Maryland has held that vanity license plates are private speech, but in a non-public forum. So no, says the Court, you can’t have a license plate displaying foreign terms for excrement.

**Political Speech**

The First Circuit upheld a decision that New Hampshire’s law banning ballot selfies (you know, photos of yourself with your marked ballot, or more often just the ballot) violated the First Amendment. The Court agreed with the judge below that there was no evidence of a real threat of voting fraud to justify the law. This is an issue that I spent quite a while analyzing back in 2012; it’s nice to see a court getting it right now. A federal district court judge in Michigan has followed suit, Ohio is contemplating a legislative reversal of its current ban on ballot photography, and emergency on the issue are pending in California, Colorado and New York. [Late-breaking news: the California and New York efforts have both been rejected.]
Also constitutionally protected is sending insulting letters to a politician’s home, unless they constitute true threats. Thanks to the Mass. Supreme Judicial Court for stating the (hopefully) obvious, but sometimes we need the obvious restated or we start to forget.

Finally, a Texas appellate panel held that a former state senator properly lost an anti-SLAPP motion on an anti-abortion group’s claim that the politician pressured radio stations into removing their ads from the airwaves during a 2014 election. The court held that the plaintiffs stated a prima facie case of tortious interference, not reaching the more complicated question of whether a public official can assert a First Amendment defense for efforts to suppress others’ First Amendment rights.

Hollywood Hijinx

A district court judge in C.D. Cal. dismissed claims against the Hollywood studios over their alleged failure to caption song lyrics in movies advertised as captioned. The court found that the studios had not promised the captioning of all vocal communication, and that deciding the degree of captioning was a matter best left to studios’ judgment.

And the California Court of Appeal held that a contract lawsuit brought by a film producer over his inferior placement in the credits of film Good Kill should have been dismissed on the defendants’ anti-SLAPP motion. The court held that movie credits are protected by the First Amendment, and constitute speech on a matter of public interest, at least in the film industry, and that there was insufficient evidence of damages for the claims to proceed.

The True Miscellany

Idaho will finally join the 21st Century when it comes to adult content: A federal judge enjoined enforcement of the state’s 40-year-old law criminalizing portrayals of simulated sex acts in a range of works far broader than those covered by the Miller obscenity standard.

Conclusion

I’ll tell you, as I was writing this I couldn’t believe that some of these things had only happened in the last two months. With everything going on around the election, never mind all of the MLRC’s activities this autumn, events at the beginning of September feel like they happened last year. Hopefully one way or another we’ll all be able to relax next week -- see you at the Forum and Annual Dinner!

Finally, for any Star Trek: The Next Generation fans out there: I’ll leave you with my hope for what happens to Donald Trump after the election.