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

So, here’s the thing. I know that government officials are allowed to speak on public issues, and specifically to criticize the speech of others. I know that courts have allowed officials to demand that private companies to exercise their discretion to censor even constitutionally protected speech, while finding that a line is crossed when those officials threaten to use government power against companies who do not comply. We saw that in Bantam Books, and more recently in Backpage.com v. Dart. But I’m not sure that, when it comes to the office of the president, the First Amendment line should be drawn at explicit threats of government retaliation.

The pressure that the Chief Executive is able to put on a company is qualitatively different than what a county sheriff or a state legislative commission might bring to bear. Whether it is the forty-fourth president leaning on Google to remove The Innocence of Muslims from YouTube or the current tenant of the White House calling on NFL teams to fire players who take a knee, the unique and uncountable ways in which a sitting president can make life miserable for a private entity mean that a threat does not need to be either specific or explicit. Indeed, the use of the bully pulpit is itself a key power of the office, giving a president unparalleled power to damage companies by rousing the public against them (and that is without considering the specific implications of a president who has bragged consistently about his ability to make companies do what he wants them to do).

But what about the reaction of NFL owners and players to Trump’s demand? Did the solidarity expressed by the league demonstrate that the incumbent’s words are just more Twitter bluster? I would argue not, for two reasons. First, just because the demand did not result in teams clamping down on players’ speech does not mean that the teams suffered no damage; it will be a while until the extent of any lost revenues as a result of Trump’s attempt to whip up anger among conservative football fans becomes clear. Second, there is independent harm from Trump’s
distortion of the protests to suit his own ends; he has coopted the players’ message to be about him, rather than the underlying injustices that it was originally intended to call to light. In that sense, the White House did indeed suppress criticism by deflecting it to another target.

Intermediaries have always been a potential choke point for freedom of expression, an issue that is perhaps most apparent on social media but applies in any situation where a speaker depends on the good graces of a third party who might have less interest in the message. Where a president steps beyond voicing views to targeting these choke points specifically, it strikes me there should be a valid First Amendment claim.

Moving on...

**Supreme Court**

**Pending Cases**

So far, the highest-profile First Amendment case for the October Term is *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. The [petitioner’s brief](#) is in, and the Justice Department has chimed in with an [amicus brief in support](#). The commentary is mostly focusing on the religious liberty side of the case, but it’s a mistake to lose sight of the expressive conduct issue. If we accept the argument that creation of an elaborate cake is an artistic and expressive act (and I think that’s a hard conclusion to avoid), then we are presented with difficult compelled speech questions. We might accept a law that forbids painters from discriminating against those who wish to buy existing paintings hanging in their galleries, but could we enforce a law saying that artists must accept commissions to create new works? Regardless of the nature of the work commissioned, the idea of forcing artists to engage in expressive activity seems problematic even if the reason for the artist’s objection is reprehensible.

Turning to the Fourth Amendment, a [wide variety of amici](#) are supporting the petitioner in *Carpenter v. United States*, arguing for limitations on the right of law enforcement to access historical cell site data without a warrant.

**Petitions**

In its first Orders List since the summer recess, the Court agreed to hear another First Amendment case about whether government workers can be [compelled to pay union fees to support advocacy](#) with which they disagree. The case raises an issue on which the Court deadlocked last term after the death of Justice Scalia.
New petitions this month include a collection of petitions from ISPs seeking review of the D.C. Circuit’s decision upholding the FCC’s 2015 net neutrality order, a last-ditch effort by copyright holder Perfect 10 to flip a devastating ruling by the Ninth Circuit in favor of Usenet provider Giganews in a digital infringement case, and Dish Network asking for review of a Florida Supreme Court decision that the state’s taxation of satellite companies is not discriminatory as compared to cable.

**Reporters’ Privilege**

The battle over the Trump Dossier rages on D.D.C., with the Russian businessman who is suing BuzzFeed now seeking to enforce a subpoena against the third party who retained ex-spy Christopher Steele to develop the dossier. The third party has sought to quash the subpoena, arguing that the First Amendment protects Steele’s sources.

A South Carolina journalist fought off an attempt in state court to fine or imprison him for refusing to identify his sources in a libel lawsuit filed against the journalist by a former state representative. However, the court held that a jury instruction that he had no sources for certain defamatory statements was warranted.

**Defamation**

**New Cases**

A multi-layered dispute over the production of the Mel Gibson movie The Professor and the Madman (no, Gibson plays the professor) has taken a turn into defamation law, as the director filed suit in C.D. Cal. against one of the companies behind the picture after the production collapsed.

A student at the University of New Haven sued Snapchat and the Daily Mail in D. Conn. over the use of her name and image in a story about spring break debauchery. Meanwhile, a horticulturist at the University of Florida sued The New York Times over two articles, which she claims falsely suggest that her support of the use of GMOs reflects financial ties to Monsanto.

Bobby Brown sued TV One in S.D.N.Y. over a TV movie about the singer’s deceased daughter; Brown objects to the portrayal of his relationship with her.

The widely reported arrest of former Knicks player Charles Oakley in the stands at Madison Square Garden in February of this year has resulted in a defamation suit in S.D.N.Y.
against Knicks owner James Dolan and the Garden. Oakley alleges that the Knicks sought to portray him as an alcoholic after the incident.

The former foreign policy adviser for the Trump campaign sued Oath in S.D.N.Y. over two stories (one on Yahoo!, one on the Huffington Post) stating that he was being investigated for meeting with Russian officials.

In the states, a blink-and-you’ll-miss-it lawsuit was filed in Florida by a real estate developer against The Coastal Star over reporting on a new project, and voluntarily dismissed less than a month later. A former Sony employee sued The Hollywood Reporter and its parent company in Illinois over an article allegedly pointing to her as the culprit in the massive 2014 hack of the studio’s data. The case had previously been kicked out of federal court after diversity evaporated. In Maryland, a New York attorney has sued an anonymous Kenyan blogger for defamation based on a post accusing her of having been suspended from the practice of law for misconduct, and sought a subpoena to Automattic for the blogger’s identity. In New York, a Manhattan supreme court judge sued the New York Post over an article quoting anonymous sources as saying that the state Democratic Party had (temporarily) declined to back her re-election because she was “lazy” and “slow” with respect to disposing of cases. Also in New York, Charles Harder (who clearly aspires to the Marty Singer Lifetime Achievement Award) has filed another lawsuit against the former Gawker properties, this time going after Jezebel over an article that allegedly accuses a life coach of operating a cult. And in Pennsylvania, the lead suspect in a murder investigation sued a variety of news organizations and reporters over their coverage of the case.

Plaintiff Wins

On a motion for reconsideration of summary judgment, a federal judge in N.D. Ga. trimmed additional allegations from a defamation suit against Viacom over a VH-1 docudrama about R&B group TLC, but otherwise allowed the suit to proceed to trial.

ABC can perhaps feel a little better about that whole “pink slime” thing now, because what’s $177 million compared to this monster: A New Hampshire jury awarded local businesspeople $274 million (and no, I didn’t forget a decimal point in there) for defamation by a radio host and mortgage broker who took to billboards and airwaves to accuse the plaintiffs of running a heroin ring and conspiring to kill him. True, that’s just funny money pending post-trial motions and a possible appeal, but, yikes, think of the price tag on the judgment bond. Someone recently suggested to me that there needs
to be a serious First Amendment review of judgment bonds in defamation cases, and cases like this could tee up the issue.

In New York, a trial court judge ordered a blogger to pay more than $38,000 in damages to a children’s charitable organization run by fans of the Buffalo Bills, after holding that statements accusing the organization and its president of engaging in criminal activity.

We had a couple of rough rulings from the Second Circuit as well. The court revived a former hedge fund executive’s claims against Bloomberg News, holding that a jury should decide whether a comment reportedly made by the hedge fund that the executive had tried to extort the fund was a statement of opinion. (Separately, the court held that a statement that the hedge fund was sued by the executive for $500 million was protected under N.Y’s fair report privilege.) Bloomberg has since petitioned for rehearing, arguing that the fund’s comment should likewise be protected as part of a fair report.

The Second Circuit also flipped the dismissal of two UVA frat members’ claims against Rolling Stone over its “A Rape on Campus” story, finding that they had plausibly alleged that the story was “of and concerning” them and holding that the 53 members of the fraternity on campus were a small enough group to support a group libel theory.

Finally, we are seeing repercussions from the Massachusetts Supreme Judicial Court’s gutting of the Commonwealth’s anti-SLAPP statute through introduction of a “good faith” defense to a motion to strike. The Massachusetts Appeals Court flipped an anti-SLAPP win in favor of Greenberg Traurig in a defamation case filed by a client’s ex-employee, citing the revised standards under the statute.

Defense Wins

But as always, there’s good news to balance the bad. In federal court, Charles Harder client Shiva Ayyadurai lost his lawsuit in D. Mass. against Techdirt, with the court holding that the identity of the “creator of e-mail” is a matter of historical interpretation and therefore opinion. In E.D. La., the sheriff of Terrebonne Parish will pay up for having his deputies raid a couple’s home on trumped-up criminal libel charges in response to a critical blog. A transparent attempt at forum shopping by an Arizona corporation suing in D.N.H. over an article published by The Deal, a Delaware LLC, was kicked out of court. Martin Scorsese’s company Sikelia Productions was dismissed from a defamation case in E.D.N.Y. over The Wolf of Wall Street, with the court ruling that the dismissal was necessary and appropriate to preserve diversity among the remaining parties. A judge in S.D.N.Y. held that a
pro se plaintiff could not avoid res judicata by repleading a defamation claim against the New York Daily News; the defamation claim had been dismissed in state court, and the plaintiff was attempting to reframe it as a section 1983 claim in federal court. And in S.D. W. Va., a judge granted summary judgment in favor of CBS on a doctor’s defamation claim over a report about his prescription of oxycodone.

In California, Richard Simmons has been ordered to pick up the tab for the National Enquirer’s defense of his defamation claim over a report that he was undergoing a gender transition. [Photo: Del Far, CC BY 2.0] In the same state, a radio station won a tentative summary judgment ruling in its favor on a trade libel claim based on accusations that the plaintiff’s herbal supplements contained human flesh (so, not so herbal, I guess); the statements were made in paid programming, and the court found no evidence of actual malice.

In Illinois, a judge dismissed defamation claims brought by state representative Scott Drury against a political opponent and a radio show host who allegedly misstated that Drury supported an education reform bill; the court found that the complaint still failed to allege actual malice even after a prior dismissal and amendment, but gave Drury another chance to amend. In another Illinois case, a television news report about poor construction at a home being rebuilt after a fire was held to be a fair report of a lawsuit between the homeowners and the construction company.

In Pennsylvania, the Court of Common Pleas tossed former Penn State president Graham Spanier’s lawsuit against Louis Freeh over a report on the university’s handling of the Jerry Sandusky scandal.

On certified questions from the Second Circuit, the Nevada Supreme Court held that statements in a 2012 online petition demanding that Mitt Romney reject campaign contributions from Sheldon Adelson were protected by the fair report privilege because they linked to judicial records, and that the petition was within the scope of the state’s anti-SLAPP law. And in New York, the Appellate Division tinkered with a trial court’s ruling identifying which statements by former Governor Spitzer might support a defamation claim by a former AIG executive, but nevertheless affirmed partial dismissal of the case.
New & Pending Appeals

The Texas Supreme Court has agreed to hear the Dallas Morning News’ challenge to an intermediate appellate ruling that reversed a trial court dismissal of a defamation claim arising out of the report of a teen suicide.

Miscellaneous

While (as mentioned above) the plaintiff in the Trump Dossier case against BuzzFeed is seeking information on the sources of information on the dossier, BuzzFeed wants to know how the DOJ, the FBI, and the DNI responded to the dossier and is fighting in D.D.C. to enforce subpoenas.

In S.D.N.Y., Sarah Palin has unsurprisingly sought reconsideration of Judge Rakoff’s unorthodox Rule 12(b)(6) ruling in favor of The New York Times, arguing that she has a right to amend her complaint to augment allegations of actual malice. Also in S.D.N.Y., Fox News is seeking dismissal of the remarkable defamation lawsuit alleging that it conspired with the White House to publish a fabricated story about a murdered Democratic National Committee staffer, while a financier named in the suit is seeking Rule 11 sanctions.

And in West Virginia, HBO has moved to dismiss the Marshall County Coal Company’s lawsuit over Last Week Tonight now that the case has returned to state court. Maybe we can get that sarcastic brief from the local ACLU refiled too?

Privacy

Rights of Publicity

Dame Olivia de Havilland’s lawsuit against FX will move forward, and quickly – a California judge granted the 101-year-old’s motion to start a trial at the end of November, and denied FX’s anti-SLAPP motion. Meanwhile, a judge in M.D. Fla. denied motions to dismiss filed by Florida strip clubs in a case alleging that they used models’ photos on social media without permission. (Did you feel a bit of whiplash moving between those two stories, or was it just me?)

It’s been a while since we’ve seen a mugshot racket case, but we had one from N.D. Ill. this month with a judge denying a motion to dismiss on the basis that charging a fee to remove mugshots likely violates the subjects’ rights of publicity.
One-hit wonder Toni Basil might be synonymous with “Mickey,” but does that mean that uses of “Mickey” in various contexts violate her right of publicity? That’s the issue raised by a new lawsuit in California against Disney, Viacom, and others; expect a copyright preemption defense. Also in California, the late comedian Chris Farley’s estate has sued Trek Bicycle over its “Farley” line of cycles, which feature a wider chassis and tires. (If you’re chuckling at that, might I suggest that an eyeroll might work just as well?)

Finally, DraftKings and FanDuel defeated an ROP claim by former collegiate football players in S.D. Ind., with the judge holding that their use of player names and likenesses in the operation of fantasy sports contests was protected by the First Amendment (with copyright preemption also playing a role). Electronic Arts will presumably be interested in how they managed that.

Disclosure of Private Information

The New Jersey Appellate Division reversed the dismissal of a claim brought by Michael Mandelbaum, son of one of the owners of the Minnesota Vikings, against his wife’s divorce lawyer. The court held, among other things, that information on a tax return provided by the attorney to the Wall Street Journal (including Mandelbaum’s social security number) was protected even if the document had also been filed in court.

Intrusion

A judge in the Eastern District of Missouri whacked the production company behind film Last Ounce of Courage with more than $32.4 million in damages under the Telephone Consumer Protection Act for a promotional robocall campaign featuring the voice of Mike Huckabee. The judge chose a figure of $10/call, far less than the maximum of $500/call provided for under the TCPA, on the basis that an award at the top end of the range would be excessive.

Wiretapping/Eavesdropping

James O’Keefe’s Project Veritas failed in its attempt to preempt a prosecution for illegal recording in Massachusetts. The group sought a declaratory judgment in D. Mass. that the Bay State’s wiretapping law is unconstitutional, but the judge held that the group’s allegations of an intent to record secretly in the Commonwealth were too vague to support standing.
Access/FOIA

New Cases

In D.D.C., a freelance writer sued the FCC for data regarding bulk uploads to the agency’s comment site, in an effort to investigate the claim that net neutrality comments were submitted in people’s names without their knowledge. Also in D.D.C., a government watchdog sued for records regarding the costs of Treasury Secretary Steven Mnuchin’s trip to Kentucky to see last month’s eclipse.

ProPublica has sued in S.D.N.Y. for access to the source code for software used by New York City to match DNA, in response to allegations that the system could have resulted in wrongful convictions.

In Florida state court, the Miami Herald is seeking 911 audio related to the nursing home deaths during Hurricane Irma. And in Washington, a media coalition led by the Associated Press has sued state legislators over a pattern of repeated noncompliance with the state’s Public Records Act.

Access Granted

Still interested in Hillary’s emails? Me neither. But Judicial Watch is still beating a dead horse, and has won an order in D.D.C. directing the FBI to release additional information about its investigation.

The California Supreme Court held that the LAPD might be required to turn over anonymized data from its automated license plate reader system, even if anonymization is not a built-in function of the system. Los Angeles also reached a settlement with the First Amendment Coalition about its record retention practices and habit of destroying documents.

In Illinois state court, CNN won an order that police officers’ personal email accounts containing official communications about the Laquan McDonald shooting are subject to disclosure. Meanwhile, the Illinois AG’s Public Access Bureau ruled that the city of Aurora improperly withheld video records, and that video must be treated like other public records.

Finally, the Michigan Court of Appeals ordered the release of audio recordings related to police handling of a county prosecutor’s car crash.
**Access Denied**

The Second Circuit kept TV cameras out of appellate arguments in a high-profile case involving a skydiving instructor who claimed that he was fired for being gay. Similarly, the Ohio Supreme Court’s office of public information shut the door to cameras during an argument over efforts to shut down a Toledo abortion clinic.

The District of Nevada held that a romance novelist and country singer could pursue a defamation claim under their usual pseudonyms without revealing their true identities, finding that their reputations were attached to those pseudonyms.

A judge in D.D.C. held that the FBI did not have to disclose how much it spent to unlock the San Bernardino iPhone, shutting down a lawsuit by the Associated Press and other outlets.

NOAA climate scientists are breathing a sigh of relief after a judge in D.D.C. held that many of their records were protected under FOIA as “deliberative” or “predecisional” materials, and that allegations of government misconduct did not override the exemption. An Arizona appellate panel reached a similar result in a case seeking the emails of climate scientists working at the University of Arizona. I know I shouldn’t be celebrating a FOIA loss here, but hey – Scott Pruitt says we shouldn’t be talking about climate change right now anyway.

A Florida appellate panel held that a new exemption to the state’s public records law allowed the Palm Beach County Sheriff’s Office to withhold the identities of witnesses to a murder on I-95. And in Illinois, a circuit judge held that Mayor Emanuel was not required to provide an index of his electronic communications.

**Pending Cases & Appeals**

The Reporters Committee for Freedom of the Press led a media coalition in filing an amicus brief at the Second Circuit, in support of Alan Dershowitz’s appeal of a district court order allowing the routine sealing and redaction of court records in Giuffre v. Maxwell.

The Ninth Circuit will hear argument in two cases about California state court clerks’ practice of withholding new complaints pending administrative processing, with district courts below splitting as to whether the practice violates the First Amendment.
Newsgathering

Prosecution of Journalists

Charges were dropped this month against the West Virginia reporter who was arrested for allegedly yelling questions at (now former) HHS Secretary Tom Price in the state’s capitol. Meanwhile, the St. Louis Post-Dispatch is demanding that charges be dropped against one of its reporters caught up in a mass arrest at a protest following the acquittal of St. Louis cop Jason Stockley for the 2011 shooting of a black man. And in New Carlisle, Ohio, a photojournalist was accidentally shot when a sheriff’s deputy – an acquaintance of the reporter – mistook his tripod for a gun.

In other news, Georgia’s Judicial Qualifications Commission decided not to impose discipline on a judge who arranged to have a journalist arrested. I talked about this case when the whole mess went down last year; the backstory is a veritable soap opera.

Punishment of Sources

Leaks continue to be a source of consternation to the White House, with National Security Adviser H.R. McMaster circulating a memo directing officials throughout the federal government to warn against leaking, and Jeff Sessions coming up with the farcical idea to conduct a one-time polygraph test on every member of the National Security Council staff. So, it seems like they still have no idea who the leakers are.

The only actual Trump-era leak prosecution to date rolls forward, with former NSA contractor Reality Winner arguing that the FBI never advised her of her Miranda rights, and mounting a renewed effort to be released on bond.

Trump Administration

Relatively little news in media/Trump Administration relations in September (what with the hurricanes, North Korea, the NFL, etc.). The EPA picked a fight with an AP reporter over coverage of flooded Superfund sites in Houston following Hurricane Harvey, and the Pentagon is becoming even less transparent than usual. We do have a new White House communications director, with Hope Hicks stepping into the role. (Don’t worry, folks, there will be more in October.)
**Lawsuits**

The Tenth Circuit held that Wyoming trespass laws that created civil and criminal penalties for “[c]ross[ing] private land to access adjacent or proximate land where he collects resource data” violated the First Amendment. The statutes were essentially a form of “ag-gag” law intended to suppress crossing onto private property in pursuit of environmental reporting. While trespassing was not protected by the First Amendment, held the court, the enhanced penalties for trespassing with the intent to collect information essentially punished the creation of speech.

That strikes me as the right result, and I’m wondering what it means for laws that create additional penalties for the publication of information obtained through wiretapping or intrusion. After all, if you can’t specially punish the gathering of information through trespass, it seems ridiculous that you could punish the publication of that information.

**Drones**

Newton, Massachusetts, has broken new ground with drone law. The city’s anti-drone ordinance was declared invalid by a judge in D. Mass., who ruled that state regulation in the field is preempted by federal law.

Speaking of which, the FAA has promulgated new regulations prohibiting unauthorized drone flights around certain national parks, monuments, and other sites – so check the list before you try to get those cool aerial shots of the Statue of Liberty or Mount Rushmore, or major dams like the Hoover or the Grand Coulee.

**Prior Restraint**

A film company attempting to produce a biopic about the plane crash that killed members of Lynyrd Skynyrd was hit with a preliminary injunction in S.D.N.Y. against the film’s release, due to the involvement of a former band member, Artimus Pyle, who had signed away his rights to exploit those events in an earlier agreement. The injunction also barred the company from developing any future projects on that subject with Pyle’s involvement.

Suge Knight’s fiancée Toi-Lin Kelly has run afoul of the law in California after selling a video to TMZ that was sealed in the music mogul’s murder trial. She has been indicted in state court for conspiracy to violate a court order.
Project Veritas has been hit with a TRO in Michigan circuit court not to disclose undercover video shot during a sting of the American Federation of Teachers in Detroit; a hearing is scheduled for October 10th on whether to continue the order.

A New Mexico judge has denied a preliminary injunction against political ads alleged to be defamatory, in a race for the state land commissioner’s office. In another case, the New Mexico Supreme Court reversed a trial court order barring a newspaper reporter from disclosing information designated confidential in a commercial lawsuit.

In New York’s Appellate Division, the EFF, the RCFP, and a group of law professors filed amicus briefs arguing that the preliminary injunction in the “lynching” defamation case I mentioned last month is unconstitutional.

Finally, we learned about a near miss with a prior restraint that occurred in Texas earlier this year, in which a convicted criminal managed to obtain a takedown order directing the removal of stories about his guilty plea from, among other sources, “media and social media sites.” The convict obtained the order under a Texas law that prevents government agencies from disclosing information about people who have pleaded guilty and successfully completed probation; but when a local TV station pointed out the limited scope of the law, the court deleted the references to media and social media.

Information Infrastructure

Federal Communications Commission

FCC Chair Ajit Pai survived an effort to block his confirmation for a new term, as critics called him out on his handling of the pending Sinclair/Tribune merger. Pai has defended his efforts, and the FCC has sought more information from Sinclair on how it intends to keep its promises to stay under the agency’s ownership rules.

Pai’s recent proposal to reclassify broadband to include wireless also provoked complaints, with opponents claiming that he was attempting to fix the country’s broadband access issue by redefining it. And the FCC’s annual report on the wireless market found it to be competitive, which, again, drew criticism from the dissenting Democratic commissioners. None of this has delayed Pai from moving forward with his deregulatory agenda, as the FCC continues to streamline regulations on cable and radio.

Pai did, however, hit a stumbling block when he called on Apple to activate FM chips in iPhones to receive emergency broadcasts. It turns out that Apple hasn’t built those chips into its phones for a few years now.
In other news, the FCC will be defending its ruling that Cablevision did nothing wrong by moving Game Show Network on a lower-audience tier, with GSN appealing the decision to the D.C. Circuit.

**Net Neutrality**

A House committee took a September 7 hearing on net neutrality off of its calendar after major tech companies would not commit to attending. However, Apple did finally take a stand on the issue, arguing in favor of the 2015 Open Internet Order.

Meanwhile, in the wake of the FCC’s massive disclosure of net neutrality complaints and other documents, Senate Democrats have asked the FCC to postpone its net neutrality decision.

**Mergers & Antitrust**

While there is consternation about the Sinclair merger, Comcast is sanguine about its own status despite rumblings from the White House about breaking up the communications giant.

Cox Communications, meanwhile, scored a win at the Tenth Circuit, which affirmed a district court decision to vacate a $6.3 million antitrust verdict for tying set-top box rentals to premium cable services.

In tech matters, extreme right-wing Twitter alternative Gab sued Google for alleged antitrust violations in E.D. Pa. over the rejection of its app from the Google Play store. Gab might have bigger problems, though, as at least one domain registrar has refused to do business with the service because of its content.

**Other Litigation**

Nielsen is suing ComScore in S.D.N.Y., alleging that ComScore is using Nielsen’s audience measurement technology beyond the scope of a license between the parties. Specifically, Nielsen is seeking an injunction against ComScore’s use of the tech to measure television audiences without an online component.

**Digital Content**

**Takedown Mania**

Prof. Volokh continues to chronicle efforts to abuse the judicial process and platforms’ content removal policies. This month, he brings us tales of: a reputation management company facing prosecution in Texas and a civil suit in California for filing sham lawsuits based on false
information to secure takedown orders; a business owner awaiting sentencing in S.D.N.Y. after pleading guilty to forging court orders to shut down critical websites; a lawsuit in Nevada state court against an anonymous online commenter resulting a default judgment and a rubberstamped order to remove not only comments allegedly posted by the “defendant,” but also many posted by multiple others who were never a party to the suit; and a takedown demand to Google to remove news stories, accompanied by a court order from an unrelated case.

Section 230

Facebook had a quick 230(c)(1) win in the Ninth Circuit over its content removal practices, although Prof. Goldman raises the excellent point that the reliance on (c)(1) in this context again demonstrates that 230(c)(2)’s protection of good faith moderation might be becoming superfluous.

SESTA, the “Stop Enabling Sex Traffickers Act of 2017,” remains the big Section 230 news. The rhetoric has been flying thick and fast, with those supporting the bill arguing that opponents are either in Silicon Valley’s pocket or looking to protect their own bottom lines at the expense of children. Notable among SESTA’s supporters is Oracle, which somewhat ostentatiously parted ways from the rest of Silicon Valley with a declaration that the bill would not “usher the end of the internet.”

Of course, the bill’s supporters (when not simply engaging in ad hominem attacks) are oversimplifying opponents’ concerns. However, the bill’s opponents appear to be struggling to have their rational concerns about the specific text of the bill, and its potential for unintended consequences, heard over the furor. A Senate hearing in September was an opportunity for politicians to express their outrage, though at least some present recognized the need to tinker with SESTA’s scienter standards to avoid some of the more deleterious effects.

Hate, Terror, and Other Internet Nastiness

Some rough times for Facebook recently. The efficacy of the company’s efforts to flag fake news on the site was questioned, with a study suggesting such tags do little to shift readers’ belief in headlines. The company moved to shut off ads from running on videos that deal with real-world tragedies and other controversial content, only for another report to reveal that advertisers were able to target Facebook users by searching for those who expressed interest in anti-Semitic content. And no sooner had Facebook shut down that form of ad targeting than news broke that a Russian company had purchased over 3,000 political ads on the site during the 2016 presidential campaign. Once again, Facebook
changed its rules and policies, while turning information over to Congressional investigators and sparking a debate over political advertising rules for digital platforms.

Facebook wasn’t alone in the Russian mess. Twitter also disclosed a massive presence of Russian-linked accounts and is facing Congressional scrutiny. Twitter also responded to criticism over its decision not to remove Donald Trump’s threats against North Korea by updating and clarifying its policies on newsworthy content.

A feminist group’s Title IX lawsuit in E.D. Va. against the University of Mary Washington over the school’s handling of cyberbullying via defunct app Yik Yak was thrown out, with the court ruling that the school had taken sufficient steps to address the issue and that banning the app from campus entirely could violate the First Amendment.

Miscellaneous

A Baton Rouge cop attempted to sue a Twitter hashtag (#BlackLivesMatter) in M.D. La. for triggering violence at a protest during which he was injured by a thrown rock. Sanity prevailed, and the case was dismissed with prejudice.

Finally, the Second Circuit partially vacated a Dead Sea Scrolls scholar’s conviction for criminal forgery of emails in order to embarrass academic rivals. The court held that the New York forgery statute, which prohibits “falsely mak[ing], complet[ing] or alter[ing] a written instrument ... with intent to ... deceive,” is facially overbroad because it criminalizes any use of a pseudonym (a potential deception) irrespective of intent to cause injury. Narrowing the statute to survive First Amendment scrutiny, the court found, would require that the defendant’s conviction on several counts be reversed.

Digital Privacy

Anonymity

The Dallas Morning News shut down an attempt in E.D. Tex. to find the identity of commenters on its website; the defendant in a pending lawsuit had sought the identities in the belief that one of the commenters was the plaintiff in the suit.
**Control of Personal Information**

143 million Americans are, or should be, scrambling to protect their accounts and their identities after a massive hack of data held by credit reporting agency Equifax. A class action was filed in D. Or., Congress has demanded an explanation, the FTC launched a probe, and the company’s CEO and Chairman has “retired.” Presumably to an underground bunker in an undisclosed location.

Me, I’ve placed credit freezes on my records at Equifax, Experian, TransUnion, as well as the lesser-known Innovis, and I’ve been keeping an eye on my credit monitoring service. I’ve learned through bitter experience that this is one of those situations where safe is much better than sorry. One word of caution: If you follow my example, DO NOT LOSE THE PIN NUMBERS THE AGENCIES WILL GIVE YOU. That’s the only way to unfreeze your credit if you want to get a new credit card, refinance your home, or do anything else requiring a credit check – and if you lose your PIN, you might not be able to recover it.

All of which makes a recent decision by the Eighth Circuit particularly striking, in which the court waded into a circuit split over whether an increased risk of identity theft is sufficient by itself to create standing to sue for a data breach. The court held that while risk alone does not create standing, an allegation by a name plaintiff that there was fraudulent activity on their credit card might suffice even if there were no evidence that the misuse of the card was related to the data breach at issue in the case. Meanwhile, a judge in D.D.C. questioned whether class actions are the best way to respond to data breaches in the course of dismissing two cases brought by federal employees affected by four breaches of Office of Personnel Management databases.

In other issues: The Ninth Circuit gave Verizon customers another chance to pursue claims in court over persistent “zombie” cookies used to collect personal information from their smartphones, holding that an arbitration clause in the company’s customer agreement was inapplicable. Also in the Ninth Circuit, Facebook users argued for revival of their claims against the social media company over its gathering of their browsing data from health sites. In N.D. Ill, a judge held that Illinois’ biometric privacy law applies to facial scans from photos as well as in-person scans, and declined to toss a case against Shutterfly on that basis. And in S.D. Ind., a judge declined to dismiss a wiretapping suit against the Indianapolis Colts and the maker of their Android app based on allegations that the app can activate the microphone on a user’s device and temporarily record audio to listen for “beacon tones” that trigger advertising.

Computer maker Lenovo was called onto the carpet for selling laptops pre-loaded with adware, with the FTC obtaining a consent order that the company will no longer load such
software onto devices without consumer consent, and a coalition of 32 states obtaining a $3.5 million settlement over the practice in California state court.

Finally, the California bill intended to compensate for rescinded Wheeler-era FCC privacy protections stumbled, after it failed to come to a vote. ISPs and broadband lobbyists had argued the California bill would impair digital security efforts.

Encryption

The U.S. Court of Appeals for the Armed Forces skirted the edge of recognizing a Fifth Amendment right against compelled disclosure of passwords for digital devices, but did not quite resolve the issue.

Internet Surveillance

The Department of Justice is still aiming for a clean reauthorization of Section 702 without an end date. Meanwhile, the Director of National Intelligence has stated that whether Section 702 allows the collection of purely domestic communications is classified, refusing to answer questions from digital policy maven Sen. Ron Wyden. So essentially, the Trump Administration is asking Congress to reauthorize a bill without telling Congress what it believes the bill allows the Administration to do. Sounds about like what you’d expect.

Google’s battles with the Justice Department over data stored on foreign servers are heating up. Even though the government has recently asserted that Google has stopped challenging most of its overseas warrants, it sought contempt sanctions against the company in N.D. Cal. for its refusal to turn over data from 22 e-mail accounts in the face of court orders that are currently under appeal. Google is also facing sanctions of $10,000 per day for contempt of an order in D.D.C. to turn over such information; however, the judge in that case stayed the order pending appeal, with sanctions not accruing until after the D.C. Circuit rules. And the company is fighting another extraterritorial warrant before the Vermont Supreme Court.

A group of people (including a journalist) whose digital devices were searched at U.S. airports have filed suit against the Department of Homeland Security in D. Mass., asserting violations of their First and Fourth Amendment rights.

The Department of Homeland Security is moving forward with a plan to gather social media information about immigrants (and, potentially, naturalized citizens and green card holders). U.S. House Representative and naturalized citizen Ted Lieu (D-Los Angeles) is not pleased.
The fight continues in D.C. Superior Court over government efforts to gather information about users and operators of the DisruptJ20 site that was used to coordinate inauguration protests in January. Following a high-profile conflict over the summer, during which the government was accused of compiling an “enemies list,” a judge has now ruled that the government may enforce the subpoena but may not dig into the substance of the materials received or turn over information to prosecutors until the court rules on the relevance of specific information that government wishes to examine. If you see a chicken-and-egg problem there, you’re not alone.

But that’s not the only front on which this battle is being fought: It has been disclosed that D.C. authorities served a warrant on Facebook for information about a page and three accounts believed to be linked to the DisruptJ20 site, including data not only about the account holders but those who might have “liked” the page or posts by the account holders, or friended or communicated with the account holders. (We knew about the warrant previously, but not its targets or scope.) The ACLU has moved to quash on behalf of the account holders; the intervention was only possible because D.C. prosecutors this month dropped efforts to prevent Facebook from alerting users when their political communications are searched, forestalling a decision by the D.C. Appeals Court as to whether such a prohibition violates the First Amendment.

Speaking of the D.C. Appeals Court, it joined the chorus of courts holding that the use of a stingray cell-site simulator to track suspects’ real-time location requires a warrant.

**Intellectual Property**

**Copyright – New Cases**

The new defamation case in C.D. Cal. over *The Professor and the Madman* also has a copyright dimension, with the director claiming that his copyright in the screenplay for the work was infringed by the producer’s cutting of what he considered incomplete footage into a film for release. The director’s preliminary effort to block distribution of the picture was rejected, with the court finding no likelihood of success on the merits.

In music cases, Taylor Swift was sued in C.D. Cal. over allegations that she was not the first to realize both that players have a predilection to play, play, play, play, play, and that haters are known to hate, hate, hate, hate, hate, baby. Chance the Rapper was hit with a suit in N.D. Ill. over sampling of the plaintiff’s work in his
song “Windows,” while Mark Ronson’s “Uptown Funk” was alleged in S.D.N.Y. to have more than incidental similarity to Zapp’s “More Bounce to the Ounce.”

In photo lawsuits, Breitbart is facing a suit in D.D.C. for using a photo of a Berkeley student protest without a license. In S.D.N.Y.: A photographer’s estate sued the Hard Rock Hotel for its display of an iconic photo of David Bowie (but seriously, is there any other kind?); Neil DeGrasse Tyson has been accused of unauthorized promotional use of a photo portrait of himself; and a New York photographer sued Complex Media over use his photo of a public defender who was punched by an administrative law judge.

Acclaimed novel The Art of Fielding allegedly rips off themes and details from an unpublished novel adapted from a published screenplay, according to a new lawsuit in S.D.N.Y.; in my humble opinion, the complaint’s allegations of access to the plaintiff’s unfinished work are, shall we say, somewhat speculative.

In silly suits, Kmart has been sued in D.N.J. for selling banana costumes that allegedly infringe the plaintiff’s giant banana design. Quoth Prof. James Grimmelmann, “There is no originality in bananas.” A football coach was sued in M.D. Pa. for retweeting a tweet containing an image of a single page from the plaintiff’s book. Oh, and VidAngel is trying again to persuade a court that its family-friendly streaming service is permitted under the Copyright Act, by filing a new lawsuit in the District of Utah. Yeah, because that tactic worked so well for FilmOn.

Copyright – Plaintiffs’ Victories

We had an amended opinion in Mavrix Photographs v. LiveJournal from the Ninth Circuit, but anyone hoping for relief from the court’s statements about imputing the knowledge of moderators to a company for the purposes of the DMCA will be disappointed. The court left the end result intact, but amended its analysis to focus on LiveJournal’s role in making material stored by a user publicly available, not its role in "publicly posting" such material.

A jury in C.D. Cal. awarded John Steinbeck’s stepdaughter $13 million in a fight over the late author’s literary rights. A judge in the same court entered a stipulated judgment and permanent injunction against a website that allowed users to convert the audio tracks from YouTube videos into downloadable mp3 files.
Finally, copies of outtakes from the *Dr. Phil Show* made by a former employee with her iPhone—and later submitted by the employee as evidence in a false imprisonment lawsuit against Dr. Phil—were held not to be protected by fair use. The ruling from E.D. Tex. makes a hash of transformative use, confusing that issue with transformation of the work itself and the amount of the original used, while the judge seems to have missed the point in his discussion of the use of copyright to suppress unflattering material (suggesting that maybe Dr. Phil was just preserving a future market for the damning outtakes). [Photo: Jerry Avenaim, CC BY-SA 3.0]

*Copyright – Defense Victories*

Textbook publisher McGraw-Hill dodged a bullet with a Ninth Circuit ruling that a photo agency claiming infringement of its stock images lacked standing to sue; the court held that the photo agency had obtained nothing but a bare assignment of the right to sue from individual photographers, which does not create standing under the Copyright Act.

In C.D. Cal., Starz fought off a novelist’s lawsuit over its series *Power*, with the court finding allegations of access to the work speculative and that there were no protectible similarities. In S.D.N.Y., the first verse of “We Shall Overcome” was held to have entered the public domain (the remainder is still at issue), and Dr. Seuss Enterprises lost its bid to stop an adult-oriented parody of “How the Grinch Stole Christmas!”

*Copyright – New & Pending Appeals*

House Representatives Zoe Lofgren and Darrell Issa filed an amicus brief in support of Carl Malamud’s Public.Resource.Org at the D.C. Circuit, arguing that copyright should not block the publication of safety standards created by private organizations but incorporated into the law by reference.

ISP Windstream gave up on its attempt to secure a prophylactic ruling that it was compliant with the DMCA, dropping an appeal pending at the Second Circuit; Windstream had filed the suit fearing that it would meet a fate similar to that of Cox Communications should it be sued over failing to terminate repeat infringers.

The “monkey selfie” lawsuit, now pending a ruling from the Ninth Circuit, is reportedly moving toward settlement. But there are shenanigans afoot (you knew there would be shenanigans); PETA wants the Ninth Circuit not only not to rule, but to vacate the lower court opinion against Naruto on the grounds that PETA’s status as “next friend” to a monkey is in
doubt. A [hilarious amicus brief] opposing the settlement points out that if PETA isn’t the monkey’s next friend, it can’t settle the case without Naruto’s approval, so…

Copyright – Miscellaneous

The creator of [Pepe the Chilled-Out Stoner Frog] is leveraging copyright law to cut off the mellow batrachian’s appropriation as an icon of the alt-right, firing off C&D letters and DMCA notices.

The Electronic Frontier Foundation [pulled out of the World Wide Web Consortium] (a/k/a W3C), the non-profit group that sets compatibility standards for browsers and websites, after the W3C voted to approve building digital rights management tools into HTML 5. Frustrated by both the process and the result, EFF accused W3C of ignoring the will of the majority of its members in service of the agenda of its largest corporate members.

Meanwhile, content producers have been lobbying the U.S. Trade Representative to keep provisions requiring DMCA-like intermediary liability protections out of a [revised North American Free Trade Agreement]; Canada, on the other hand, has objected to the USTR’s demand for stricter copyright enforcement without respect for fair use.

Idea Theft

In S.D.N.Y., Pepsi lost a motion to dismiss an ad agency’s claim that the beverage company [stiffed it on the bill] for the concept for its [2016 Super Bowl ad], with the court rejecting Pepsi’s argument that the claim was preempted by the Copyright Act.

Patent

You knew Judge Rodney Gilstrap of the Eastern District of Texas wasn’t going to give up his title as America’s Patent Judge without a fight. Despite a Supreme Court ruling strictly limiting where patent claims may be filed, Gilstrap [came up with a tortured reason] why the presence in Texas of a single salesperson working from his home was sufficient for him to retain jurisdiction over a case between tech giants Raytheon and Cray. It didn’t take the Federal Circuit long to [grant mandamus relief vacating Gilstrap’s order] and to direct transfer of the case.

Apple found itself sued for patent infringement in D. Del. [by a newly created company owned by Native American tribes]. The new company apparently cut a deal with the original patent holder to assume the patent and sue Apple. The scheme was intended to dodge a review at the USPTO that could invalidate the patent, by invoking Native American tribes’ sovereign
immunity to USPTO proceedings. This is one of those cases where you just know someone is going to get smacked for being too clever by half.

**Commercial Speech**

*Trademark*

A judge in S.D. Cal. denied summary judgment on the issue of whether the term “Comic-Con” has become generic for comic book conventions, letting that issue go to a jury in a battle between granddaddy of all pop culture conventions San Diego Comic-Con and alleged infringer Salt Lake Comic Con.

Netflix gets kudos for its sense of humor this month, after it sent a remarkably tolerant C&D to a Chicago bar that had transformed its event space into a tribute to hit series *Stranger Things*. Rather than shut the space down immediately, Netflix’s allusion-filled letter requested that the bar not extend its plans for the pop-up past its current end date and that it ask permission before doing something like this again.

On a more serious note, the killing of a Netflix location scout in Colombia has ratcheted up tensions in the midst of an ongoing trademark dispute with the family of Pablo Escobar over the series *Narcos*.

In addition to the copyright-related amicus brief in Carl Malamud’s case mentioned above, six intellectual property law professors filed an amicus brief in the D.C. Circuit challenging the district court's application of trademark law in the case.

*Compelled Commercial Speech*

The Ninth Circuit held that San Francisco’s proposed warning labels for soda violated the First Amendment, unduly burdening protected speech.
False Advertising

In a first for the agency, the FTC reached a settlement with individual social media influencers who were alleged to have promoted a website to their fans without disclosing their ownership interest. In W.D. Wash., the FTC obtained a $1.5 million settlement from the maker of a health app that promised to help users reach exercise goals, but resulted only in leaner wallets. And Gatorade will cough up $300K and will no longer be permitted to take pot-shots at plain old water, after a settlement with the State of California over an advergame that penalized players for drinking H2O as they sprint across the screen.

On the other hand, VICE and the Marshall Project defeated a false advertising suit in E.D. Mich. brought by the author of an essay. The author, who had submitted his work under a modest title, had claimed that the clickbait-y headline under which the essay eventually ran misrepresented his work.

Product Disparagement

The Seventh Circuit held that hyperbolic comments made by the Chicago Cubs’ owner about owners of rooftops adjacent to Wrigley Field, who sold access to rooftop seating to view Cubs games and other events, did not violate a non-disparagement agreement between the parties.

Professional Speech

An Alabama Supreme Court justice who was investigated on judicial misconduct charges for talking on the radio about potential defiance of the Supreme Court’s 2015 ruling in Obergefell will be allowed to proceed with a claim that state laws on judges’ speech violate the First Amendment. A judge in M.D. Ala. held that the justice’s claim was not mooted by the fact that he was cleared of misconduct.

Miscellaneous

Academia

The Justice Department has intervened in a case in N.D. Ga. brought by a student against the public Georgia Gwinnett College; the student claims his First Amendment rights were violated when he was stopped from distributing religious literature without a permit outside of a designated free speech zone.
A judge in N.D. Cal. dismissed claims that U.C. – Berkeley discriminated on the basis of viewpoint when it imposed restrictions on a speech by Ann Coulter on campus, but granted leave to refile within 30 days if the campus group filing the suit could come up with plausible allegations of ideological censorship.

**Government Licensing & Public Fora**

In a bizarre case arising out of a police chief’s effort to take revenge on Tea Party protesters, the Seventh Circuit upheld a content-neutral law banning signs on highway overpasses, though it questioned whether a 100-foot buffer zone on either side of an overpass was necessary.

A judge in D. Utah held that a movie theater could not have its liquor license revoked for serving alcohol during an R-rated film (in this case, *Deadpool*).

**Political Speech**

Minnesota’s Supreme Court held that a law barring people from disturbing public meetings was inconsistent with the First Amendment due to the “countless ways” that protected speech might violate the terms of the law.

Not so lucky are New York voters who want to take ballot selfies; a judge in S.D.N.Y. held that a N.Y. law banning ballot photography was content-neutral (because the judge apparently misunderstood *Reed*) but would nevertheless survive strict scrutiny (because the judge apparently misunderstood what “least restrictive means” means). On the latter point, the judge seems to have confused the tailoring analysis with the fact that it’s simpler to ban ballot photography than to investigate and to prove voter fraud; as all of my readers will know, tailoring isn’t about what’s easier for the government. I’ve shared my (pre-*Reed* but *Reed*-consistent) take on the ballot selfie question before, but here it is again anyway in case anyone cares.

**Hollywood Hijinks**

Put those notes on a napkin back under your drink, Harvey. The New York Appellate Division held that a “term sheet” discussing a potential $1.5 million deal for Harvey Keitel to appear in E*Trade commercials did not amount to an enforceable contract.
The True Miscellany

Left at the bottom of the barrel this month, we’ve got a couple of kiddy porn appeals with interesting legal issues. The Washington Supreme Court upheld the conviction of a minor who sent an explicit picture of himself, raising the question of whether the rationales for punishment of child pornography apply when the photographer is also the subject. (The decision might also have been influenced by the fact that the recipient was apparently another unwilling minor, but the court did not explicitly rely on that fact.)

Meanwhile, the Ninth Circuit affirmed a man’s conviction for attempting to import child pornography from Cambodia to the United States even though the man was mistaken about the age of the "minor" depicted; she was actually an adult. The court held that the defendant’s mistake did not affect the fact that he had the necessary mens rea for a conviction.

Conclusion

I’ll end with a brief note to mourn the passing of rocker Tom Petty; the first concert I ever went to was on the Heartbreakers’ 1989 Strange Behavior tour, and somewhere I think I might still have the T-shirt. Tom – Snoop, Viggo, Kamala and I will miss you at the party in two weeks; say hi to Jerry, Bela and Mickey for us.