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

The Monthly Daily
An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

So, yes, I took a bit of a summer break from The Monthly Daily – but I promise I’ve been keeping busy. If you read George’s column in the MediaLawLetter from last month, you’ll know that he and I have been dashing about the country with the MLRC Institute to teach media law topics at Knight-sponsored journalism conferences. We’ve been ably assisted by many of our members in various cities, who came out to share their wisdom. My sincere thanks in particular to those of you who partnered up with me to teach our copyright and digital media law sessions!

Now I’m back in the flow and ready to dive into a sea of First Amendment and media law news. In an attempt to keep my head above water, I’ll be navigating this summer’s developments a little differently – but no need for tears, I’ve washed my hands of soppy poetry. Let’s set sail! Oho! (That’s an H and two O’s, get it? Remember that I promised this would be an “elemental” issue, so keep your eyes peeled.)

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Supreme Court

Before we get into the substance, we’ve got another changeup on the Court. Anthony Kennedy has left the building and Brett Kavanaugh from the D.C. Circuit is (as of right now) likely to be confirmed as his successor. Dean Chemerinsky has a review of Kennedy’s record on freedom of speech, and there are plenty of folks willing to share their widely differing opinions of what Kavanaugh might do with the First Amendment. You can also read Kavanaugh’s own questionnaire responses, to the extent that you find that kind of thing meaningful.

Decisions

Let’s start with Masterpiece Cakeshop v. Colorado Civil Rights Commission, on which I’ve opined before. The Court’s decision was something of a damp squib for those of us who thought long and hard about the compelled speech angle on the case, with a ruling that the state’s decision was infected by hostility toward the baker’s religion and thus needed to be re-examined.

The Court also issued a summary GVR (that’s “grant-vacate-remand,” for those of you who are not compelled by your employer to read SCOTUSblog every day) in light of Masterpiece Cakeshop on a pending petition for cert from a florist who refused to serve a gay wedding – but it’s anyone’s guess what guidance the lower court is supposed to take away from Masterpiece. Meanwhile, other state courts continue to rule against bakers and other wedding service providers in similar circumstances.

That said, Justice Thomas (joined by Justice Gorsuch) wrote separately in concurrence, taking the position that the creation of a wedding cake is protected as expressive conduct, with the state’s compelled acceptance of commissions posing a First Amendment problem. That provides an interesting backdrop to the decision written by Thomas for the Court in NIFLA v. Becerra, striking down a California statutory requirement for certain pregnancy and family planning clinics to provide notices to their clients. The Court held that the notices, which involved availability of low-cost pregnancy services (including abortion) and a disclaimer for
unlicensed clinics that they were not staffed by medical professionals, were an unjustified and unduly burdensome intrusion on the First Amendment rights of the clinics.

The decision is somewhat fascinating (and frustrating); I’ve got a much more detailed analysis of the case in my article in this month’s MediaLawLetter. And if you’re looking for more data points on how the Court is handling compelled speech, we have a couple: In its final orders list of the Term the Court denied cert in another Ninth Circuit case, First Resort v. Herrera, in which the Court of Appeals upheld the constitutionality of a city ordinance against false and misleading advertising by anti-abortion clinic, while GVRing in yet another case from the Ninth involving an ordinance mandating warnings about cell phone usage, CTIA - The Wireless Association v. Berkeley. (You can check out these and other GVRs from the end of the term here; we’ll talk about other denials of cert separately, as usual.)

Of course, the third big compelled speech decision of the Term was Justice Alito’s opinion for the Court in Janus v. AFSCME, which struck down mandatory financial support for government employee unions from non-member employees. Despite the politically charged nature of the issue in the case, I found the compelled speech analysis to be more straightforward than in either Masterpiece Cakeshop or NIFLA. The Court had long held that compulsory fees could not be used to fund “ideological” speech; the current opinion recognized that it is much harder than previously acknowledged to separate the ideological from the non-ideological in union negotiations. Seems reasonable to me.

The more controversial aspect of the case (leading to Justice Kagan’s startling complaint about the majority’s “weaponization” of the First Amendment) had to do with the question of whether the compelled speech issue was rendered moot by the government employee speech doctrine. Policy issues aside, I found somewhat odd the dissenting justices’ suggestion that status as a government employee allows the state to compel one’s support for a union that is, in the main part, negotiating against the government. That said, it’s been a while since I looked at Pickering, Garcetti, and the rest of those cases in any great depth.

We also received the opinion in Minnesota Voter Alliance v. Mansky on political apparel at polling places, with the Court striking down a state ban on such apparel as overbroad.
notwithstanding its legitimate interest in preventing voter intimidation. Basically, said the Court, the logic of *Burson v. Freeman* on electioneering bans at polling places only goes so far.

And then there was *Lozman v. Riviera Beach*, in which the Court held that existence of probable cause to arrest a person does not preclude a lawsuit for retaliatory arrest triggered by the person’s speech, at least in the narrow case where a municipal policy of retaliation can be established. The Court has also granted cert in another case, *Nieves v. Bartlett*, in which it will have the chance to decide whether proof of such a policy is essential.

Moving beyond First Amendment cases to other opinions of interest, we had *South Dakota v. Wayfair*, in which the Court overruled its “physical presence” requirement for states to require internet retailers to collect sales taxes, and *Carpenter v. United States*, in which the Court rejected the application of the third-party doctrine to hold that the warrantless search of historic cell-site location information could violate the Fourth Amendment. Two very different issues, to be sure, but as a pair the rulings revealed some interesting insights into how the opinions’ authors think about the influence of new technology -- I’ve got a deeper analysis in last month’s *MediaLawLetter*.

Finally, we had a disappointing ruling on partisan gerrymandering in *Gill v. Whitford*, with the Court puntng on the constitutional issue. It was at the periphery of the MLRC’s interest to begin with—the First Amendment issue had to do with rights of association—but still.

**Pending Cases**

So, just because we’re between terms doesn’t mean that nothing new is happening. The Trump administration has filed a brief with the Court urging it to vacate a 2016 decision from the D.C. Circuit that upheld the FCC’s 2015 Open Internet Order establishing net neutrality principles. With the repeal of the 2015 order, argues the administration, the 2016 decision is now moot. Of course, that misses the fact that the repeal is itself currently subject to a legal challenge such that the validity of the 2015 order very much a live issue (as discussed under *Internet Infrastructure*, below).
Petitions

In addition to the First Amendment retaliation case mentioned above, we have a few more grants worth mentioning. Probably of greatest interest to the MLRC crowd is *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, in which the Court has been asked to decide whether a would-be copyright plaintiff has satisfied the registration requirement upon filing with the Copyright Office or only when the Office acts on the application. Other issues the Court will consider include whether Apple’s operation of its App Store violates antitrust law (*Apple Inc. v. Pepper*), class certification in a false advertising case (*Neutraceutical Corp. v. Lambert*), and the definition of the “on sale” date under patent law after the America Invents Act (*Helsinn Healthcare v. Teva Pharmaceuticals*).

But, oh, the melancholy of what could have been. The justices broomed quite a few lingering petitions during their end-of-term housecleaning, including:

- **Wyckoff v. Commissioner of Baseball** (2nd Cir., dismissal of antitrust claims);
- **Den Hollander v. CBS News** (2nd Cir., RICO claim vs. news media over coverage of 2016 election);
- **Rohn v. Viacom** (6th Cir., affirming defense win in trademark case over "Bubble Guppies" cartoon characters);
- **Right Field Rooftops v. Chicago Cubs** (7th Cir., alleged breach of agreement not to obstruct adjoining rooftops’ view of Wrigley Field events);
- **Subway Restaurants v. Warciak** (7th Cir., ability of defendant in spam text messaging case to invoke arbitration clause in plaintiff’s contract with third-party service provider);
- **Dassey v. Dittman** (7th Cir., affirming ruling that confession of defendant on series “Making a Murderer” was voluntary);
- **Braddock v. Jolie** (9th Cir., film did not infringe copyright in book due to lack of substantial similarity);
• *Universal Processing Serv. of WI v. FTC* (11th Cir., availability of joint & several liability for violations of FTC Telemarketing Sales Rule);

• *Flanigan's Enterprises v. Sandy Springs* (11th Cir., repeal of ordinance blocking sale of adult products renders appeal of ordinance moot where reenactment is unlikely);

• *Fernandez-Rundle v. McDonough* (11th Cir., affirming citizens’ rights to surreptitiously record the police in the state of Florida);

• *Jacobs v. Estefan* (11th Cir., statute of limitations in idea theft case over TV show concept); and

• *SNR Wireless LicenseCo v. FCC* (D.C. Cir., FCC denial of spectrum license discounts).

Just think, we could have had two separate baseball-related cases next term. Those would have been great for Jack Greiner’s collection (and if you’ve never talked to Jack about baseball and the law, I recommend it).

Turning to new petitions, we’ve got competing petitions for cert arising out of Bill Cosby’s legal woes. Cosby is seeking review of California appellate decisions allowing Janice Dickinson to sue him for his lawyer’s statements calling her a liar. At the same time, he is opposing Katherine McKee’s petition for cert on a First Circuit decision holding that she was a public figure for the purposes of her own defamation claim against Cosby.

A petition for cert was filed in a case in which the Tenth Circuit ruled that New Mexico’s anti-SLAPP law is procedural in nature, and thus does not apply in diversity cases in federal court. The Court has requested a response.

Meanwhile, after the California Supreme Court declined to grant review, we’re expecting a petition in September from Olivia de Havilland on her failed false light claim over “Feud: Bette and Joan.” The case would raise questions of how to define actual malice in the special context of docudramas. (As of publication, we haven’t seen this petition yet.)

There were a handful of copyright-related petitions. TVEyes is seeking cert on Fox’s win in the Second Circuit regarding a news clip archive and search service. A photographer who floated a claim that his snap of Michael Jordan in mid-air was lifted to create Nike’s iconic
“Jumpman” logo has taken a flyer at relaunching his case. (That’s two.) And a debate over repeat offender policies under the DMCA is giving the justices the opportunity to consider the statute for the first time in a case involving (what else?) digital pornography.

Oh, and look – there’s a FOIA case! The Food Marketing Institute petitioned for cert on an 8th Circuit ruling requiring the disclosure of records on the federal food stamp program to the Argus Leader; the Court recalled and stayed the Eighth Circuit’s mandate pending the denial of the petition or the judgment of the Court.

Reporters’ Privilege

The lead story in this section is the Justice Department’s secret seizure of New York Times reporter Ali Watkins’ phone and email records, leading to the prosecution of a former Senate Intelligence Committee aide with whom the reporter had a three-year relationship. The DOJ claims to have followed its guidelines in conducting the investigation and does not plan to call any reporters as witnesses. Still, the case has raised questions about the Trump administration’s handling of leak prosecutions and the need for a federal shield law.

Not sure whether this one really belongs in this section, but here goes. CBS subpoenaed a Cone Communications, a PR firm in Boston, for “all documents concerning communications between (Cone) and any reporter, journalist or other member of the media concerning: (a) CBS; (b) Viacom; or (c) any of the NAI Parties” in the context of CBS’s ongoing dispute with its largest shareholder, National Amusements. The subpoena has been criticized as impinging on source relationships.

The Fourth Circuit affirmed the district court’s blocking of a demand by a county school system official for the source of a WTVR news story about her criminal past. The Court of Appeals rejected her argument that the identity of the source might lead to evidence of actual malice.

A California state court quashed a subpoena to CBS from a man charged with murder; he was seeking outtakes from his interview with Dr. Phil. Citing the state’s shield law, the court found that there was insufficient ground to believe the information would be necessary to his
defense. In New York, the blog Legal Insurrection fought off a subpoena from Oberlin College for information on its reporting about the school, with Oberlin withdrawing the subpoena once the blog put up resistance in court. And in Virginia, a reporter for the Virginian-Pilot has been let off the hook from testifying at the trial of a city councilperson charged with forgery and identity fraud.

A shocking split decision from the New York Court of Appeals declared that a trial court order to a reporter to comply with a subpoena following the commencement of a criminal proceeding is non-appealable, rejecting a line of authority from the state’s intermediate appellate courts. The disturbing result is that a New York Times reporter ordered to testify about an interview with a prisoner has no ability to appeal the order directly regardless of the state’s powerful shield law. All hope is not lost— the New York high court suggested that a reporter might be able to file a separate Article 78 proceeding to challenge the order, and the minority opinion pointed out that there’s always the contempt route.

In other news: A fight in the Central District of California over a subpoena to obtain press records in Republican fundraiser Elliott Broidy’s lawsuit against Qatar for allegedly hacking his email to leak them to the media seems to have resulted in disclosure; a judge in the Southern District of Florida ordered Fusion GPS to answer questions about its role in the development and distribution of the Steele dossier; a judge in the Ohio Court of Common Pleas ordered a reporter to testify about communications with Oberlin’s Dean of Students in connection with a student protest (but blocked questions related to other sources and work product); and a judge in New York’s Supreme Court ordered Sony to disclose the people with whom it spoke in the course of its internal investigation of sexual assault charges against producer Dr. Luke.

Defamation

Given that (a) the sheer number of reports that can accumulate over a three-month period is staggering, (b) some of you print this out to read it, and (c) even an ordinary issue of the Monthly Daily stretches my sanity, for some sections this month I’m going to be highlighting selected cases and providing headlines for the remainder.
New Cases

The Stormy Daniels saga rolls on in C.D. Cal., with her former attorney Keith Davidson filing a defamation counterclaim against her over an accusation that he was a “puppet” for Trump attorney Michael Cohen. However, this particular claim turned out to be a tempest in a teapot, and was dismissed before Labor Day. Meanwhile, in D.D.C., one of the attendees at the infamous Trump Tower meeting sued a vocal critic of Vladimir Putin who accused the Russian representative of being an intelligence officer.

For those of us following the world of book publishing, there were revelations aplenty in a defamation complaint filed in S.D.N.Y. by the former CEO of Barnes & Noble against the company over statements made in connection with his termination. In E.D. Tex., Fox commentator Ed Butowsky sued NPR over a series of stories related to murdered DNC staffer Seth Rich.

Regular readers will know that I can’t resist sharing stories that have leaked out of the X-files. In Colorado, a company that makes films about UFOs and crop circles was sued by a streaming service offering “consciousness-expanding” videos, after the former called the latter a “Luciferian coven equals CIA front.” Which, as everyone knows, is a deadly insult in tinfoil hat circles. And over in Missouri, a Bigfoot-themed attraction sued a Kansas cattle rancher over a one-star TripAdvisor review. Which is odd, because you’d think the rancher would have sued the UFO folks because of all those cattle mutilations.

New Hampshire saw a brief flirtation with a criminal prosecution for defamation against a man who accused a police chief of “covering for a dirty cop.” The prosecution was quickly dropped after the state AG’s office got a look at it. North Dakota also has a new criminal case, with a daycare provider charged with assaulting a three-year-old child and then defaming the child’s mother to a prospective employer after she confronted the provider.
Other Stories:

- D. Conn.: Gubernatorial Candidate Sues Stamford Advocate Reporters Claiming Libel Over 2013 Article (Complaint: Whitnum v. Hearst Corp.) [Ed.: This case is facing sua sponte dismissal for a flaw in diversity jurisdiction according to PACER]


- C.D. Cal.: Former NFL player alleges Instagram post was defamatory (Complaint: Patterson v. Baller Alert)

- D. Nev.: Man accused of sabotage at Tesla brings his own lawsuit over defamation (Answer and Counterclaim: Tesla v. Tripp)

- S.D.N.Y.: 50 Cent Hit with $3 Million Defamation Lawsuit by Hip-Hop Website (Counterclaim: Jackson v. Cheri Media) [Ed.: This case has now settled according to PACER]

- E.D. Pa.: Stripper at Sopranos hangout sues New York Daily News over 'unflattering' photo (Complaint: LoMoro v. Daily News)

- W.D. Va.: Former Roanoke Times reporter countersues for more than $150,000 in Twitter case (Counterclaim: BH Media Group v. Bitter) [Ed.: More on this case under Trade Secrets, below]

- Ala. Cir.: Failed Alabama Senate candidate Roy Moore files defamation lawsuit over ads (Complaint: Moore v. Muhlendorf)

- Fla. Cir.: Somebody started an attack website in this activist's name. Now, she's suing

- Fla. Cir.: Marvel's Ike Perlmutter Sued for Allegedly Sending Court Filing to Hollywood Reporter

- La. Dist.: French Quarter restaurant sues TV chef Gordon Ramsay, claims ‘Kitchen Nightmares’ scenes ‘fabricated’

- Minn. Dist.: State Supreme Court candidate MacDonald sues former GOP operative, blogger Brodkorb
• N.Y. Sup.: Rape, Sexual Harassment Allegations Prompt Defamation Suit from Small-Press Comics Publisher

• S.C. Cir.: Blogger sues city of Myrtle Beach, mayor for defamation


**Plaintiff Wins**

A judge in E.D. Tex. has held that regardless of whether the Texas Citizens Participation Act is characterized as substantive, it contains procedural elements that conflict with Fed. R. Civ. P. 12 and 56 and as such does not apply in federal diversity cases. Accordingly, a Texas lawyer’s claim over being called a drug addict and white nationalist will be allowed to continue. (The plaintiff has filed some questionable lawsuits before; the defendant has been declared a vexatious litigant – this looks like it could turn ugly.)

In bankruptcy court in S.D.N.Y., a judge has ruled that a freelancer for Deadspin could not take advantage of a provision in Gawker’s liquidation plan to block a lawsuit filed by a Las Vegas oddsmaker. (A bankruptcy judge in D.D.C. reached a similar result in the Boston Herald’s bankruptcy proceeding, rejecting the inclusion of third-party releases in the paper’s Chapter 11 plan.)

And in New York’s state courts, a judge has held that Donald Trump must sit for deposition in Summer Zervos’s lawsuit, which could potentially be the first time that Trump has been put under oath since he took office. Can you even imagine cross-examining Donald Trump on his credibility?

In N.D. Ga., Viacom settled a lawsuit with the former manager of R&B group TLC over a documentary. And in Pennsylvania state court, we had three settlements: a judge settled a suit over his portrayal in a book about the murder trial of Kermit Gosnell; a Philly restaurateur settled a claim against the Philadelphia Business Journal over a report that he had been in jail; and a pair of county commissioners settled their long-running suit against the Scranton Times after a jury in a bifurcated trial found statements about their behavior before a grand jury in 2003 to be false.
On appeal, New York’s top court tossed out an interlocutory appeal by Trump in the Zervos case, holding that a trial judge’s order rejecting his claim to immunity from suit as the president was not a final appealable order. A California appellate panel affirmed the denial of Floyd Mayweather’s anti-SLAPP motion in a defamation lawsuit filed by his ex-girlfriend, except with respect to an emotional distress claim. And in Pennsylvania, an appellate panel reversed the dismissal of part of a hospital’s claim against a doctor who allegedly defamed the institution in a promo video for a proposed reality show about vaginal reconstruction.

Other Stories:

- M.D. Fla.: Judge Allows Hemp Oil Seller’s Defamation Suit to Continue (Opinion: AFI Holdings v. Waterman Broadcasting)
- S.D. Ohio: Judge allows subpoenas for neo-Nazi website publisher’s dad
- Cal. Super.: Judge rejects Odell Beckham Jr.’s bid to toss part of lawsuit
- La. Dist.: Livingston Parish judge won’t strike former Walker cop’s defamation suit against WBRZ-TV
- N.Y. Sup.: Kesha Faces Expanding Defamation Lawsuit Upon Judge’s Decision
- Tex. Dist.: Texas judge allows Alex Jones defamation suit to move forward

Defense Wins

BuzzFeed picked up an important interlocutory win in S.D. Fla., with the court holding that the publication of the Trump dossier could be the subject of the fair report privilege under New York law. Perhaps unsurprisingly—but still unfortunately—the court struck BuzzFeed’s neutral reportage defense, noting criticism of the privilege outside of the Second and Eighth Circuits and its rejection by New York state courts.

In other interlocutory news, a judge in Delaware’s Court of Chancery held that TROs against allegedly defamatory statements in libel cases are generally unconstitutional.
In S.D.N.Y., a pair of lawsuits against Fox News over coverage of the Seth Rich story—one filed by Rich’s parents, the other by a private detective—were bounced under Rule 12(b)(6). The first was a defamation claim in IIED’s clothing, failing (among other reasons) because it was not sufficiently “extreme and outrageous” under New York law to make a defamatory statement to a media outlet. The second failed because none of the allegedly defamatory statements were provably false.

A judge in D.D.C. called out a journalist for trolling the public by throwing an “okay” hand symbol in the White House press room that was at the time speculated to double as a “white power” symbol (see below), and booted the defamation lawsuit she filed when another reporter adopted the latter interpretation. Unfortunately, the judge held that the District’s anti-SLAPP law did not apply.

In D.C. Super., Christopher Steele, the author of the Trump dossier, racked up an anti-SLAPP win against a defamation claim by three Russian oligarchs because they failed to demonstrate actual malice.

I love, love, love this next one. The First Circuit issued a ruling that libel injunctions will rarely, if ever, be constitutional due to the fact that the meaning of language is subjective and contextual. I mean, dig this language:

By its very nature, defamation is an inherently contextual tort. ... Words that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice. What is more, language that may subject a person to scorn, hatred, ridicule, or contempt in one setting may have a materially different effect in some other setting. ... The cardinal vice of the
injunction entered by the district court is its failure to make any allowance for contextual variation.

*Finally,* a court gets it. I’m seriously considering getting the first sentence of the quote as a tattoo.

The First Circuit also shut down a *defamation case from a Greek Orthodox priest/hedge fund manager* against Bloomberg, holding that he failed to establish actual malice in the media outlet’s *reporting on an SEC investigation*.

The Fourth Circuit had an interesting ruling this month. The basic holding that a *county school system budget director was a public official who failed to show actual malice* was fine, but it was sweetened by an ancillary ruling affirming the denial of the plaintiff’s attempt to uncover the defendant’s confidential source. The Court of Appeals rejected as speculative the argument that the source’s identity might lead to evidence of actual malice. (Wait, I covered this one already, didn’t I?)

*Other Stories:*

- S.D. Fla.: Judge Ends Ex-Pitcher’s Defamation Suit Against AP, ESPN (Order: Nix v. ESPN)
- N.D. Ill.: Federal judge tosses Chicago suit over bad online reviews (Order: Law Offices of David Freydin v. Chamara)
- S.D.N.Y.: Mariah Carey Wins $2 Million Defamation Battle With South American Promoters (Order: Mirage Entertainment v. FEG Entretenimientos S.A.)
- M.D. Tenn.: Court Dismisses Pro Se Complaint Against WSMV-TV Channel Four (Order: Molthan v. Meredith Corp.)
- Colo. Dist.: Important Victory Against An Oil Company's Censorious SLAPP Suit In Colorado (Order: SG Interests v. Kolbenschlag)
• Ill. Cir.: Former WWE star CM Punk wins defamation lawsuit brought by company doctor

• Mich. Cir.: Local sports radio host drops lawsuit against Grand Rapids counterpart

• Nev. Dist.: Court dismisses casino mogul defamation case against AP (Opinion: Wynn v. Associated Press)

• N.J. Super.: Judge Dismisses Defamation Lawsuit Over Police Officer's Suicide (Opinion: Pistilli-Leoparcli v. Medianews Group)

• N.Y. Sup.: Court Rejects Libel Lawsuit Based on Lawyer’s Post on Harvard Law School's SHARIAsource Blog

• R.I. Super.: "A Court Cannot Tell [Anyone] That He or She Cannot Be Rude, Insulting, or Boorish" (Order: Fuoco v. Polisena)

• Cal. App.: Calif. Atty's Defamation Suit Against Newspaper Shot Down (Opinion: Robertson v. Hearst Corp.)


• Iowa: Supreme Court says Iowa church didn't defame women exploited by pastor (Opinion: Bandstra v. Covenant Reformed Church)

• Ky. App.: GOP lawmaker to appeal defamation ruling (Opinion: Palmer v. Alvarado)

• Me.: Court dismisses Seth Carey's defamation suit (Opinion: Carey v. Board of Overseers of the Bar)

• N.M. App.: Court rules in KRQE defamation case (Opinion: Reina v. LIN Television Corp.)

• Tex.: Justices Won't Hear Family's Libel Suit Over Trial Book

• Tex. App.: Blogger Uses Texas Free Speech Law To Nix Defamation Row (Opinion: The Iola Barker v. Hurst)
• Tex. App.: Atty Can't Revive Defamation Suit Against Daily, Judge (Opinion: Vodicka v. A.H. Belo Corp.)

• Tex. App.: Court affirms anti-SLAPP win in “Clock Boy” defamation case (Opinion: Mohamed v. Center for Security Policy)


New & Pending Appeals

Shiva Ayyadurai, the individual who claims to have invented e-mail, has appealed to the First Circuit on the dismissal of his defamation suit against Techdirt over the latter’s articles challenging the historical validity of his claim. And Vermont’s high court recently heard argument in a case involving a local paper’s front-page story repeating information about the plaintiff drawn from a law enforcement BOLO alert.

Miscellaneous

Bill Cosby might not have much to celebrate lately, but the First Circuit served him a victory in his case against AIG over defense costs. The Court of Appeals held that his bills in his various defamation cases were covered by his homeowners policy and a personal excess liability policy. Which leads to the inevitable question, what must life be like for someone who elects to purchase a personal excess liability policy?

Privacy

Rights of Publicity

A bunch of cases we were watching came to a sudden end over the summer, including: Fox settling a case in N.D. Cal. over its use of footage of Muhammad Ali in a Super Bowl pre-game tribute; comedian Chris Farley’s estate settling a suit in W.D. Wis. over the sale of so-called “fat bikes” under the Farley name; and Stan Lee dropping his suit in Cal. Super. against Pow! Entertainment for allegedly tricking him into giving up his likeness rights.
New York’s legislature also skirted the edge of adopting a broad new right-of-publicity law with extended postmortem rights and vague protections for “persona” before adjourning both houses without a vote, killing the bill. Phew.

Other Stories:

- N.D. Cal.: Salvador Dali Foundation Sues Monterey Museum for Use of Name, Likeness
- N.D. Cal.: Judge Shrugs Off Survey Showing Very Few Gameplayers Can Identify 'Madden NFL' Avatars (Opinion: Davis v. Electronic Arts; Order on Motion to Certify Class)
- D.N.J.: Man suing to get his picture off a porn site
- Ala. Cir.: Lawsuit claims exploitation by “S-Town” podcast team
- Cal. Super.: Steve McQueen's Children Sue Ferrari for Using His Name to Sell Cars
- La. App.: Lawsuit by slain drug smuggler Barry Seal's daughter over movie deal dismissed (Opinion: Frigon v. Universal Pictures)
- Ind.: FanDuel Tells Ind. Justices Fantasy Sports Are 'Newsworthy' (Video of Oral Argument: Daniels v. Fanduel)
- Va. Cir.: Court Dismisses Right of Publicity Claim Over Documentary Film (Opinion: Barber v. Kartemquin Films)

Disclosure of Private Facts

Regular readers will have noticed that Michigan’s protective consumer data laws have resulted in lawsuits around the country; this month, three such cases against major publishers resulted in significant settlements. In E.D. Mich. and S.D.N.Y., Time and Hearst respectively settled class actions under Michigan’s Video Rental Privacy Act for the sale of subscriber information (Time for $7.4M; Hearst for $50M). Meanwhile, Conde Nast settled a similar claim in S.D.N.Y. arising out of the Michigan Preservation of Personal Privacy Act for $13.75M.

In Vermont, a TV station will pay out an undisclosed sum to the family of a murdered teacher whose nude body it showed during a news broadcast. In Florida, new White House
Communications Director Bill Shine settled a suit lingering from his old job at Fox News, where he was alleged to have ousted a gay man to the media as a litigation tactic; Fox, meanwhile, has moved to dismiss the claims.

**Intrusion**

The private detective allegedly behind In Touch Weekly’s reporting on Richard Simmons (itself the subject of a recently dismissed defamation lawsuit) has been charged in California with illegally planting a tracking device on the fitness guru’s vehicle to determine whether he was visiting hospitals in connection with a suspected gender transition. [Photo: Angela George, CC BY-SA 3.0]

Also in California, Bravo and the star of reality show “Flipping Out” are being sued by the surrogate mother for the star’s child after she discovered that the birth was being covertly filmed despite alleged assurances to the contrary. There’s a wiretapping claim in there too, of course.

**Wiretapping/Eavesdropping**

Speaking of wiretapping, a 13-year-old in Illinois was charged with a felony after tape recording a meeting with his principal. Which sends a shiver down my spine, given that I spent quite a while in high school in Massachusetts setting up an eavesdropping system to transform the vibrations of the windows in the teachers’ lounge back into audible speech. See, what you do is place a tiny corner cube mirror in the target room, bounce a laser off of it through the window, and then decode the returning beam as modulated by the vibration using an optical sensor fairly similar to that used in old film projectors to read the soundtrack.

Not that, you know, I actually turned it on or anything. Because that would have been wrong. Very, very wrong. I know that now. Besides, anything I wanted to know would have been easy enough to learn, given that back in the ’80s you could force almost any lock in the place with the school-issued student ID.
**False Light**

E! Entertainment shut down a false light claim in M.D. Tenn. by former American Idol contestant Corey Clark on summary judgment. The court held that Clark had failed to present any evidence that E! in its reporting had consciously neglected information supporting Clark’s claim to have had an affair with Paula Abdul, or otherwise acted with actual malice.

**Miscellaneous**

The Second and Third Circuits held that Time Warner Cable and Yahoo, respectively, were not autodialers under the Telephone Consumer Protection Act and thus could not be held liable under the TCPA for vast numbers of messages misdirected to their respective subscribers’ accounts.

Finally, there’s a new mugshot racket lawsuit (remember when those were a thing?) in Missouri, where website STLMugshots is accused of illegally demanding payment for the removal of booking photos.

**Access/FOIA**

**New Cases**

Paul Manafort’s legal woes have ignited a firestorm of controversy, with one jury in E.D. Va. branding him a criminal while the flames in a second prosecution in D.D.C. may wind up licking at Trump’s own heels; no wonder then that these cases have sparked press efforts to bring the details of both cases to light. (That’s three.)

Speaking of controversy, elsewhere in D.D.C. a pair of lawsuits are pending against the DOJ and the National Archives to obtain copies of all of Judge Brett Kavanaugh’s emails.

The Providence Journal took its fight with a superior court judge to federal court in Rhode Island, claiming that the judge’s ongoing interference with the paper’s effort to speak
with jurors in a high-profile murder trial constituted an infringement of its First Amendment rights.

Oh, and here’s an interesting one. The N.Y.P.D. was sued in state court for access to records of handguns owned by Trump and his family. I suppose that could help to tell us whether he was serious about shooting someone on Fifth Avenue.

*Other Stories:*

- N.D. Cal.: Filmmaker Takes 2nd Crack At Therasan Deposition Footage
- D.D.C.: Organizations sue FEMA over information tied to Hurricane Maria
- D.D.C.: Daily Caller News Foundation Sues To Obtain Information On Comey’s Leaker
- Ark. Cir.: Newspaper moves to intervene in FOIA flap over Wendt firing records in Fayetteville
- Ill.: News media return to state's high court to try to end secrecy over Officer Van Dyke's murder case
- Ky. App.: Lawsuit filed for media access to Shayna Hubers jury selection
- La. Cir.: Louisiana Police Appear To Be Using A Hoax Antifa List Created By 8Chan To Open Criminal Investigations
- N.Y. Sup.: NYPD Sued for Withholding Transcripts in Police Disciplinary Proceedings
- Pa.: Inquirer, other Pa. news outlets petition Supreme Court for access to grand jury report on clergy sex abuse

*Access Granted*

We had a couple of interesting decisions on standing (I know, sounds like an oxymoron) from the U.S. Courts of Appeals over the summer. The Eighth Circuit held that a Missouri law requiring the attendance of citizens at executions created *standing for a reporter to claim that he was excluded in retaliation for his criticism* of capital punishment. Meanwhile, the Ninth Circuit rejected a *technical challenge to a FOIA requester’s standing* by the Department of Energy,
holding that any uncertainty as to whether the party who filed suit was the party who made the underlying records request could have been resolved through an inquiry by the agency.

The D.C. Circuit also had a pair of decisions that will be useful in future cases. In a case involving documents related to government expenditures for “VIP” travel expenses, the court ruled that the Department of Homeland Security’s failure to abide by FOIA deadlines could support a “policy or practice” claim. Meanwhile, in a case against the DOJ’s Office of Professional Responsibility, the court slammed OPR’s attempt to avoid a request through a Glomar response, calling circumstances justifying such a response a “rare situation.”

Speaking of Glomar responses, a judge in S.D.N.Y. held that the discussion of an intelligence-gathering raid in Yemen during a White House press briefing precluded the CIA from refusing to confirm or deny the existence of records related to the raid. A similar ruling from D.D.C. held that Trump’s decision to declassify Congressional memos about the validity of the dossier compiled by Christopher Steele barred the FBI from rejecting FOIA requests related to its own efforts to verify the dossier. Also in S.D.N.Y., a judge rejected Michael Cohen’s attempt to seal filings related to his claims of privilege for documents seized in an FBI raid.

And not to bury the lede, but a media coalition dug in its heels and succeeded before Florida’s appellate courts in unearthing video related to the Parkland school shooting; in the trial court, the press also got the dirt on the accused shooter’s statement to police after he was run to ground. (That’s four.) The botched redaction of the materials would lead to other issues, however…see the discussion under Prior Restraint.

Other Stories:

- N.D. Cal.: Judge rules in favor of media in death-penalty case (Order: Los Angeles Times v. Kernan)
• D.D.C.: Judge orders Starr grand jury leak report to be released as Dems seek Kavanaugh info (Order: In re Emergency Request to Unseal)

• D.D.C.: AT&T Merger Trial Transcripts Go Public After DOJ Push (Order: U.S. v. AT&T)

• D.D.C.: Judge orders EPA to disclose any science backing up Pruitt’s climate claims (Order: Public Employees for Environmental Responsibility v. U.S. Environmental Protection Agency)


• S.D. Iowa: Judge orders city to give up full video in case of Iowa mom killed by cop (Order: Steele v. City of Burlington)

• E.D.N.C.: Magistrate Rejects Sealing in Discrimination Lawsuit Against Novelist Nicholas Sparks and the School He Founded (Order: Benjamin v. Sparks)

• D.P.R.: Federal judge allows public records lawsuit to proceed against Puerto Rico’s financial oversight board, orders schedule for documents to be released (Opinion: Centro De Periodismo Investigativo v. Financial Oversight and Management Board for Puerto Rico)

• FISC: FBI releases FISA records on Carter Page surveillance

• Bankr. D. Del.: Harvey Weinstein Employment Deal Becomes Public Record

• Ala. Cir.: Judge orders city of Mobile to release body camera video of 2016 pepper spray incident at the Loop

• Alaska Super.: Judge: Palin's son cannot bar media from his court case

• Arizona Appeals Court rules against Jodi Arias' request for court secrecy

• Cal. Super.: Judge Unseals Ex-Playboy Model’s Lawsuit Against Elliott Broidy

• Colo. Dist.: Aurora theater shooter’s psychiatric reports unsealed by 2015 trial judge

• Fla. Cir.: Why wasn’t road closed before FIU bridge fell? Judge orders release of key records (Order: Miami Herald Media v. Florida Dept. of Transportation)
• Ga.: Payday lending group loses lawsuit over record release (Opinion: Campaign for Accountability v. Consumer Credit Research Foundation)

• NJ Justices Pass On Horizon's Bid to Shield Tiered Plan Docs

• N.J. Super.: Judge says APP can view killer cop's file

• Pa. Super.: Court orders records unsealed in Penn State officials' role in Sandusky case (Opinion: Commonwealth v. Curley)


• Puerto Rico releases records of deaths since Hurricane Maria to CNN and another news organization

• Tex.: Mayor Turner’s former press secretary indicted for withholding public records

• Utah Dist.: Judge rules BYU police department is subject to state open-record laws

• Wash. Super.: Tacoma hit with $300,000 fine for improperly withholding records about surveillance device (Order: Banks v. City of Tacoma)

• W.D. Va.: Court denies motion to seal “Giglio material” voluntarily disclosed by prosecutor (Order: In re Voluntary Disclosures)

• W. Va.: Lawmakers hear WV Supreme Court employee's words, OK media on court tour

**Access Denied**

Maybe it’s just the nature of the cases it’s been hearing lately, but recently it’s felt like the Second Circuit is where FOIA lawsuits go to die. Over the summer, the Court of Appeals held that that the DOJ can redact information about its predator drone program that was believed to have been publicly disclosed years ago, and that the Department of Defense can refuse to release photos from Abu Ghraib more than a decade old because of their potential use as a recruitment tool for the Islamic State.
Down in the D.C. Circuit, the court affirmed a ruling that the FBI properly redacted records related to the prosecution of Aaron Swartz, and granted great deference to a district court decision denying attorneys’ fees to a successful FOIA plaintiff.

While the White House’s loose lips did undermine its position in some FOIA cases, as discussed above, a judge in S.D.N.Y. held that a tweet by Trump did not declassify the existence of a CIA program to support rebels in Syria.

Finally, there was a remarkable and disturbing decision from the Colorado Supreme Court broadly rejecting First Amendment rights of access to judicial documents. The Colorado Independent, through our old friend Steve Zansberg, quickly petitioned for rehearing; the court denied the petition, and now the Independent is looking at a petition for cert to the Supreme Court. The Colorado court’s ruling is particularly troubling in light of a recent Denver Post report finding that access to more than 6,700 cases, most of which were criminal in nature, had been sealed entirely by the state’s courts. [Photo: Jeffrey Beall, CC BY 3.0]

Other Stories:

- C.D. Cal.: Plea Deal Kept Sealed Despite Leak on Court Website
- S.D.N.Y.: Judge won't order disclosure of Trump White House visitor logs
- S.D.N.Y.: Court Refuse to Unseal Docs in High Profile Libel Case (Opinion: Giuffre v. Maxwell)
- N.D. Ohio: Media Can't Access Drug Co. Data In Opioid MDL (Order: In re National Prescription Opiate Litigation)
- Bankr. C.D. Cal.: Avenatti gets judge to bar media from bankruptcy testimony
• N.J.: Dashcam ruling is a blow to police transparency (Opinion: Paff v. Ocean County Prosecutor)

• Tex. App.: Asbestos Depo Doc Isn’t A Court Record, Texas Court Says (Opinion: Biederman v. Brown)

Pending Cases & Appeals

The Sixth Circuit heard argument from a media coalition seeking access to inmates involved in the Lucasville prison riot more than two decades ago, and the Ninth Circuit heard argument on rights of contemporaneous access to newly filed complaints in California’s court system. Meanwhile, a new appeal at the Eleventh Circuit seeks to revive a FOIA claim over FBI records allegedly related to domestic support for the 9/11 hijackings.

Legislation

U.S. Senator Chris Van Hollen (D-MD) is attempting an end-run around the Trump administration’s refusal to disclose the number of travelers barred from the United States under the Trump travel ban, with an amendment to an appropriations bill requiring the relevant agencies to declare the total number of applicants denied a waiver of the ban.

A California bill to open records of investigations into police shootings and use of force is making its way through the state legislature. And while Colorado might be having access issues on the judicial side, its executive branch is looking out for the public: Gov. Hickenlooper vetoed a bill that would block access to records of child autopsies. Unfortunately, Connecticut has decided to tread the path of secrecy, enacting a law that allows “vexatious” FOIA requesters to be denied access to records for up to a year.

Miscellaneous

Links & blinks:

• Minn. Supreme Court OKs cameras in courtrooms with conditions

• In the hunt for sustainability, DocumentCloud and MuckRock are joining together as one organization

• The NSA Just Released 136 Historical Propaganda Posters
ICE Is Planning to Destroy Its Documents on Detainee Deaths and Rapes

Sens. Seek Same-Day Audio From Supremes

Newsgathering

Prosecution of Journalists

The summer was marred by the attack on the newsroom of the Capital Gazette in Annapolis, where five people died at the hands of a libel plaintiff whose claim against the newspaper failed in court. Our deepest respect to those who died protecting the public’s right to know and our deepest sympathy to their families and colleagues.

It’s impossible to tell if this particular shooter would have done such horrific things if not for the anti-media drumbeat flowing from the White House. What is plain, however, is that the physical safety of journalists is now in greater jeopardy than ever before due to Trump’s reckless screeds. We have seen death threats targeting CNN (Trump’s self-selected archenemy) and the Boston Globe (the coordinator of a remarkable nationwide effort by media outlets to speak out against Trump’s dangerous bile) that were directly linked to Trump. Security for newsrooms and journalists covering Trump’s public events has wisely been increased.

Oh, but Mike Pompeo called on Myanmar to release a pair of imprisoned Reuters journalists, so that makes everything okay.

Yet as dark as times have become, there is still some positive news. A judge in D.D.C. has allowed part of a freelance journalist’s challenge to his allegedly mistaken inclusion on a U.S. drone “kill list” to proceed over a motion to dismiss by the Trump administration. In W.D. Tex., a federal judge called out Immigrations & Customs Enforcement on misrepresentations in the course of ruling that Mexican journalist Emilio Gutierrez-Soto was targeted for deportation in retaliation for his criticism of the agency; ICE then dropped the case. (Speaking of ICE, a leaked agency manual for undercover operations advised agents to impersonate lawyers, doctors and journalists – at least two of which are usually illegal.) And the federal government dropped
the remaining prosecutions in D.C. Superior Court against participants in the Trump inauguration protests, so journalist Aaron Cantú is officially off the hook.

But good luck didn’t hold for Salvadoran journalist Manuel Durán Ortega: He won a reprieve from his imminent deportation from the Board of Immigration Appeals, but a federal judge in W.D. La. subsequently rejected his claim that he was seized by ICE in retaliation for his criticism of local police and dismissed his habeas corpus petition.

Other Stories:

- De Blasio lets security haul away Post reporter for asking question
- Body-cam vid shows Denver cops cuffed Indy editor as she photographed their badges
- ‘My life is threatened.’ Listen to Sen. Daphne Campbell call 911 on a Herald reporter

Persecution of Sources

The U.S. Army Court of Criminal Appeals rejected pardoned leaker Chelsea Manning’s appeal of her conviction, holding that the First Amendment did not immunize her actions against prosecution.

NSA leaker Reality Winner changed her plea to guilty, and was sentenced to 63 months in prison with three years of supervised release. The supervised release seems a bit odd, given the crime – I’d think it’s hard to fall into recidivism as an informant when your security clearances have been pulled.

A former FBI agent who gave documents (ironically, about how the bureau assesses informants) to The Intercept has pleaded guilty in D. Minn. and will be sentenced in October. A former computer engineer for the CIA has been charged in S.D.N.Y. with a massive leak of data to WikiLeaks regarding the agency’s hacking capabilities; he has pleaded not guilty. And, of course, there was the indictment of James Wolfe in D.D.C., the former Senate aide accused of leaking information to NYT reporter Ali Watkins and others.
Trump Administration

Trump has appealed to the Second Circuit from a decision ruling that his blocking of unwanted followers on Twitter violated the First Amendment. The @realDonaldTrump account has nevertheless unblocked some users as the case progresses. The tech-industry group Internet Association has weighed in with an amicus brief in support of neither party, arguing that regardless of the outcome nothing in the case should be held to affect Twitter’s own ability to control its platform.

The U.S. Geological Survey is the latest branch of the federal government to feel Trump’s iron (albeit tiny) grip clamping down on contacts with reporters, with a directive that any such contacts must be approved by the Department of the Interior. Media access to the Pentagon has experienced some notable erosion. We must also say goodbye in this issue to Scott Pruitt, whose agency’s poor treatment of the press was sometimes obscured by his efforts at turning the EPA into an episode of Welcome to Night Vale. [↩ Sometimes, an Alexandra Petri column is the only thing that gets me through the week these days.]

The media’s relationship with the White House continues to be abysmal, with ever-dwindling press briefings and rancor at those that do take place. The press has responded with increased solidarity. Predictably, CNN was on the receiving end of another high-profile slight, with one of its reporters being banned from an event in the Rose Garden after she shouted questions to Trump during an Oval Office meeting. The White House has also stopped publishing public summaries of Trump’s phone calls with foreign leaders, presumably because it was just too darn exciting to keep writing about all the winning.

Finally, Trump lawyer Charles Harder (where have I heard that name before?) has threatened Simon & Schuster, accusing the publisher of inducing Omarosa Manigault-Newman to breach an NDA in connection with the publication of her tell-all book “Unhinged.” Simon & Schuster politely but forcefully explained, among other issues, the substantial First Amendment problem with attempting to lock down the non-classified communications of federal employees.
Lawsuits

In an early ruling applying the Supreme Court’s decision in *Lozman*, the Second Circuit held that no jury could find that a photographer who refused police orders to climb down from the top of a phone booth while recording at Zuccotti Park was arrested in in retaliation for videotaping police activity. Another photographer arrested for documenting police activity ran into problems with his case in N.D. Tex., with a judge holding that the right to record was not yet clearly established in the Fifth Circuit at the time of the arrest (though it is now); but while the arresting officer was entitled to qualified immunity, the case continues against Dallas Area Rapid Transit as the government agency involved.

In other stories, the Ninth Circuit reversed the dismissal of a claim alleging that Customs and Border Protection’s policy of prohibiting photography at border crossings is unconstitutional. And in D.D.C., the family of a journalist who was tortured and beheaded in Syria has filed a lawsuit against the Syrian government.

Drones

The FAA won a victory in the D.C. Circuit, with the court denying a petition for review of the agency’s drone regulations. The FAA also told local governments in no uncertain terms that it had the exclusive authority to promulgate such laws, putting the kibosh on a pending effort to develop state-level model legislation. Meanwhile, the Department of Homeland Security is looking for its own authority over drones, with a bill that would allow it to track and destroy drones within the United States.

Miscellaneous

The CEO of the National Enquirer has been granted immunity in exchange for providing information related to the payments made by Michael Cohen on behalf of Donald Trump. The deal follows a subpoena issued to the Enquirer by federal prosecutors.
Prior Restraint

Trump’s lawyer asked the Central District of California for a gag order on Michael Avenatti. Accused leaker James Wolfe’s legal team sought a gag order on Donald Trump in D.C. federal court. Neither court granted the request, and one wonders whether it was because of the futility of trying to shut either of them up. Meanwhile, media amici have intervened in a case in the Fourth Circuit involving environmental issues around hog farming, in order to challenge a gag order that the press argues will chill newsgathering efforts.

A judge in C.D. Cal. dropped a prior restraint on the L.A. Times, ordering it to remove information about a former Glendale police officer accused of working with organized crime in Mexico. The case reached the Ninth Circuit before the district judge vacated the order, following a hearing in which he determined that the paper did not obtain the information illegally. But as Kelli Sager argued, how the paper got the information isn’t relevant to the question of a prior restraint.

Meanwhile, the Broward County judge in the Parkland shooting case seems to be suffering from similar misconceptions as to the application of the First Amendment. She threatened to hold the press in contempt for reporting on the contents of documents that were improperly redacted; while she does not appear actually to have entered such an order, she suggested that in the future she would give orders to the media on what they were allowed to publish on a line-by-line basis.

And there were some remarkable developments in judicial battles to prevent the online distribution of 3-D printing templates for firearms. After successfully blocking the distribution of such electronic files by Defense Distributed, the U.S. Department of State underwent an abrupt change of policy and settled its pending case in W.D. Tex. by withdrawing its objections. Defense Distributed then resumed sharing the files, only to encounter a coalition of 8 states led by Washington state suing in W.D. Wash. to block their distribution. Defense Distributed responded with its own case in W.D. Tex, seeking to block the states’ action. The judge in W.D. Wash. issued a TRO which has now ripened into a preliminary injunction; however, Defense Distributed appears to be playing games
with the order by attempting to adhere to its letter while ignoring its spirit. The First Amendment questions here remain quite pertinent.

Other Stories:

- S.D.N.Y.: Wigdor Firm Seeks Order to Stop 'Threatening' Calls From Party in Defamation Suit
- Cal. Super.: She was a Palm Desert blogger. Now, a court is hitting her with a gag order.
- Cal. Super.: Another "Stop Talking About Him" Court Order, This One Obtained by Convicted Securities Fraudster (Order: Appel v. Zona)
- Ill. App.: First Amendment Doesn’t Prevent Probationer Condition Restricting the Display of Illegal Activity on Social Media (Opinion: In re Jawan S.)
- Me.: Threatening Facebook Posts Violated Protection Order, U.S. Court Rules (Opinion: State v. Heffron)
- N.Y. Sup.: Oyster Bay Town critic ordered to remove online posts in defamation lawsuit
- Tex. Dist.: TV Station Ordered to Expunge Archived Story About Teacher's Dismissed Domestic Violence Charges (Order: Barone v. Harris County Sheriff's Office)
- Tex. Dist.: County judge charged after telling Sheriff Chody to quit tweeting
- N.J. Court Orders Google to Vanish Plaintiff’s Photo -- Published at the Chicago Tribune -- From Search Results (Order: Malandrucco v. Google)
  - D.N.J.: Case Ordering Google to Stop Showing Picture of Plaintiff Removed to Federal Court
  - D.N.J.: Plaintiff Dropping Case in Which He Got Order to Google to Vanish Photo from Search Results
Information Infrastructure

Net Neutrality

The repeal of the 2015 Open Internet Order has taken effect, and the legal challenges quickly followed. Twenty-two states have petitioned the D.C. Circuit to block the FCC’s Restoring Internet Freedom Order, as have a host of tech companies.

A new net neutrality bill before Congress, the 21st Century Internet Act, would take all of this out of the FCC’s hands. In the interim, however, Democratic senators were at last count still 41 votes short of what they need to block the Restoring Internet Freedom Order under the Congressional Review Act.

Meanwhile, Washington state’s net neutrality law has now taken effect. California’s version of a net neutrality law looked for a while like it was going to be watered down to inefficacy, but the bill’s author fought back and now a quite powerful version has been approved by the state legislature. Massachusetts has come up with a different kind of bill, which jettisoned more standard net neutrality provisions in favor of a proposal to create a registry that would rank ISPs according to their bad behavior. Huh.

But don’t look for net neutrality in Alaska, where Gov. Walker has declined to issue an executive order along the lines of those issued by other states’ chief executives. And the cable lobby has turned to the Federal Trade Commission for relief from state regulation, asking the FTC to preempt the field.

For what it’s worth, FCC Chair Ajit Pai admits that he lied to Congress about the existence of a cyberattack on the FCC’s comment system during the net neutrality comment period in 2017. He claims he was asked to stay silent by the Office of the Inspector General. There will be no consequences for him, because Congress.

Federal Communications Commission

Mignon Clyburn’s successor as a Democratic commissioner on the FCC is, as expected, former FCC Enforcement Bureau assistant chief Geoffrey Starks. The second link goes to a clip from The Simpsons, so turn your speakers on; I bet you can guess which clip before you click.
Other Stories:

- 8th Cir.: Court Upholds FCC BDS Remake (Opinion: Citizens Telecommunications v. FCC)
- D.C. Cir.: Ajit Pai loses in court—FCC can’t kill broadband subsidy in Tribal areas (Order: National Lifeline Association v. FCC)
- D.C. Cir.: Federal Court Upholds FCC’s UHF Discount (Judgment: Free Press v. FCC)
- FCC Proposes Boosting DBS Fees, Lowering Cable
- FCC Proposes Major Kids TV Rule Changes
- NBCU Pushes FCC To Create Video Description Safe Harbor
- Dish Is Facing Questions From FCC on Network Build-Out Plan
- The FCC wants to charge you $225 to review your complaints
- FCC Votes to Launch Incubator Program
- Cable TV Leased Access Fight Heats Up At FCC
- Austin pirate radio station, flagship for Alex Jones, faces $15k fine

Mergers & Antitrust

AT&T defeated the Justice Department’s antitrust challenge in D.D.C. to its merger with Time Warner, with Judge Richard Leon finding potential risks in such vertical mergers but insufficient evidence of harm to competition in the case at bar. The DOJ has appealed to the D.C. Circuit and has sought an expedited hearing. The FCC, among other groups, has weighed in; the Commission argues that the judge gave too little weight to regulators’ analysis.

More surprising, perhaps, was the sudden collapse of the Sinclair-Tribune merger. After a summer marked by increased anxiety from opponents of the merger as approval of the deal by both the DOJ and FCC seemed all but inevitable, Ajit Pai announced “serious concerns” about the deal. Sinclair quickly rejiggered the deal in an attempt to satisfy the Commission, but the FCC was concerned that some of Sinclair’s divestments were a sham and the deal was referred to
an administrative law judge. Trump predictably fulminated and Pai later said that White House counsel were sticking their noses in, but the referral stuck. That was the last straw: Sinclair withdrew the proposal for the merger, and moved to end the ALJ proceeding (which the FCC’s Enforcement Bureau did not oppose).

Anticlimactically, the FCC’s Inspector General then announced that Pai did not show favoritism to Sinclair. A cynical person might be inclined to inquire as to whether Pai’s “serious concerns” arose before or after he came under investigation for partisanship on a deal where Trump was overtly interfering. A practical person would simply move on, as we do now.

After many seasons of will-they/won’t-they, Sprint and T-Mobile have finally moved to tie the knot, asking the FCC to bless their merger. But as Batman and Catwoman sadly learned over the summer, a lot of things can go wrong before the final “I do.” And those longing to see the Fantastic Four and the X-Men join the MCU were pleased to hear that the Justice Department has approved Disney’s purchase of Fox assets, though the approval was conditioned on the divestiture of regional sports networks. About which Marvel fans care not one bit.

It does raise the problem about what the House of Mouse will do with this fellow, however.

Finally, the Justice Department announced that it is investigating whether major television station owners coordinated the efforts of their ad sales teams to fix prices. A wave of antitrust lawsuits has followed.

Other Stories:


• FCC Tosses News Distortion Claim In CBS Merger Dispute (Opinion: In re Entercom Communications and CBS Radio)

• N.D. Ill.: Comcast Beats $75M Antitrust Suit Over Ad Platform (Order: Viamedia v. Comcast)
Miscellaneous

Charter is facing serious problems in New York, with an appellate court affirming the denial to dismiss a lawsuit filed by the state alleging that the company made false representations to subscribers as to its system’s fitness for high-bandwidth applications. Even worse, the state’s Public Service Commission has become completely fed up, revoking its approval of Charter’s 2016 purchase of Time Warner Cable and ordering Charter to sell off the TWC system and leave the state. Charter has vowed to fight, but yikes.

Other Stories:

• 11th Circ. Sides With Time Warner In Sale Interference Suit (Opinion: Cableview Communications of Jacksonville v. Time Warner Cable Southeast)

• S.D. Cal.: Charter, Calif. City End Court Fight Over Blacked-Out Stations

• S.D.N.Y.: Media Giant Televisa Has Been Sued For Allegedly Paying Millions In Bribes For World Cup Rights (Complaint: Gross v. Grupo Televisa)

• White House plans to nominate conservative documentarian, Bannon ally, to lead Broadcasting Board of Governors

• U.S.-Funded Broadcaster Directed Ads to Americans

• A year after Trump’s zero-budget threat, public broadcasting is … doing okay
  o House budget proposes level funding for Corporation for Public Broadcasting in FY2021

• Bill Roundup: House Passes Radio, Broadband Legislation
  o Precision Agriculture Connectivity Act
  o Preventing Illegal Radio Abuse Through Enforcement, or PIRATE, Act
  o Access Broadband Act
  o National Suicide Hotline Improvement Act
Digital Content

Section 230

We have the long-awaited decision from the California Supreme Court in Hassell v. Bird, the case in which the Court of Appeal issued a ridiculous decision undermining the reach of Section 230 and rejecting the idea that platforms have a First Amendment interest in the third-party content they carry. Fortunately, the state supreme court did the right thing and held that Yelp could not be ordered to remove 1-star reviews on its service, but rather than the full-throated rejection of the Court of Appeal opinion for which we were hoping, the decision was deeply split without a majority opinion. Eric Goldman has the analysis.

A case against Google in N.D. Cal. accusing the company of responsibility for the November 2015 attacks by ISIS in Paris (on account of YouTube’s alleged material support for terrorism) has failed for a fourth time, with the dismissal of the plaintiff’s third amended complaint under Section 230. The plaintiff was allowed a fifth shot, but only to replead allegations that YouTube shared revenue with ISIS.

The Electronic Frontier Foundation has filed a lawsuit in D.D.C. challenging the constitutionality of FOSTA, the sex trafficking law that amended Section 230. The arguments will be familiar to those who remember Reno v. ACLU, or who tracked the First Amendment arguments that Backpage.com raised in response to efforts in various states to block trafficking ads.

Former U.S. Rep. Christopher Cox (who co-authored Section 230 with then-U.S. Rep./now-Sen. Ron Wyden) filed an amicus brief in the Ninth Circuit in Homeaway.com’s appeal with respect to home-sharing restrictions in Santa Monica. If you want to know what Cox and Wyden were thinking when they drafted Section 230, it’s here in black and white. And there’s a new proposal from Sen. Mark Warner (D-VA) on regulation of Internet platforms which contains some interesting, if problematic, ideas about the future of Section 230. We’ve heard much more disturbing comments on Section 230 from other lawmakers, lately.
Other Stories:

• S.D. Fla.: Consultant Sues Facebook Over Fake Account (Complaint: Conway v. Facebook)

• D. Md.: Section 230 Helps Facebook Defeat Pro Se Defamation Suit (Opinion: Jefferson v. Facebook)

• Ga. App.: Snapchat’s Speed Filter Not Protected by Section 230 (Opinion: Maynard v. Snapchat)

Disinformation, Manipulation, and Problematic Content

The fight over malicious manipulation of the digital public sphere continues.

The Federal Election Commission held hearings to discuss new rules for online ads in June. The State of Washington has taken a more aggressive approach, suing Facebook and Google in state court for violations of its campaign finance law and alleging the platforms failed to make information about the sale of political advertising publicly available as required.

Google has responded by pulling all state and local election ads in Washington, particularly in light of amendments to Washington’s law that were about to take effect to accelerate the speed with which such disclosures must be made. Meanwhile, Facebook implemented new measures to block the paid promotion of political content; however, these measures quickly ran into problems as they erroneously blocked news content on political topics.

Media outlets filed suit in the District of Maryland over a new Maryland state law mandating enhanced disclosures regarding the purchasers of online political ads. The press argues that the law is overbroad, vague, and unconstitutionally compels speech.

Facebook has sounded the alarm that it has detected an active influence campaign targeting the 2018 midterm elections, surprising no one except those who willingly refuse to admit there’s a problem.
**Online Nastiness**

In the Sixth Circuit, the families of victims of the Pulse nightclub shooting filed their appellants’ brief arguing that social media platforms could be held liable under federal anti-terrorism laws for their alleged role in the radicalization of the shooter. The Eighth Circuit found that even cursory investigation would have revealed that a sarcastic comment in response to a pro-gun meme was not a threat, vacating qualified immunity for the officers who arrested the commenter. The Ninth Circuit heard argument on the constitutionality of Washington state’s cyberstalking law. And in D. Md., a judge denied a defense motion to toss out the prosecution of a man who attacked journalist Kurt Eichenwald with a tweet designed to trigger his epilepsy.

At the state level, New York’s senate unanimously passed a wildly broad cyberbullying bill.

**Sorting, Blocking & Filtering**

I would have hoped that this nonsense would have burned itself out by now, but we’ve seen so much hand-wringing about the legal implications of filtering and alleged bias on social media platforms that I’ve no choice but to create a new section.

Not that every case about blocking is meritless, of course – particularly when the blocking is at the hands of a government official or agency. The ACLU recently dismissed a lawsuit that it brought in the District of Arizona against a state congressperson over blocking of Facebook comments, after the pol in question voluntarily changed his practices. In D. Conn., a judge cited the Knight Institute’s case against Trump in denying a motion to dismiss a claim against the Meriden Police Department for Twitter blocking. In D. Me., a judge allowed a case to proceed against Maine Gov. LePage over blocking activists from his Facebook page.

The cases keep rolling in, too. State Senator Richard Pan faces a Twitter blocking case in E.D. Cal., while the ACLU is leaning on Vermont’s governor to knock it off with Facebook blocks and deletions.

On the other hand, cases against social media sites themselves for blocking access have failed across the board. Twitter defeated two such lawsuits in California over the summer from
people who got a little too excited reading the Supreme Court’s decision in *Packingham*. (Surprisingly, a *small shred of one of these cases survived dismissal* at the trial court level before the Court of Appeal *smacked the lower court back into line* on a petition for writ of mandate.)

Expect a similar result in a *pro se lawsuit filed against Twitter* in D. Ariz. by revenge porn purveyor and risible U.S. Senate candidate Craig Brittain, and in a *wacky case in D.D.C.* from serial litigant Larry Klayman alleging, of all things, that major platforms engaged in antitrust violations by discriminating against conservative speakers. Let’s make this plain: There is no concept of antitrust in the marketplace of ideas. We also have Prager University’s *brief on appeal* to the Ninth Circuit in its case against Google, a proceeding we’ll be watching closely.

Regardless of the futility of these cases, the perceived bias of digital platforms remains a cause célèbre for folks in the District of Columbia. As social media sites come under *increasing criticism* for *carrying hateful content*, others *decry censorship* or *denial of equal exposure* for right-wing ideas. We had ludicrous *Congressional hearings*, and of course *Trump got into the act* because he didn’t like his search results.

**Terms of Service**

Uber might be making every effort to clean up its public image, but it’s still having problems enforcing its user agreements as recent losses in the *First Circuit* and *New York state court* demonstrate.

**Miscellaneous**

**Other Stories:**

- 11th Cir.: Why You Don’t Want to be a Test Case and How to Stop Serial Website Plaintiffs (Opinion: *Haynes v. Hooters of America*)
- 9th Cir.: In case alleging discrimination against bankruptcy attorneys, Ninth Circuit asks for California Supreme Court help on internet standing issue (Order: *White v. Square, Inc.*)
- N.D. Cal.: Most Of Ad Publishers' Claims Against Google Axed (Opinion: *AdTrader v. Google*)
• N.D. Cal.: Advertiser’s Suit Against Google Loses for Third (and Final) Time (Order: Abid v. Google)

• Ill. Cir.: Apple Fights Chicago’s Amusement Tax On Music Streaming

• Wash. Super.: Facebook bows to WA State pressure to remove “discriminatory” ad filters (Assurance of Discontinuance: In re Facebook)

• HUD Secretary Carson accuses Facebook of enabling housing discrimination (Complaint: Assistant Secretary for Fair Housing & Equal Opportunity v. Facebook)

**Digital Privacy**

**Anonymity**

Plaintiffs were permitted to pierce the anonymity of the posters of allegedly defamatory material in N.D. Cal., where a Mexican hotel chain was allowed to subpoena Facebook for the identity of a user whose complaints about the chain sparked nationwide coverage, and in Cal. Super., where an ad exec was allowed to seek the identities of the operators of the Diet Madison Avenue account on Instagram.

In D. Md., Kurt Eichenwald has been allowed to subpoena Twitter, Google, and other companies for information on individuals who pledged money to a defense fund in the epilepsy tweet case and/or who made comments about the assault. A judge rejected the defendant’s attempt to block the subpoenas for lack of standing as well as the lack of any undue burden upon the defendant himself. And Immigration and Customs Enforcement has successfully subpoenaed Twitter for information on the identity of a New Zealand national who made a habit of seeking out exposed or leaking data online and flagging the vulnerabilities for correction. Oddly, ICE used an “Export Enforcement Subpoena,” which doesn’t seem to fit the situation.

There was a notable win in E.D. Mich. for an anonymous blogger, who was sued for copyright infringement for posting a link to an unauthorized copy of the plaintiff’s multi-level marketing manual. Even after a finding of infringement (and with the benefit of a trip up to the Sixth Circuit and back), the blogger was allowed to protect his/her anonymity on the basis that
disclosure could chill his/her other protected speech. Congratulations to Joshua Koltun on this result.

The Texas Supreme Court has agreed to hear argument on whether a demand to Glassdoor for the identities of two employees of a lingerie company should be quashed.

In new demands, the BBC headed to court in C.D. Cal. to uncover the identity of a person who leaked a clip from the upcoming season of Doctor Who via Tapatalk. (The new season starts October 7th, and if you’re wondering how I feel about the Doctor’s current incarnation being female, the answer is: perfectly fine. If you get wigged out by change, a show that’s the entertainment analogue of the Ship of Theseus really isn’t for you.)

CFAA/Hacking

A hacker who participated in obtaining and distributing nude photos of Jennifer Lawrence and other celebrities was sentenced in the District of Connecticut to 8 months in prison plus three years of supervised release.

We have new hacking prosecutions in D. Kan. and Cal. Super.: in the former, a Wichita lawyer is accused of working with a computer software engineer to attack websites with information critical of the lawyer’s work; in the latter, a New Jersey woman is accused of hacking the email account of pop star Selena Gomez.

The Democratic National Convention formally sued WikiLeaks, the Russian Federation, and current and former associates of Donald Trump over the hacking of its computer systems in advance of the 2016 election. Curiously, service on WikiLeaks was accomplished via Twitter.

Control of Personal Information

California has enacted a new, far-reaching online privacy law with amazing (and many say reckless) speed. The law gives California residents the right to request that businesses disclose “the categories and specific pieces of personal information the business has collected,” in response to which the businesses must “promptly take steps to disclose and deliver, free of charge to the consumer, the personal information.” There is also a right to demand that a
business delete a consumer’s data (which demand the business must also forward to all “service providers,” whatever those might be), and complicated provisions regarding opt-outs with respect to the sale and resale of consumer data. And there’s a concept of “financial incentives” to consumers to allow the collection, sale, or deletion of their data, keyed to an opt-in provision, which frankly I’m still puzzling over. And more, so much more, including individual and AG causes of action for failure to comply.

For companies who just finished two years of GDPR compliance efforts, this measure was an unwelcome development to say the least. Tech and business interests are fighting to amend the law, and scholars are raising legal concerns; the tech lobby is also looking to Congress to supersede the law with federal legislation.

As it happens, Congress is looking at tech as well. After Facebook dropped 454 pages of answers to questions asked by Senate committees in April, the DOJ, FBI and SEC announced the initiation or expansion of investigations into the company’s privacy practices. The Commerce Department is working on its own privacy proposal, and has looped in ISPs, tech giants, and consumer advocates. And the Federal Trade Commission is looking for greater authority to dole out fines and pass regulations addressing consumer privacy; plenty of folks had thoughts on that idea during a public comment period.

The FTC might be a little sensitive about its power after the Eleventh Circuit held that an inadequate data-security program did not constitute an unfair act or practice within the scope of Section 5(a) of the FTC Act. Thus, the FTC did not have the authority to order a company to undertake additional protective measures. However, in a related retaliation lawsuit, the D.C. Circuit held that agents of the FTC were entitled to qualified immunity for their efforts in the case.

Users who claim that Facebook tracked their activity after they signed out have asked the Ninth Circuit to revive their case after multidistrict litigation below was dismissed. Three additional tracking cases were filed in the Northern District of California: one against Twitter and comScore for allegedly tracking kids using Disney apps; one against Google for allegedly
spying on Gmail; and a second against Google for tracking location data from cell phone users after Location History had been turned off.

In other matters, the legality of cy pres settlements is before the Supreme Court in *Frank v. Gaos* (argument is scheduled for Halloween), but an amicus brief filed by the DOJ has raised some eyebrows by questioning whether the plaintiffs who originally sued Google in the underlying privacy case had standing in the first place under *Spokeo v. Robins*.

Finally, revenge porn statutes survived constitutional challenges in two states in August: Wisconsin and Vermont.

**Other Stories:**

- M.D. Fla.: Florida frat bros sued over Facebook revenge porn (Complaint: Novak v. Simpson)
- S.D.N.Y.: Court Dismisses Privacy Claims Against Email Subscription Management Tool (Order: Cooper v. Slice Technologies)
- NY Senate Passes Bill That Would Make It A Crime To Publish Photos Of The Elderly Without Their Consent (S. 409)
- FTC Heeds Groups’ Input In OK'ing Modified COPPA Program (Letter from FTC)

**Encryption**

The U.S. government appears to have renewed its assault on strong encryption. A DOJ task force report laid out a 7-point plan to counter the so-called “going dark” problem. The points include legislating guaranteed law enforcement access to encrypted devices and penalties for service providers who withhold information. So, you know, basically steamrolling its way through the complex policy debate while shouting slogans.

Not that the DOJ is waiting for Congress to act; in a sealed case in N.D. Cal., the feds are attempting to compel Facebook to crack open the encryption on Messenger to let them listen in on a suspect’s voice communications. And the U.S. has joined together with the other
governments in the not-at-all creepily named “Five Eyes” group of countries to demand that companies build backdoors into their software and devices.

An Indiana appeals court, however, held that compelled disclosure of a cell phone password by a criminal defendant can violate the Fifth Amendment self-incrimination privilege.

**Internet Surveillance**

The First Circuit affirmed the dismissal of an Electronic Communications Privacy Act claim brought on the basis of a man's employer taking screenshots of his work computer, finding that the screenshots were not "contemporaneous" with the communications thus recorded.

Some other pings on our radar:

- Bad Bill Would Create A Nationwide Exception To Subpoena And Warrant Requirements For Cellphone Location Data (Kelsey Smith Act)
- Cal. App.: Court Says Probation Violations By Teen Don't Justify On-Demand Warrantless Searches Of His Electronics (Opinion: People v. D.B.)
- Oregon Supreme Court Adopts Use Restrictions on Nonresponsive Data for Computer Warrants (Opinion: State v. Mansor)
- Vt.: High court rules AOL didn’t violate Vermont man’s rights in child porn case (Opinion: State v. Lizotte)
- U.S. Lawmakers Warn Google, Facebook About Vietnam Cyber Law

**Transatlantic Privacy**

Look, it’s not like the U.S. is exactly seen as cooperative, trustworthy, or indeed sane on the world stage right now, so it won’t come as a surprise that the EU parliament is calling for suspension of the EU/U.S. Privacy Shield agreement. The FTC is under pressure from groups in the U.S. to fine Facebook in connection with the Cambridge Analytica scandal in order to
demonstrate good faith. Meanwhile, the EU has struck a new data transmission agreement with Japan, just to show it can be done.

And some tales from the GDPR:

- ‘Everyone is breaking the law right now’: GDPR compliance efforts are falling short
- US sites continue to block European visitors post-GDPR
- More than 1,000 U.S. news sites are still unavailable in Europe, two months after GDPR took effect
- Germany: Internet overseer ICANN loses a THIRD time in Whois GDPR legal war (Order: ICANN v. EPAG Domainservices)

**Intellectual Property**

**Copyright – New Cases**

Energized by BMG Rights Management’s victory in E.D. Va. against ISP Cox Communications over failure to deny access to internet users who were repeat copyright offenders, a group of major record labels has followed suit with a massive infringement case in the same court. Cox settled the original suit, but the amounts at issue in this new case make the notion of settlement much more complicated.

**Other Stories:**

- N.D. Cal.: PopSugar is Being Sued for Millions of Dollars for Stealing Influencers' Imagery (Complaint: Batra v. PopSugar)
- N.D. Cal.: Canadian Producer Claims Disney/Pixar's 'Inside Out' Ripped Off His Student Film (Complaint: Pourshian v. Walt Disney Co.)
- N.D. Cal.: AMC's 'Fear the Walking Dead' Is Target of Copyright Lawsuit (Complaint: Smith v. AMC Networks)
- C.D. Cal.: 'Kickboxer: Retaliation' Producers File $5M Copyright Suit Over Final-Cut Leak (Complaint: Our House Films v. Tunnel, Inc.)
• C.D. Cal.: Lynyrd Skynyrd Sued Over Jerry Lee Lewis Photo Displayed During Farewell Tour Performances (Complaint: Philpot v. Lynyrd Skynyrd Productions)

• C.D. Cal.: G.M. Used Graffiti in a Car Ad. Should the Artist Be Paid? (Complaint: Falkner v. General Motors)

• S.D. Fla.: Former Colombian Reporter Says Netflix's Narcos Copied Her Best-Selling Memoir (Complaint: Vallejo v. Narcos Productions)

• S.D. Fla.: Nurse Practitioner Site Says Aggregator Swiped Its Articles (Complaint: MidlevelU v. ACI Information Group)

• N.D. Ill.: 'Cloud Gate' sculptor Kapoor sues NRA over recruiting video (Complaint: Kapoor v. NRA)

• D. Md.: ‘Westworld’ Accused in Court of Ripping Off ‘Fallout Shelter’ (Complaint: Bethesda Softworks v. Behavior Interactive & Warner Bros.)

• E.D.N.Y.: HBO documentary used Slenderman painting without consent: suit (Complaint: Coleman v. HBO)

• S.D.N.Y.: Ed Sheeran's Copyright Battles Are Much Weirder Than Anyone Can Imagine (Complaint: Structured Asset Sales v. Sheeran)

• S.D.N.Y.: MLB Network Sued For Playing Song Without License (Complaint: Yesh Music v. Major League Baseball Properties)


• W.D. Tex.: Sony Taken to Court Over 'Slender Man' Threats (Complaint: Phame Factory v. Sony Pictures Entertainment)

Copyright – Plaintiffs’ Victories

Ah, the dangers of songwriting contests. The First Circuit held that Ricky Martin could not invoke mandatory arbitration of a claim that his video “Vida” infringed a music video submitted to a contest held by Sony, because Martin was not a party to the contract governing the contest.

In a case the media have been watching closely, the Second Circuit declined review of a district court holding that embedding of content from social media that contains an unauthorized copy of a photograph could infringe the photographer’s exclusive public display rights. Though fair use and other defenses remain in play, the district court decision threatens the utility of a popular method by which news websites enhance stories with visual content.

The Second Circuit also revived a copyright claim against Justin Timberlake over his sampling from “Sho’ Nuff” by ’70s soul group Sly Slick & Wicked for his “Suit & Tie,” holding that defendants’ repudiation of the plaintiffs’ claim to copyright ownership during the original term of a copyright does not constitute a repudiation of a renewal term or time-bar a claim to royalties during the renewal term. The defendants have sought rehearing.

The Ninth Circuit overturned a striking district court decision that because digitally remastered versions of pre-1972 sound recordings were independently copyrightable under the federal Copyright Act, federal law preempted state copyright claims based on infringement of the original recordings. The Court of Appeals rejected that logic, and further rejected the concept that the slight changes caused by digital remastering were sufficiently creative to be copyrightable.

Speaking of copyrightability in the Ninth Circuit, Experian fought off an attack on the copyrightability of its consumer database, with the Court of Appeals ruling that selectively omitting certain information was sufficiently creative to get over the Feist bar. The Ninth Circuit also: denied rehearing in the “Blurred Lines” case; held that it was error to deny attorneys’ fees
to a plaintiff in a torrenting case simply because the plaintiff also sued 300 other defendants; and ordered that a screenwriter who claimed Fox’s “Empire” infringed his treatment be given an opportunity to amend his complaint.

Two more worth a special mention before we roll on. A district judge in E.D.N.Y. rejected a magistrate’s recommendation that Conan the Barbarian be denied copyright protection as insufficiently distinct from any other musclebound warrior with a limited vocabulary and a penchant for leather briefs, holding that the creativity of fictional characters must instead be considered in the context of the works in which they appear. And finally, the Court of Federal Claims whacked the U.S. Postal Service with a $3.5 million judgment for infringement due to its mistaken use on a postage stamp of an image of an artist’s Las Vegas sculptural take on the Statue of Liberty rather than a picture of the Lady herself. Whoops.

Other Stories:

- N.D. Cal.: Judge Allows Copyright Claims Over Technology Used on Disney's 'Avengers' (Order: Rearden LLC v. Walt Disney Co.)
- N.D. Cal.: 'Star Wars' Card Game App Lawsuit Produces Copyright Win for Lucasfilm (Opinion: Lucasfilm v. Ren Ventures)
- C.D. Cal.: Katy Perry Copyright Suit Heading to Trial (Order: Motion for Summary Judgment: Gray v. Perry)
- C.D. Cal.: Man Gets $1.9M After Beauty Co. Copies Marketing Pics (Default Judgment: Babayan v. Yeganian)
- C.D. Cal.: Disney Wins Injunction Against Redbox: Movie Download Codes Can't Be Sold Separately (Order: Disney Enterprises v. Redbox Automated Retail)
• S.D. Fla.: Filipino Media Co. Gets Injunction Against Streaming Sites (Order: ABS-CBN Corp. v. angprobinsyano1.com)

• S.D. Fla.: Judge Allows Lawsuit Over Risque Melania Trump Photos (Order: Lickerish v. Z Lifestyle)

• S.D. Ind.: Attorney awarded $150K for infringement of Indy photo (Order: Bell v. ROI Property Group Management)

• E.D.N.Y.: ‘Appalled’ by 5Pointz Developer, a Judge Upholds the Massive $6.75 Million in Damages Awarded to Graffiti Artists (Order: Cohen v. G&M Realty)

• S.D.N.Y.: U.S. judge blocks programs letting 'Grand Theft Auto' players 'cheat' (Order: Take-Two Interactive Software v. Zipperer)


• S.D.N.Y.: Trolling the Internet for Photos Creates Copyright Headaches for Ad Agency (and the Advertiser) (Order: Laspata DeCaro Studio Corporation v. Rimowa GmbH)

• S.D.N.Y.: Judge Rules Photographer Owned Marilyn Monroe Photo to Copyright, Fair Use Moves to Trial (Opinion: Stern v. Lavender)

• E.D.N.C.: Mom’s Defense of “Cheating” Fortnite Kid Fails (Order: Epic Games v. C.R.)

• W.D. Va.: GOP Rep. Can't End Copyright Suit Over Anti-Immigrant Ads (Order: Bigelow v. Garrett)

• W.D. Wis.: Memorabilia Dealer Barred From Using Sports Photogs’ Work (Judgment: Boehm v. Svehla)

• Bankr. D. Del.: Weinstein Judge Lets 'Children Of The Corn' Suit Go Ahead
Copyright – Defense Victories

In the Second Circuit, former Fox News host Andrea Tantaros fought off a DMCA copyright management information claim from an editor who claimed to have ghostwritten her 2016 memoir. Specifically, the Court held that the plaintiff’s claim that Tantaros violated the DMCA by leaving his name off of the book failed because he did not plead any facts to support the high scienter requirement for such a claim – namely, that the defendant knowingly provided false copyright information and did so with the intent to induce, enable, facilitate, or conceal an infringement.

The Second Circuit also affirmed summary judgment in favor of the author of a play parodying “How the Grinch Stole Christmas,” holding that it was (1) protected as a fair use under the Copyright Act and (2) protected as parody under the Lanham Act per the court’s rulings in Rogers v. Grimaldi and Cliffs Notes.

Fox’s “Empire” might still be facing legal issues in the Ninth Circuit, but the Third Circuit affirmed the dismissal of a screenwriter’s claim that the show infringed his pilot on the basis of a lack of substantial similarity.

There was a striking decision in the Fourth Circuit, holding that the Copyright Act did not override state sovereign immunity under the Eleventh Amendment, and that Congress’s attempt to do so via the Copyright Remedy Clarification Act was unconstitutional. Thus, a videographer who sued North Carolina and its agencies and officials over the unauthorized use of his work was out of luck.

Praise the powers that be, the Ninth Circuit has denied rehearing en banc in the monkey selfie case. It also denied en banc rehearing on the dismissal of a photographer’s case over Nike’s “Jumpman” logo.

In addition, the Ninth Circuit: affirmed summary judgment for the developer of real estate photo software on a DMCA claim for removal of copyright management information, due to insufficient evidence to meet the scienter standard; affirmed the dismissal of an online infringement case on the basis that an IP address does not adequately identify a defendant as the
infringer; affirmed an award of attorneys’ fees to Elizabeth Banks in the “Walk of Shame” lawsuit; and held that a California law granting artists a portion of auction sales proceeds could only be applied to art sold prior to the effective date of the 1976 Copyright Act.

In the D.C. Circuit, Chinese tech giant Alibaba’s video site Youku Tudou won a ruling that U.S. courts do not have jurisdiction over copyright claims against the company. If you’re wondering, “youku” means “excellent/cool”; Youku Inc. purchased video sharing service Tudou Inc. (“tudou” meaning “potato”) in 2012 to create the new company Youku Tudou Inc. (“excellent potato”). The remarkable similarity between this composite name and that of a somewhat better-known U.S.-based video sharing service is, I’m sure, a complete coincidence.

Finally, we had a win for open government activists in the D.C. Circuit, in which the court vacated injunctions against Public.Resource.Org’s distribution of privately created safety standards incorporated by reference into public laws. The court held that the district court erred in its application of fair use doctrines under both copyright and trademark law.

Other Stories:

- N.D. Cal.: Writer Spat Over Popular Novel Likely Headed to Trial (Order: Cline v. Reetz-Laiolo)
- C.D. Cal.: Judge Rejects Lawsuit Alleging 'Shape of Water' Ripped Off Pulitzer Prize Winner (Opinion: Zindel v. Fox Searchlight Pictures)
- C.D. Cal.: Producer Drops Film Rights Suit Against Weinstein, Disney (Stipulation: Borchers v. Weinstein Co.)
- C.D. Cal.: Penthouse Bankruptcy Ends 'Caligula' IP Suit
- M.D. Fla.: Court Awards $12,500 For 'Emotional Harm' From Bogus Copyright Lawsuit (Order: Johnson v. New Destiny Christian Center Church)
- S.D.N.Y.: Paramount, Comic Artists Part Ways In Iron Man IP Row (Stipulation of Dismissal: Horizon Comics Productions v. Marvel Entertainment)
• S.D.N.Y.: Comedians' Heirs Owe Fees In 'Who's On First' Copyright Row (Order: TCA Television v. McCollum)

• S.D.N.Y.: Sony Looks To Boot Suit Over Beatles Documentary (Memorandum: Ace Arts v. Sony/ATV Music Publishing; Notice of Voluntary Dismissal)

• S.D.N.Y.: 'The Art Of Fielding' Copyright Suit Strikes Out (Order: Green v. Harbach)
  o 2d Cir.: Author Takes 'Art Of Fielding' Copyright Fight To 2nd Circ. (Appellant's Brief: Green v. Harbach)

• S.D.N.Y.: Three little words make a fair use (Order: Oyewole v. Ora)

• S.D.N.Y.: After 'We Shall Overcome' Loss, Music Co. Hit With Attys' Fees (Order: We Shall Overcome Foundation v. The Richmond Organization)

• S.D.N.Y.: Disney Finds It's Not So Easy to Sue Over Knockoff Characters at Birthday Parties (Order: Disney Enterprises v. Sarelli)

• E.D. Pa.: Photographer’s Copyright Claim over Photo of Philadelphia Skyline Fails (Order: Maule v. Anheuser Busch)

• E.D. Va.: U.S. Judge Claims Using Photo Found on the Internet Is Actually 'Fair Use' (Order: Brammer v. Violent Hues Productions)

• Dow Jones to Receive $3.4 Million from State Agency that Misused Articles

Copyright – Miscellaneous

Did the Trump administration intend in its proposed trade deal with Mexico to extend the term of copyright in the United States to life plus 75 years (from the current life plus 70)? Or did the administration just not know the law? These days, who can tell?

The Senate Judiciary Committee approved the Music Modernization Act, which provides a revamped framework for compensating artists for digital streaming of musical works. A
companion bill, the CLASSICS Act, still faces vocal opposition for mucking around with the duration of protection that it would grant to certain sound recordings.

To the surprise of many, the Computer Crimes and Intellectual Property Section of the Department of Justice has voiced its support for proposed Section 1201 exemptions intended to support security researchers. The exemptions are intended to protect researchers from being sued for circumventing digital security in the course of identifying weaknesses in such security for correction; the DOJ has supported the idea that the anti-circumvention provisions of the DMCA should only apply in circumstances actually involving copyright infringement.

And finally, I don’t know whether after all this time the following is a win, a loss, or merely a heavy, heavy sigh: The “dancing baby” case has now settled in the Northern District of California.

Patent

Speaking of settlements in interminable legal disputes, Samsung and Apple have buried their hatchets after seven years of litigation over mobile phone patents.

Idea Theft

A judge in S.D.N.Y. denied a motion by Pepsi to dismiss an idea theft claim filed by a Connecticut ad agency over the alleged misappropriation of its pitch for a Super Bowl ad. In the same court, a children’s book author settled a claim with Viacom over the alleged theft of his idea for Nickelodeon’s “All In With Cam Newton.”

Trade Secrets

Ooh, a trade secret case! The parent of two newspapers in Virginia has alleged that a reporter’s popular Twitter account was the company’s creation, and that the account’s follower list was a trade secret that the reporter misappropriated when he left for a competing publication and refused to relinquish control of the account.
Commercial Speech

Trademark – New Complaints

It wouldn’t be the Trademark section without a couple of new disputes over band names. This time around, we have The Crests battling in the Middle District of Florida over use of their name by a former registrant of the mark, and two groups going by the name Church Girls clashing in the Southern District of Florida.

Other Stories:

- N.D. Cal.: Atari Hits T-Shirt Retailer With Counterfeiting Suit (Complaint: Atari Interactive v. SunFrog)
- N.D. Ill.: Ill. Strip Club Is A 'Chronic' TM Infringer, Models Say (Complaint: Gibson v. CSWS)
- N.D. Ill.: Amazon is Using its Search Engine & Your Trademark to Sell Inferior Products, Per New Suit (Complaint: The Comphy Co. v. Amazon.com)
- S.D.N.Y.: Viacom Sues Media Co. Over 'Double Dare' Game Show TM (Complaint: Viacom International v. Armstrong Interactive)
- S.D.N.Y.: DJ Khaled Sues Company Trying to Trademark His Son’s Name (Complaint: Khaled v. Bordenave)

Trademark – Plaintiff Wins

Talk about ridiculous arguments. The Coalition for Better Government claimed that its logo did not infringe that of the Alliance for Good Government, because while the Alliance’s trademark was a stylized eagle in blue facing left between parallel horizontal lines on a white background, the Coalition’s mark was a stylized hawk in white facing left between horizontal lines on a blue background:
See the difference? The Fifth Circuit didn’t either.

The Federal Circuit revived an attempt by Royal Crown to have Coca-Cola’s “zero” mark for diet sodas declared generic.

The Ninth Circuit held that there was not enough evidence to find that a hip-hop artist’s “mastermind” trademark was not protectible, reversing and remanding in an infringement case filed by the artist against rapper Rick Ross. The Ninth Circuit also revived a trademark suit brought by the narrator of the viral “Honey Badger Don’t Care” video over the unauthorized use of the catchphrase on greeting cards; a coalition of 37 law professors filed an amicus brief in support of en banc review, saying the ruling erroneously threatens a wide range of legitimate products.

Speaking of memes, a judge in the Central District of California ruled in a declaratory judgment action that a coffee shop that made “Grumppuccinos” and other Grumpy Cat products was infringing copyright and trademark because it violated a condition of its license limiting its offerings to iced coffee. However, because the defendants did not act in bad faith, the court denied the plaintiff its attorneys’ fees on the IP claims.

In the dispute over the term “Comic-Con” in the Southern District of California, the judge issued an injunction against the defendant’s use of the mark on top of $20,000 in damages. Even more striking was an award of $3.9 million in attorneys’ fees.

Oh, and since we’re flagging band-related cases, The Commodores obtained summary judgment in the Middle District of Florida against a former band member who was using the name.
Other Stories:

- C.D. Cal.: Eazy-E’s Son and Widow Settle Lawsuit Over NWA, Ruthless Records Use
- N.D.N.Y.: Nominative fair use defense in 2d Cir goes about as well as you’d expect on motion to dismiss (Order: Excelsior College v. Wolff)
- S.D.N.Y.: Hasbro and DC Comics Settle ‘Bumblebee’ Trademark Dispute
- E.D. Va.: Express Homebuyers Wins Its Bid To Cancel Competitors ‘We Buy Houses’ Trademark (Order: Express Homebuyers USA v. WBH Marketing)

Trademark – Defense Wins

The Sixth Circuit issued an interesting decision distinguishing between fair use, on the one hand, and the use of a term in a non-trademark manner, on the other. The court navigated a tangle of circuit precedent to hold that the description of a parcel of real estate as the “former Old Taylor Distillery” did not infringe the trademarks of the current holder of the “Old Taylor” trademark.

The Eighth Circuit had a similarly interesting ruling about the boundary between copyrights and trademarks, involving the alleged “knocking off” of an artist’s interactive light sculptures. The Eighth said with glee, look, this quintessentially isn’t a trademark; the artist’s labor on such aethereal work is best suited to the alchemy of copyright, which is the nemesis of his claim. (And that’s five.)

Beyond that, we saw a lot of keyword advertising cases, and those bore me to tears, so let’s keep moving.

Other Stories:

- 9th Cir.: Keyword ad buys are fine for less expensive products too, court confirms (Opinion: Lasoff v. Amazon)
• 10th Cir. Sides With Dish In 'DishNet' TM Fight (Opinion: Digital Satellite Connections v. Dish Network)

• N.D. Cal.: TWiT’s Trademark Lawsuit Against Twitter Sent Back to the Drawing Board (Order: TWit v. Twitter)

• N.D. Cal.: Search results labeled as results aren't confusing (Order: Carter v. Oath Holdings)

• N.D. Cal.: Negative Keywords Help Defeat Preliminary Injunction (Order: DealDash OYJ v. ContextLogic)

• D. Idaho: Unlinked Webpage Doesn’t Support Trademark Infringement (Order: Nelson-Ricks Cheese Company v. Lakeview Cheese Company)

• S.D.N.Y.: GoDaddy & Instagram Avoid Liability for Users’ Photos of Knockoff Goods (Order: Franklin v. X Gear 101)

• S.D.N.Y.: The long Cocky-gate nightmare is over (Order: Hopkins v. Kneupper)

• W.D.N.Y.: Seeking monetary damages can undercut irreparable harm claim (Order: Rush v. Hillside Buffalo)

• D. Utah: Another Failed Trademark Suit Over Competitive Keyword Advertising (Order: JIVE Commerce v. Wine Racks America)

Trademark – Miscellaneous

We can’t really call this one a win for either side: The First Circuit declared a pox on all houses in cross-appeals between former members of classic rock band Boston, affirming the judgment of the district court in all respects.

And okay, sure, maybe the USPTO’s ban on “disparaging” trademarks was unconstitutional for lack of viewpoint neutrality, but is that true of the ban on “scandalous or vulgar” marks? The Trademark Office doesn’t think so, and has suspended all applications for such marks pending its decision to seek Supreme Court review of the Federal Circuit’s opinion in In re Brunetti (the “FUCT” clothing trademark case).
Compelled Commercial Speech

All of the excitement in this category was at the Supreme Court, but we did have a Ninth Circuit ruling that California could not force candy maker Mars, Inc. to disclose on its labeling any labor issues (such as the use of child or slave labor) that might have tainted its supply. For bonus points, try running that decision through the flowchart I used in my article in this month’s MediaLawLetter.

False Advertising

Yowch. The First Circuit affirmed a 72-month prison sentence for a man convicted of falsely advertising non-prescription drugs as treatments for “hundreds of different diseases and medical conditions” on “over 1,500 websites containing altered clinical studies, fabricated testimonials, and false indicia of origin to induce consumers in the United States and elsewhere to purchase his products.” Can’t say he didn’t deserve it, I suppose.

The Seventh Circuit held that a company that produced bovine growth hormone rbST did not need consumer surveys to demonstrate that the defendant’s ad, which related children’s purported responses to a request to imagine what “rbST” might be, falsely suggested that the hormone was dangerous. One child supposedly provided the description, “RbST has razor sharp horns. It’s so tall that it could eat clouds. You may want to pet it but the fur is electric,” which was accompanied by the following image:

Needless to say, preliminary injunction affirmed.
We saw a pair of movie marketing cases this time around. A moviegoer who alleged he was lured into seeing 2011 film *Drive*, only for it to crawl at an “art house” pace and allegedly contain an anti-Semitic message, had his claims rejected by the Sixth Circuit for failure to plead claims under the Michigan Consumer Protection Act. Meanwhile, the producers of the film *War Dogs* escaped Lanham Act liability in D. Del. for allegedly misrepresenting the film as being based upon a former defense contractor’s “true story.”

There was an interesting decision this month from M.D. Tenn. for anyone following the issue of deceptive use of manipulated photos and video. In a case involving the alleged disparagement of the plaintiff’s wood siding by a competing non-wood siding manufacturer, the court held that a photograph appearing to show a woodpecker attacking the plaintiff’s product was not literally false because of various indicia which would have led a reasonable viewer to detect that the photo was a fake.

Finally, the California Court of Appeal held that Sony Entertainment and the Michael Jackson estate could not be held liable for alleged misrepresentations that vocals on a posthumously released album were in fact Jackson’s voice. Such statements, the court held, were merely the defendants’ opinion.

*Other Stories:*

- C.D. Cal.: Dr. Oz settles lawsuit over diet supplement for $5.25 million ([Settlement Agreement with Media Defendants: Woodard v. Labrada](#))
- S.D. Cal.: Preserve challenged ads/social media posts after receiving a C&D or risk sanctions ([Order: Nutrition Distribution v. Pep Research](#))
- D.N.J.: Industry magazine publisher can be sued under Lanham Act due to allegations of financial interest in competing businesses ([Order: NY Machinery v. Korean Cleaners Monthly](#))
- S.D.N.Y.: Lie of Pablo: Churchillian tweet gets Kanye West in trouble ([Order: Baker-Rhett v. Aspiro AB](#))
- MGM, Fox to provide $8.7M worth of James Bond films to end class action
• N.D. Cal.: Judge guts FTC's $4-billion lawsuit against DirecTV (Order: FTC v. DirecTV)

• N.D. Cal.: Non-lawyer's purchase of "trademark attorney" as a keyword doesn't itself plausibly deceive consumers (Order: LegalForce RAPC Worldwide v. Swyers)

• D. Kan.: Direct competition + literally false advertising don't equal standing without more (Order: Brave Law Firm v. Truck Accident Lawyers Group)

• Ariz. App.: The perils of default judgments against speech: showing up late can prove onerous (Opinion: Lokosky v. Gass)

Professional Speech

Quickly, now, we’re almost at the end.

• 6th Cir.: Appeals court says Ohio's rules on judicial campaigns are constitutional (Opinion: Platt v. Board of Commissioners on Grievances)

• D.D.C.: Speech Limits on Court Agency Employees Rebuked by Judge

• Alabama Justice wins free speech lawsuit

• Arizona Supreme Court Rejects Proposed Lawyer Speech Code (Rule 8.4(g))

• Tenn.: Lawyer's statements about judges 'rigging the game' require suspension, top Tennessee court says

Miscellaneous

Academia

The Fourth Circuit held that the University of South Carolina did not violate a student group's First Amendment rights by requiring them to attend a meeting to review complaints about displays and comments at an event held on campus.
The Fifth Circuit heard argument from faculty members at the University of Texas that the institution’s decision to allow the concealed carry of guns in classrooms interfered with their academic freedom; curiously, the University has argued that it is the school and not individual professors that enjoys academic freedom. On the other hand, the Wisconsin Supreme Court held that Marquette University professor John McAdams was wrongly terminated in violation of his rights to academic freedom for criticizing a graduate student on his blog.

The ACLU filed suit in D. Kan. to defend the rights of Shawnee Mission students who claim that the school district put unconstitutional limitations on the content and coverage of protests during the National School Walkout demonstrations against gun violence.

The Independence School District turned a student over to the cops for listing Truman High School in Independence, Mo., for sale on Craigslist as a prank – which the detectives properly laughed off. Undeterred, the school also blocked the student from graduating. The ACLU filed suit in W.D. Mo. to force the school to let him graduate; as of now, a judge has denied the plaintiff’s requested TRO.

**Government Licensing & Public Fora**

The D.C. Circuit has upheld the right of the District of Columbia’s transit system to prohibit issue-oriented advertisements in and on buses, trains and stations. As non-public forums, held the Court, such venues may be subject to subject-matter-based but not viewpoint-based restrictions; quoth the Court, “Were the Archdiocese to prevail, WMATA (and other transit systems) would have to accept all types of advertisements to maintain viewpoint neutrality, including ads criticizing and disparaging religion and religious tenets or practices.” Notably, Judge Brett Kavanaugh sat on the case for oral argument but was pulled away before he could participate in the opinion; during the argument, he seemed inclined to treat the transit system’s decision as naked anti-religious bias.
**Threats & Incitement**

The Fifth Circuit held that a Louisiana anti-intimidation law was unconstitutionally overbroad, because it prohibited “threats” against public officials that the speaker would engage in lawful behavior intended to influence the official’s behavior.

Meanwhile, in a closely watched case, the Sixth Circuit heard argument on the claims of protesters injured at a Trump campaign rally that Trump should be held liable for inciting the violence that led to their injuries. The Sixth Circuit had granted interlocutory review on a district court decision denying Trump’s motion to dismiss.

**Other Stories:**

- “Racial Ridicule” Is a Crime in Connecticut -- and People Are Being Prosecuted
- Mass.: New Appeal Claims Michelle Carter’s Texts Urging Boyfriend to Kill Himself Were ‘Protected Speech’
- Pa.: Rap Song = Punishable True Threat, Says Pennsylvania Supreme Court
- Va. Cir.: Kessler gets a win and $5

**Hollywood Hijinks**

We saw a contrasting pair of anti-SLAPP decisions out of Hollywood. In C.D. Cal., rapper The Game sued Viacom over injuries he received from a criminal permitted to appear on his reality show. The claim was stricken under California’s anti-SLAPP law, with the judge’s ruling that the decision to allow the assailant to appear on the show represented Viacom’s exercise of its right to free speech.

On the other hand, a California state appellate panel rejected Fox’s motion to strike a cross-complaint in a dispute with Netflix over employee poaching. The court held that the restrictive contracts between Fox and its employees that Netflix challenged and Fox’s enforcement of those contracts were not protected elements of the exercise of its free-speech rights.
Other Stories:

- C.D. Cal.: Judge Rules Morgan Spurlock Production Co. Likely Breached Deal for TNT Docuseries
- C.D. Cal.: 'Spinal Tap' creators may pursue fraud claim in $400 million U.S. lawsuit (Order: Century of Progress Productions v. Vivendi)
- Cal. App.: NBC, Dr. Dre, Ice Cube Escape Suge Knight Killing Suit (Opinion: Carter v. NBC Universal)
- Cal. Super.: Johnny Depp Scores Big Win in Lawsuit Against Ex-Lawyer Jake Bloom
- N.Y. Sup.: Man sues 'Fox & Friends' host after being struck by ax on set

Publishing

The Northern District of Indiana held that an ex-Navy SEAL and author had presented sufficient evidence to survive summary judgment on a claim that his attorney’s malpractice cost him $6.7 million in royalties. The author claimed that the lawyer advised him to forgo prepublication review by the Armed Forces of his book about his first-hand experience of the raid that killed Osama bin Laden; the dollar figure sought reflects the total royalties that the author was required to forfeit to the government as a result of breaching a non-disclosure agreement.

The True Miscellany

In a split decision, the Second Circuit ruled that there was insufficient evidence to support a $1.4 million verdict against two state prosecutors for interfering in the business of a Long Island magazine publisher during the course of an investigation into alleged fraud in the publisher’s distribution channels.

Following a decision earlier this year by the Sixth Circuit, the Eighth Circuit held that atheists’ constitutional rights against compelled ideological speech were not violated by the inclusion of “In God We Trust” on U.S. currency.
Other Stories:

- S.D. Cal.: Lawsuit Argues Honking Your Car Horn Is Protected By The First Amendment (Complaint: Porter v. Gore)

- W.D. Va.: Court Says Cop Gets No Immunity For Pulling A Man Over For Flipping Him Off (Order: Clark v. Coleman)

- N.C. Super.: Roy Moore Attorney Sues ‘Reputation’ Manager

Conclusion

And with that, I officially declare the summer over. But that’s not a terrible thing…we have the Virginia conference, the MLRC Forum, and the Annual Dinner coming up; on a personal note, my birthday and my anniversary are both in October; and as a native New Engander I can state without qualification that the autumn is the best time of year.

Oh, and I hope you enjoyed the little puzzle in this issue. If you think you spotted all the puns in each element’s appearance, I seriously doubt it, but I hope you prove me wrong – be sure to drop me a note and let me know! Till then, I wish you open seas, a fair wind, a cheery hearth and a fertile garden, and that je ne sais quoi of which philosophers dream.

See you next time!