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MEDIALAWLETTER

Reporting Developments Through March 25, 2016

LIBEL & PRIVACY

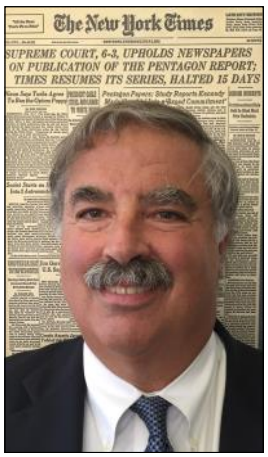
INTELLECTUAL PROPERTY

From the Executive Director's Desk

The Donald Hogan: One Person, Multiple Personas

Hulk Hogan and Donald Trump certainly were March's two biggest newsmakers. But the more I thought about writing about them, the more I realized that, in essence, they were almost the same person.

Both are brash, blunt, bullying, braggadocio bloviating brand-purveyors. Both objectify women and have had extramarital affairs. Trump tweets photos of his wife and Ted Cruz's, not so subtly comparing their looks – how low can a presidential campaign go? – and says Heidi Klum is no longer a "10" – an error in evaluation even greater than his foreign policy plans; Hulk has sex on numerous occasions with his best friend's wife. They both talk endlessly and proudly of their sexual exploits and prowess – Hulk on radio and in books, Trump in the midst of a Republican presidential debate.


The New York Times

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

Both are hopelessly entwined with their brands: Hulk wears his trademark bandana everywhere, including to court; Trump is surrounded by his wines and steaks when giving a press conference (except that they weren't even his steaks). Both seem totally untruthful and unprincipled: based on documents that the trial judge did not admit into evidence, Hulk may well have lied about whether he knew his sex with Bubba the Love Sponge's wife was being taped. Trump, who routinely doesn't pay his legal (and many other) bills, testified in a libel suit he brought about his wealth that his net worth varies by hundreds of millions of dollars depending on what kind of mood he's in.

A Trump press conference threatening protestors and other "bad guys" in the audience isn't all that different from a Hulk pre-fight interview where he screams how he will dismantle a future opponent. Trump preening after a primary victory can easily morph into Hulk flexing after a victorious pin.

And they both have multiple personas. Hulk claims that he is actually Terry Bollea and that Hulk Hogan is only a character he portrays in the ring (albeit, he testified in court, one with a bigger penis than his own). Trump wears multiple hats: ruthless businessman, family man, reality show host and now presidential candidate. He is a self-proclaimed billionaire, though one who has sought and received support mainly from the poor and uneducated. He purports to own real estate everywhere, but often his name is simply licensed to be on other people's property. He says he's a good guy, but often doesn't pay his contractors and, according to the New York D.A., fleeces students at his Trump U. He says he loves minorities, though he

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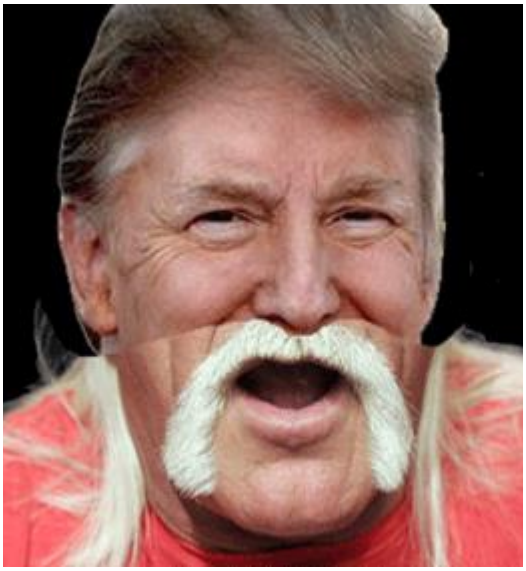

The Donald Hogan: brash, blunt, bullying, braggadocio bloviating brand-purveyor.

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lambasts them; he says he loves and respects women, though he belittles them nastily, from Carly Fiorina to Megyn Kelly.

Neither seems to have friends. The New York Times recently reported that Trump has almost no real friends. Hulk says his best friend betrayed him by offering up his wife for sex but then, unbeknownst to him, taped them. And they both love to fight with all comers, Hulk with all types of foes in the ring, Trump blasting idols as well-respected as the Pope and war prisoner John McCain.

And, relevant to our profession, both are litigious and have used the legal system to their advantage. After all, Hulk just won $140 million for the post of a 1 ½ minute sex tape of which 9 seconds was actual sexual activity, and even that, I am told, was so grainy that it couldn't really be seen – and that's after Hulk had put his sex life on the public's table by blabbing about it on radio interviews and in books. Trump, somewhat similarly, uses lawsuits as a form of leverage in negotiations, claiming victories in settlements he has forced down poorer people's throats (though, interestingly – see below - he lost the libel suit he brought regarding the amount of his wealth).

* * *

Of course, the news Trump made relevant to our organization is his statement that as President, he would "open up our libel laws." More specifically, kind of, he explained that come his Administration "when they write purposely negative and horrible and false articles, we can sue them and win lots of money."

In my First Amendment Law midyear exam, I asked my students what was incorrect and pretty stupid about his statement. First, of course, he seems to ignore that the President cannot make or change constitutional law. Even though he is not a former constitutional law professor as is our current President, he probably should now that it is the courts, and more specifically the Supreme Court, which can alter prevailing First Amendment law. Just as SCOTUS caused a huge turnabout when in 1964 it constitutionalized libel law- - due primarily to historical circumstance, ie, not wanting to allow the southern segregationist establishment to use libel lawsuits to intimidate and chill the northern media from reporting on the abuses heaped upon Blacks and civil rights workers in the South - - so it would have to be SCOTUS to somehow "open up" the libel laws to make them more plaintiff-friendly. And it's worth noting that New

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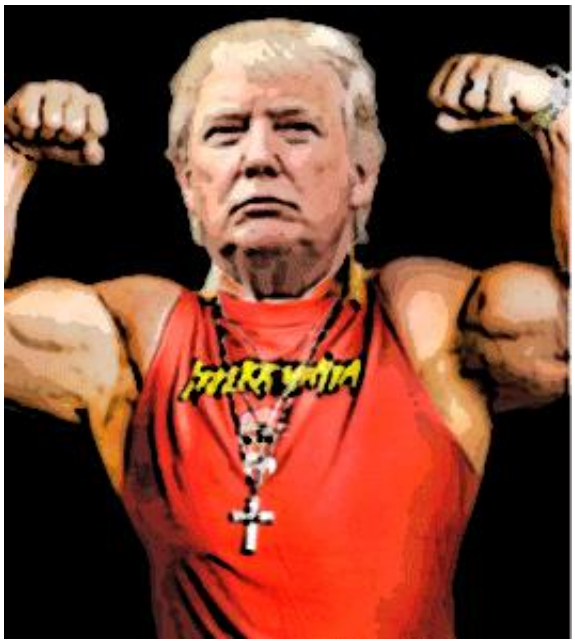
York Times v. Sullivan is now over 50 years old, and that despite a number of attempts by various justices in the first 20 years to soften its protections, no alterations to its holding have ensued.

More to the point, Trump says that even public figures should be able to win libel suits where the publication – he just happens to name The New York Times and Washington Post as examples – writes purposely negative and false articles. But I think most of us would agree that in such a case plaintiff should be able to win in today's regime. Thus, a purposely false article would meet the Sullivan test; indeed, it is almost exactly what the Sullivan standard is.



Trump preening after a primary victory can easily morph into Hulk flexing after a victorious pin.

Finally, and ironically, I would think Trump ought to think twice before campaigning to make the libel laws more favorable for a plaintiff. For while he cries victim as to the media's bias against him, and cites examples where they have written terrible things about him even though he is a "good guy", based on the last few months of his campaign it would seem far more likely that he is a potential libel defendant who would need the protection Justice Brennan found so vital in Sullivan. Thus, whether it's his opponents or past Presidential candidates Romney or McCain or Mrs. Cruz, Trump seems to cast aspersions with reckless disregard and abandon, and very much would seem to need the protections he is wailing against.

More troubling is that a transcript of a meeting he had with the Editorial Board of the Washington Post seems to indicate he has very little grasp of what he is talking about. Indeed, when asked specifically what he would do to "loosen up" the libel laws, he responded that "I'd have to get my lawyers in to tell you." But for starters, in discussing the libel laws, he cites his "tremendous surprise" at the Hulk Hogan outcome because libel cases are so difficult to win – notwithstanding that the Hogan case was, of course, an invasion of privacy case. When pressed by the Post editors on how he would change the law, he drifts, seemingly answering by saying that he's a good person but that the Post "writes badly about me – and they do, they don't write good…the hatred is so enormous." He did finally offer a specific, arguing that under today's libel laws he can't do anything about an egregious and wrong article "because I'm a well-known person," thereby apparently seeking to eliminate the public figure/private person distinction founded in Sullivan and its progeny.

But this all pales beside Trump's attitude and behavior towards journalists generally - behavior which is disgusting and hopelessly inappropriate. Putting aside his belittling a totally

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fair Fox interrogator at a debate for menstruating and making fun of a handicapped New York Times reporter for being handicapped, Trump routinely riles up crowds by pointing to the press pen and reviling the reporters therein. First, why are they penned at all? I don't believe any other candidate segregates the press in such a manor.

But worse, by then mocking and disparaging them, he is using them as a foil to get a rise out of the crowd - hardly Presidential demeanor. And given that he has gotten more free press coverage than anyone in history, he is biting the hand that feeds him - and his ego. And even more inappropriate, he is demeaning and taking cheap shots at journalists who are simply doing their jobs - jobs which are of great importance to the election and our democratic system. Surely, in the event he actually becomes President, this would not be a very effective way of dealing with the press and bolstering public support.

And to think - at least in my view - he is far preferable and less scary than his main opponent for the Republican nomination.

* * *

The Hulk Hogan v. Gawker trial was, of course, March's big media law story. Pitting the larger than life hometown hero Hulkster against an irreverent New York media outlet, and with a referee who seemed to make every call against Gawker, the match-up seemed a trifle one-sided. While many columnists tried to portray this as a serious threat to press freedoms and the First Amendment – one Fox outlet postulated it was as important a case as Times v. Sullivan – it seems to me the result is far more an indictment of an irrational jury system.

Trump seems to cast aspersions with reckless disregard and abandon, and very much would seem to need the protections he is wailing against..

To be blunt, a $140 million verdict – more than the ridiculous $100 million Hulk sought -for a sex tape showing 9 seconds of barely recognizable sex is totally crazy and outrageous. That $60 million of that was for purported economic damages is even more absurd. (To the extent financial harm resulted, it was from racist statements not made on the sex tape which was aired.) The only positive about the size of the verdict is that is should make reversal on appeal more likely. Combined with the fact that the judge didn't allow evidence tending to show that Hogan was aware his copulation with the Love Sponge's wife was being taped, Gawker's prospects on appeal seem pretty good.

The reason I feel that the case doesn't have broad invasion of privacy ramifications is that a sex tape case seems pretty sui generis. Take the archetypical privacy case – a report that a celebrity's – or say President's - daughter was caught doing drugs. If I were vetting that story, the Hogan verdict would have absolutely no bearing on my legal analysis. First, it's just a jury verdict, not a binding legal precedent. But more important, a sex tape is different from reporting

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on someone's drug or alcohol overuse, financial condition or sexual preference or affairs, the quintet of situations giving rise to most privacy cases. When a picture or videotape of a penis comes into play, the parameters are inevitably a bit different.

But that's not to say distribution of a sex tape is necessarily an invasion of privacy, even assuming - as we can't in this case – that the taping was without the consent or knowledge of one of the participants. Certainly the publication of a sex tape of a private person could give rise to a pretty strong plaintiff's case. Even a sex tape of a celebrity could often make for a good case – say a tape of Derek Jeter with a girlfriend or a senator and his wife. On the other hand, one has to look no further than former Rep. Anthony Weiner to see where photos of a penis are newsworthy; likewise if one of Bill Cosby's trysts with his alleged victim were taped, that would seem of legitimate public interest as well.

But the Hulk tape is not even that close a call. This was a plaintiff who openly and publicly spoke, neigh bragged, about his sexual activities and prowess – on radio interviews, such as with the hardly decorous Howard Stern, and elsewhere. It just can't be that Hulk is allowed to spin his sexual exploits in the way he chooses, but then claim grievous injury for showing a few grainy seconds of the tawdry act itself. Add to that the intriguing accompanying article — about how celebrity sex is as boring and mundane as everyman's (and everywoman's) sex— and you have a pretty good justification for running the tape, particularly where it was edited down substantially to show just a few moments of quasi-action.

Finally, I was very surprised at the Hogan team's strategy: at the very outset of the trial, despite seemingly being in a strong position and odds-on favorites to win the trial, they portrayed the plaintiff as having two personas: the public Hulk who really, they said, was just a character for wrestling show purposes, and the private Terry Bollea, who had personal problems and depressions like any of us, and whose privacy was invaded by the tape. Thus, it was Hulk who boasted about his sexual prowess publicly but the far less endowed and far more sensitive Bollea who engaged in sex with his friend's wife because he was unhappy about his own marital situation. Putting aside that Terry Bollea wore Hulk's well-known bandana in court – which would seem to undercut the position that these two characters aren't inevitably intertwined – to me, the two persona position seems awfully confusing for jurors; moreover, you would have thought that they would have responded quite cynically to such an artificially constructed portrait. Of course, it turned out I was wrong – either because the jurors didn't care or because, as sophisticated and experienced viewers of reality shows, they truly bought in to this scenario.

At least Hulk isn't running for President. But wait, wasn't there another famous pro wrestler, who similarly successfully sued the media for libel, who became Governor of Minnesota?

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

The Monthly Daily:

A Roundup of Media Law Developments

By Jeff Hermes

Let's start with a show of hands:

- Who predicted that #FBIvsApple would be decided by tech rather than law?
- Whose prediction in #HulkvGawk was off by more than an order of magnitude?
- Who thinks we should dump the Bluebook and just cite cases with Twitter hashtags?

We'll get back to the early favorites for Privacy Case of the Year a bit later, but for now, on with the show.

Supreme Court

Please, can we call the self-published instabook *A ~~Gronking~~ Borking to Remember*? Chief Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia was nominated by President Obama this month to fill the empty seat left by Justice Scalia's death, but the refusals by Senate Republicans to hold a hearing on the nomination had started even before he was named.

Political pressure and the strength of Judge Garland's qualifications have caused a couple of cracks in the Senate's stonewalling, however, so it might just be worth taking a look at Garland's First Amendment background. Luckily, in the midst of all the bloviating, there are a few folks who have focused on these issues, including the always-reliable Ron Collins at Concurring Opinions; also, check out NYU Law School's curated selection of Garland's opinions, these comments on his attitude toward journalists, and this article picking apart Garland's concurrences and dissents to see what he thinks when he's on his own.

In other news, while we've got some potentially interesting arguments coming up at the Court in April – including *Kirtsaeng II* on attorneys' fees in copyright cases and *Cuozzo Speed Technologies v. Lee* on USPTO reviews of patent validity – there wasn't much sign of media law at the Court in March. The Court decided one First Amendment case, *Friedrichs v. California Teachers Association*, with a one-line per curiam affirmance on a 4-4 split that clarifies nothing other than why a ninth justice would be helpful. And the hearing in the barely interesting *Microsoft v. Baker* on denials of class certification has been punted to the October Term, so if you were holding your breath, please let it out.

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Meanwhile, petitions for cert on media issues are being denied left and right. *EA v. Davis* on rights of publicity? Nah. Copyrightability of the Batmobile? Fuggedaboutit. Applicability of state anti-SLAPP laws in federal court (the *MEBO Int'l* case)? Nosiree Bob. Apple's price-fixing of eBooks? No love. First Amendment status of bus advertising? Who cares? (Well, Justices Thomas and Alito, apparently, but $1 + 1 \neq 4$.)

But, y'know, if you wanted a ruling on a narrow question regarding limitations of damages in design patent cases, they've squeezed in *Samsung Electronics v. Apple*. Again with the IP damages cases, huh? Sure, the numbers at issue are huge, but this one still fails to excite me.

Reporters' Privilege

We got most of the way through this month without a reporters' privilege issue, and then Bill Cosby showed up in S.D.N.Y. demanding that *New York* magazine to cough up notes on its interviews with the seven women suing him for defamation in the District of Massachusetts. The magazine is, naturally, resisting the demand.

But to make up for that, we saw a couple of good rulings at the end of the month. First, a Pennsylvania judge quashed a subpoena to Philadelphia Media Network for original documents allegedly leaked at the direction of AG Kathleen Kane. The judge invoking both the Pa. Shield Law and the constitutional reporters' privilege.

Then, the Eastern District of California held that Facebook doesn't, for the time being, have to cough up anonymous users' information to the Kazakhstan government in response to a miscellaneous subpoena related to a CFAA hacking case in S.D.N.Y. Because of the potential that the information could be used to crack down on reporters and their sources in Kazakhstan, and implications for reporters' privilege issues, the court held that the validity of such a demand should first be determined in the S.D.N.Y. action.

Defamation

New Cases

March: in like a lion, out like a loon. This month saw a whole bunch of defamation cases involving people who really need to get outside, enjoy the warm weather, and breathe some fresh air:

- A reputation management company was caught filing defamation claims in California on behalf of shell plaintiffs against non-existent defendants to secure judgments used to demand the removal of search results.
- The man allegedly behind a tickling fetish video production racket filed not one but two lawsuits against the producers of a documentary on the subject.

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- In D. Del., the embattled Central Bank of Venezuela filed an amended complaint in its bizarre claim that a website defamed the bank by publishing unauthorized dollar/bolivar exchange rates.
- A man who was kidnapped and tortured by a former Arizona beauty queen sued in Tennessee state court over his kidnapper's description of her crimes in a post-prison TV interview.
- The owners of El Taco Tako in Odessa, Texas, sued in state court over a viral video that they allege was faked to show a worm in their ground beef.
- In Arizona district court, the charmingly monikered game developer Digital Homicide sued a video game critic after an online spat over a YouTube review spiraled way, way out of control.
- A convicted killer is suing the author of a book about the Mafia in M.D. Pa., alleging that he was attacked after being falsely labeled as an informant.
- A self-published author didn't see the returns he wanted on his masterpiece, and according to his libel suit in S.D. Ala., it's all Google's fault, and Facebook's, and Amazon's, and that of more than other twenty other companies.
- A rapper sued TMZ over a case of mistaken identity, claiming that it was a different rapper that, shall we say, joined the cult of Cybele and leapt from a second-story balcony.
- A disgraced American University professor filed suit in D.C. Superior Court against media outlets who said he was imprisoned for arson, when in fact he had pleaded the charges down to burglary (with matches and lighters in his pockets).

Told you we had some weird ones this month. Oh, and let's not forget the fallout from 2013's battle of the shock jocks, as a case heads to trial in Florida involving Todd "MJ" Schnitt's legal fees for his defamation suit against Bubba "The Love Sponge" Clem (yes, *that* Love Sponge). And to top it off, Donald Trump burbled incoherently at WaPo's editorial board about his "thoughts" on libel (his "grasp" on cyber policy was likewise shaky).

One suit that definitely falls in the bonkers category deserves special mention. William Shatner (yes, *that* William Shatner) was sued for defamation in Florida, after he denied the plaintiff's claim to be Shatner's son. We at the MLRC have seen a few cases lately on this fact pattern (I accuse you, you deny it, I sue you for calling me a liar). These cases cry out for some sort of qualified privilege defense, which is usually how the law corrects for specific situations in which the basic elements of defamation produce undesirable results. Allowing lawsuits to proceed in these cases creates an imbalance in the marketplace of ideas by allowing the "first to market" to shut out others with the threat of a defamation claim. It's not good policy to allow

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public disputes of fact to be shunted into court in this manner, never mind that a denial doesn't usually equate to calling someone a liar and that harm is far more likely to result from the Streisand Effect.

In saner (if not necessarily meritorious) claims, we have an attorney in Dallas County district court suing over online statements the defendant allegedly posted to Ripoff Report; the attorney had previously represented a client suing the defendant for similar posts. Two radio hosts were sued in Kentucky for allegedly misidentifying the source of leaked information regarding the University of Louisville's planned response to a sex scandal involving its basketball team. A Massachusetts kennel sued the Worcester Telegram & Gazette over allegations of improper care; Massachusetts actually has appellate precedent on the subject. An Oregon woman sued Gawker over a 2007 article about her reasons for resigning from a position at Yahoo. (My copy of the MLRC 50-State Survey tells me there's a one-year statute of limitations there.) Finally, cartoonist Ted Rall has sued the L.A. Times over alleged blacklisting and defamatory statements following Rall's termination from the company.

Defense losses

Plaintiffs made headway this month in the trial courts, with several cases surviving dismissal. Speaking of suits over being called a liar, a judge in Cal. Super. held that Janice Dickinson's claim against Bill Cosby will go to trial, while in S.D.N.Y., a woman who claimed Jeffrey Epstein trafficked her for sex can continue her case against a British socialite who accused her of making up her story. In N.Y. state court, a Georgetown law professor will be permitted to proceed with his claim against the publisher of online magazine TheBlot, and a Jewish news website will have to defend its inquiry into whether an ultra-Orthodox Brooklyn resident was a "hero or a crook." In the Pennsylvania Court of Common Pleas, a realtor will be able to pursue CBS over a report that she planted dead animals in a neighbor's yard. And in E.D. Pa., a claim by Norman Mailer's ex-mistress over a tell-all book survived a motion to dismiss, as did a defamation claim in C.D. Cal. by N.W.A.'s former manager Gerald Heller over the film *Straight Outta Compton* (though his misappropriation claim was dismissed).

At the appellate level, a Loyola economics prof quoted by the *New York Times* as saying slavery was "not so bad" had his defamation suit reinstituted by the U.S. Court of Appeals for the Fifth Circuit. The Court held that the district court improperly resolved questions of fact when it dismissed the case under Louisiana's anti-SLAPP law. And in the Third Circuit, the court granted rehearing on a Philadelphia firefighter's lawsuit over the use of his stock photo image

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First Circuit: Claims Against Backpage Dismissed Under Section 230

By Jeffrey J. Pyle

February 8, 2016 marked the 20th anniversary of Section 230 of the Communications Decency Act. About a month later, the Court of Appeals for the First Circuit handed down its sweeping decision in *Doe v. Backpage.com*, demonstrating that the statute's broad prohibition on claims against Internet providers for content posted by third parties has lost none of its potency. *Doe* contributes to Section 230 jurisprudence by rejecting artful attempts to "end run" immunity by attacking a website's construct and operation, by relying on supposed misrepresentations about content moderation, and by asserting trumped-up intellectual property claims.

A. Hard Facts: The Exploitation of the Plaintiffs and Backpage.com.

Backpage.com is a classified advertising website, constructed much like Craigslist. The plaintiffs in *Doe* are three girls who were allegedly exploited by sex traffickers in Massachusetts and Rhode Island. According to their complaint, plaintiffs' pimps uploaded advertisements offering the plaintiffs for sex to the "escort" section of Backpage.com. Plaintiffs sought to hold Backpage.com liable for their exploitation because the ads were posted there.

Doe contributes to Section 230 jurisprudence by rejecting artful attempts to "end run" immunity.

The plaintiffs' central claim fell under the federal Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595, which imposes civil and criminal liability on anyone who "knowingly benefits, financially or by receiving anything of value from" a trafficking venture. 18 U.S.C. § 1595(a). By accepting money from individuals who published ads for "escort" services, Plaintiffs alleged, Backpage.com knowingly benefited from sex trafficking. Plaintiffs also sued under an analogous Massachusetts anti-trafficking statute, and brought other claims as well.

The plaintiffs acknowledged at the outset that Backpage.com did not author any of the content in the ads — either the plaintiffs or their pimps did so. That was a problem for the plaintiffs' case, of course, because Section 230 immunizes websites against claims that treat them "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). It also was not disputed that Backpage.com took extensive voluntary measures to filter and screen "adult" ads—exactly the sort of moderation that Section 230 was intended to incentivize.

The site not only employed an automatic filtering system to preclude ads with "red flag" terms, but also hired dozens of moderators to manually screen ads. Further, Backpage.com referred ads that possibly featured minors to the National Center for Missing and Exploited

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Children ("NCMEC"), and promptly responded to subpoenas from law enforcement. According to plaintiffs' 48-page complaint, however, these were merely "superficial" gestures in furtherance of Backpage.com's alleged "scheme" to facilitate sex trafficking.

Backpage.com filed a motion to dismiss invoking Section 230. The District Court (Richard Stearns, J.), allowed the motion, relying primarily on the fact that the ads about plaintiffs were uploaded by third parties, thus activating Section 230 immunity. *See Doe ex rel. Roe v. Backpage.com, LLC*, 104 F.Supp.3d 149 (D. Mass. 2015). The plaintiffs appealed to the First Circuit.

B. The First Circuit Rejects Plaintiffs' Attempt to "End Run" Section 230.

On March 14, 2016, the First Circuit affirmed in all respects, in an opinion written by Judge Bruce Selya and joined by Judge David Barron and Retired Supreme Court Justice David Souter, sitting by designation. *Doe No. 1 v. Backpage.com, LLC*, No. 15-1724, 2016 WL 963848 (1st Cir. Mar. 14, 2016). Fundamentally, the court ruled, plaintiffs' claims arose from the advertisements posted by the pimps, and thus plaintiffs' "trafficking" claims "treated" Backpage.com as their "publisher" within the meaning of § 230(c)(1). "[T]hird-party content is like Banquo's ghost," the court explained, "it appears as an essential component of each and all of the appellants' TVPRA claims." Consequently, the court affirmed Backpage.com's immunity from the claims: "Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers."

Like many courts before it, the First Circuit emphasized that websites displaying third-party content "may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content would have an obvious chilling effect in light of the difficulty of screening posts for potential issues." To protect websites from that chilling effect, and to encourage moderation, the court held Section 230 requires "a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party."

What follows are a few highlights of the Court's opinion:

1. A Website's Decisions Concerning its "Construct and Operation" Are Protected.

Plaintiffs' allegation that Backpage.com's posting rules and moderation practices encouraged sex trafficking, the court held, was simply another way of trying to hold it liable for third-party content. "We hold that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1). This holding is consistent with, and reaffirms, the principle that a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection." Many plaintiffs have tried to plead around Section 230 by arguing the website's policies and structure

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"encouraged" or "facilitated" harm. *Doe* will be helpful precedent in denying such evasion and thereby avoiding erosion of free speech on the Internet.

2. "No effect on criminal law."

Plaintiffs attempted to invoke an exception in Section 230 for "the *enforcement* of . . . any . . . Federal criminal statute." 47 U.S.C. § 230(e)(1). Plaintiffs were not claiming to be private attorneys general—rather, they argued that the exception should be read to encompass *civil* claims that are based on federal *criminal* statutes, because such private "enforcement" enhances government regulation. The First Circuit disagreed. The plain meaning of "enforcement of . . . any . . . Federal criminal statute" clearly "excludes civil suits," the court ruled. The title of the section, "no effect on criminal law," and the stated Congressional policy "to ensure vigorous enforcement of Federal criminal laws to *deter and punish*" illicit activities online, bolstered the conclusion. "Seen in this light, the distinctions between civil and criminal actions — including the disparities in the standard of proof and the availability of prosecutorial discretion — reflect a legislative judgment that it is best to avoid the potential chilling effects that private civil actions might have on internet free speech."

3. "Forged Entirely Out of Surmise."

Plaintiffs next argued that Backpage.com's *representations* about its moderation efforts were actionable, independent of the advertisements that allegedly caused plaintiffs' harm. They alleged that (a) because Backpage.com worked with and made representations to law enforcement and groups such as NCMEC to combat sex trafficking (actions Plaintiffs alleged were a ruse); (b) this "successfully deflected public scrutiny"; (c) thereby "lowering the supply-side transaction costs involved in sex trafficking online," which (d) allowed the "online sex market" to grow; and (e) this "expanded market ensnared the Plaintiffs"; (f) whereas, otherwise, the website might have been shut down altogether; and (g) Plaintiffs would have never been victimized by the pimps who recruited and abused them. The First Circuit held this "laboriously construct [ed]" chain of causation failed the *Iqbal/Twombly* plausibility standard, independent of Section 230. "When all is said and done, it is apparent that the attenuated causal chain proposed by the appellants is forged entirely out of surmise."

The First Circuit in *Doe* correctly resisted the temptation to make bad law out of hard facts.

4. Plaintiffs' Intellectual Property Claims Failed to State a Claim.

Finally, the Court rejected plaintiffs' attempt to invoke the Section 230 exception for claims "pertaining to intellectual property." 47 U.S.C. § 230(e)(2). Plaintiffs alleged that Backpage.com permitted their photographs to be published in third-party ads without their consent (or at least without *valid* consent, given their age at the time), thus infringing their right of publicity. The court disagreed.

It first noted in a footnote that it is not "free from doubt" that a state law-based, privacy-derived claim for unauthorized use of a picture amounts to an "intellectual property" claim

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subject to the Section 230 exception (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007). The court went on to hold that for liability to attach under Massachusetts and Rhode Island law, such a use must be for the defendant's commercial benefit, whereas the alleged unauthorized use in third-party advertisements was for the benefit of the advertisers (the pimps), not Backpage.com. The court also dismissed a copyright claim brought by Jane Doe No. 3 based on a "selfie" that she had taken and which her trafficker used in an ad. The court held that she had failed sufficiently to allege damages redressable under the copyright statute, or entitlement to an injunction.

Conclusion

The First Circuit in *Doe* correctly resisted the temptation to make bad law out of hard facts. The opinion is a resounding vindication of Congressional policy and Internet freedom, and should be helpful to Section 230 practitioners in the future.

Jeffrey J. Pyle and Robert A. Bertsche of Prince Lobel Tye LLP, with Jim Grant and Ambika Doran of Davis Wright Tremaine LLP, represented Backpage.com in the Doe case. John Montgomery, Ropes & Gray, Boston, represented plaintiffs.

Court of Appeals Affirms a Major Victory for Newspapers in Access to Records Case

By Jon L. Fleischaker & Michael P. Abate

On February 19, 2016, the Kentucky Court of Appeals issued an opinion which hopefully will put to an end bitter litigation between the two largest newspapers in Kentucky and the Kentucky Cabinet for Health and Family Services over access to records of children killed or severely injured as a result of abuse or neglect. *Courier-Journal v. Cabinet for Health & Family Services.* In that opinion the Court of Appeals affirmed a judgment for the newspapers ruling that the records were open to the public (with very limited minor exceptions) and affirming an award of attorney fees and a $756,000 penalty against the State for its willful effort to wrongly withhold the records from public scrutiny.

We could write a book about this case and the efforts of the Cabinet to avoid and evade the State Open Records case. Among the pertinent facts are the following:

In a ruling in 2010 on access to one case file, the trial court ruled that the Cabinet was required to disclose its records regarding Kayden Branham, a 20-month old infant who died while he and his teenage mother were in the custody and control of the Cabinet after drinking toxic chemicals in a methamphetamine lab. In that case, the Cabinet had taken the position that it had the unreviewable discretion to deny any requests for records in cases of child fatality and near fatality. Franklin Circuit Court disagreed. The court found the Cabinet's argument to be "contrary to the plain language of the Kentucky Open Records Act, which provides that '[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884'" (the Kentucky Open Records Statute). The Cabinet chose not to appeal that decision.

We could write a book about this case and the efforts of the Cabinet to avoid and evade the State Open Records case.

Despite the Franklin Circuit Court's ruling in the Branham Case, the Cabinet continued to deny open records requests for child fatality and near-fatality files. In response to the open records requests at issue in this case—which sought all of the Cabinet's internal fatality reviews and underlying case files for a two year period—the Cabinet's General Counsel sent each requester a letter on January 21, 2011 stating that the Cabinet had no obligation to disclose such records, notwithstanding the Franklin Circuit Court's prior ruling to the contrary. The Cabinet also issued new "emergency" regulations that would have "severely limit[ed] information the Cabinet would release in fatality and near fatality cases."

The Cabinet issued "emergency" regulations authorizing non-disclosure of the records, but after being challenged allowed so-called "emergency regulations" to lapse. The Cabinet then attempted to remove the case to federal court, "arguing unsuccessfully that Plaintiffs' Open

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Records requests presented issues controlled by federal law." R. 557 (*Id.*). The U.S. District Court for the Eastern District of Kentucky disagreed, remanding the case back to state court.

Once back in state court, the Cabinet continued to argue that it was not bound by the Franklin Circuit Court's prior ruling. For months, it declined to produce any case files, or to even attempt to provide a specific list of privilege claims, as required by the Open Records Act.

On November 3, 2011, the Franklin Circuit Court granted summary judgment to the Plaintiffs and ordered the Cabinet to disclose records in cases of child fatalities and near fatalities. Among other things, the court held that the Cabinet "is bound by *res judicata* to the judgment in the first lawsuit."

The Cabinet immediately sought modification of the court's order, asking the court to declare that it had "fully complied with its obligation [s]" under the Open Records Act by providing "heavily redacted" versions of the internal fatality reviews required by the law. It also asked the court to approve a proposed "redaction protocol" that was to be applied to the underlying case files, and to prohibit the Plaintiffs from challenging any redactions made by the Cabinet under that proposed protocol.

The Cabinet continued to resist full disclosure even after the Governor's 2011 pledge to release state records.

The court refused that request, declaring the protocol "inadequate and unreasonable" because it would have allowed, among other things, the redaction of all "names of relatives and other information," including "the names of parents or guardians who are charged with a crime related to the allegations of child abuse or neglect, even though the criminal charges are public."

Instead, the Court allowed the Cabinet to make "some limited redactions" to its files as it produced them.

The Court ordered the Cabinet to keep a redaction log showing its deletions and supporting them with specific claims of statutory privilege. It also made clear, however, that Plaintiffs would "be given an opportunity to challenge all redactions, and if such a challenge is made, the Cabinet will bear the burden of proof to sustain all redactions, as required under the law."

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Rather than producing redacted case files and explain the basis for its deletions in a redaction log—which is what the Open Records Act demanded of the Cabinet all along—the Cabinet appealed and unsuccessfully sought a stay of *any* disclosure obligation, first from the Court of Appeals, and then from the Supreme Court. Both courts refused to set aside the circuit court injunction. The January 19, 2012 Order remained in effect. That Order was ignored by the Cabinet for over 15 months.

When it finally began producing documents in response to the Court's January 19, 2012 Order, the Cabinet used the very same redaction protocol which had been expressly rejected by the court. The Cabinet delegated the application of that protocol to numerous different employees without giving them any written guidance or training on how to interpret or apply it in specific cases.

The results of this haphazard process can only be described as irrational and unlawful. For example, the court found the Cabinet made countless redactions under the "clearly unwarranted invasion of personal privacy" exception "without any regard as to whether these 'protected' persons had spoken publically, participated in criminal proceedings, or whether the redacted information had otherwise been made public." As the court noted, these wholesale privacy redactions violated Kentucky law, which makes clear that "the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context.'" The Cabinet even redacted information from *public documents* appearing in its own files, such as press releases, published obituaries, police reports, criminal complaints, arrest warrants, court judgments, and criminal history reports.

The Cabinet made countless redactions under the "clearly unwarranted invasion of personal privacy" exception.

The Cabinet also redacted countless substantiated and unsubstantiated reports of abuse and neglect from the Case files. Likewise, it deleted documents it deemed, without explanation, to be "unrelated" or "duplicate." The withheld documents amounted to thousands of pages. It also withheld entire case files simply because a prosecutor asked it to do so—including in one case where the parent had been convicted of murder and successfully appealed her conviction to the Kentucky Supreme Court. Finally, the Cabinet continued to withhold records under the Health Insurance Portability and Accountability Act ("HIPAA"), even though the circuit court held in the prior case that HIPAA "does not apply to these records" and the Cabinet declined to appeal that ruling

In many cases the Cabinet redacted information and cited bases which were not addressed in its own the Protocol at all. In addition, there was much information that was not noted on the Cabinet's redaction log, but was still removed for unexplained reasons from the case files. After a three-day hearing, supplemented by depositions, the court found that "[i]t became

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apparent in the hearing that the 'detailed redaction log' did not represent a good faith attempt to justify the redactions on an individual basis, but rather was a post-hoc blanket application of the wholesale redaction policy that had been previously rejected by this Court."

The hearing was held to give the Cabinet an opportunity to defend its redactions. The Cabinet failed to call even a single witness with personal knowledge of the redactions. Instead, it offered an official witness who had been designated by the Secretary as the "responsible official of the Cabinet for implementation of [the] Court's orders," but who testified that she: (1) had no involvement in developing the redaction protocol; (2) played no role in implementing the redaction protocol in specific cases; and (3) *had not reviewed even a single file* for in preparation for the hearing to ensure that it complied with the Open Records Act or the court's prior orders.

The Cabinet also offered testimony from the Commissioner of the Department for Community Based Services (DCBS), as well as a number of case workers involved in the twenty sample files examined during the hearing. Each of those social workers stated that they had no idea what information had been released, and what had been withheld.

The Franklin Circuit Court issued a 56-page Opinion and Order on December 23, 2013. That Order held that the Cabinet's conduct over the course of this litigation "makes a mockery of the statutory command that 'free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.'" The court also held that "[t]he Cabinet's conduct demonstrates that it will not comply with the plain requirements of the Open Records Act, except in response to significant judicial sanctions."

The court noted that it was "willing to consider individual claims of exemption, however the burden *is on the Cabinet* to demonstrate that the documents should be non-public." Reviewing the record amassed at the hearing, the court repeatedly held that the Cabinet had not justified *any* of its redactions because it "utterly failed to provide any case specific factual basis to support such redactions in the 140 Case files at issue in this case." It also criticized the Cabinet's "habitually narrow reading of KRS 620.050(12)," which permits the Cabinet to avoid its open records responsibilities by classifying fatalities as being unrelated to abuse or neglect.

The court then found that the Cabinet's violation of the Open Records Act was willful because "[t]he Cabinet has intentionally continued to employ a wholesale blanket approach to withholding public records, despite such approach being prohibited by the Open Records Act and contrary to this Court's repeated Orders to support any and all redactions by case by case analysis." It therefore granted the Plaintiffs leave to seek a supplemental award of costs and attorneys fees.

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In addition, the court awarded statutory penalties to the Plaintiffs under KRS 61.882(5), which permits a court to "award the person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record." The court imposed a penalty of only $10 per day for each day the files had been withheld, excluding the period of time when the Court of Appeals had administratively stayed the case while considering the Cabinet's motion for interlocutory relief. The total penalty awarded the newspapers was $756,000.

The Cabinet asked the circuit court to stay its mandatory disclosure order pending appeal, but the circuit court denied the request, holding that the Cabinet "presented no evidence that full compliance with the Court's injunction will cause injury or harm." The Court also concluded that "increased public disclosure leads to greater public awareness of this urgent social problem, and to positive executive and legislative action."

At that point, the Cabinet could have sought injunctive relief from the Court of Appeals. Instead, and in order to "avoid the time and expense of redacting the documents," the Cabinet handed the complete, unredacted files over to Plaintiffs.

In Dec. 2013, the judge hit the Kentucky Cabinet for Health and Family Services with a $756,000 fine for making "a mockery" of the state's Open Records Act

On appeal, the Court of Appeals affirmed the judgment of the circuit court in all respects and remanded the case to the circuit court to consider an additional attorney fees award.

Regarding the substantive issues relating to access to the Cabinet's records, the court had no difficulty in ruling that as a result of the Cabinet's release to the newspaper of all the records at issue, the case was moot. In sum the court found that:

Considering the highly fact-specific nature of the circuit court's judgments and orders, as well as the unique and egregious facts present in this case, we do not believe the Cabinet has demonstrated a "likelihood of future reoccurrence of the question."

The remainder of the court's opinion deals with the award of attorneys' fees, costs and penalties. Under Kentucky law:

> Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the

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> records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.
>
> * * *
>
> Willful action "connotes that the agency withheld records without plausible justification and with conscious disregard of the requester's rights.

After reciting the circuit court's detailed and lengthy decision on the issue of willfulness, the Court of Appeals affirmed the award of attorney fees, costs and statutory penalties.

> The express object and policy of the Open Records Act is to serve the public's interest in the "free and open examination of public records." KRS 61.871. This intent is served not only by a limited reading of exceptions to such a rule, as required under KRS 61.871, but also by liberal reading of those provisions aimed at the meaningful punishment of those who willfully obfuscate the public's ability to examine non-exempt records. Reading KRS 61.882(5) liberally and in conjunction with this policy as expressed throughout the Open Records Act, the trial court's interpretation and application of that statute in light of the Cabinet's conduct was entirely reasonable. Hence, the Franklin Circuit Court's award of attorneys' fees and costs fell within its discretion; and its imposition of penalties against the Cabinet survives even a non-deferential review.

The Court of Appeals concluded its opinion as follows:

> The penalty we affirm is a substantial one. Substantial, too, is the legal obligation the Cabinet owed the public and the effort it expended in attempting to escape it. While it will ultimately be the public that bears the expense of this penalty, we maintain that the nominal punishment of an egregious harm to the public's right to know would come at an even greater price.

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> The Cabinet's conduct in this case was indeed egregious. The face of the record reveals the "culture of secrecy" of which the trial court spoke; and it evinces an obvious and misguided belief that the Open Records Act is merely an ideal – a suggestion to be taken when it is convenient and flagrantly disregarded when it is not. We could not disagree more. "Publicity," Justice Brandeis tell us "is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1913).*
>
> In sum, we affirm the trial court, but we also echo its exasperation at the Cabinet's systematic and categorical disregard for the rule of law – both as codified in the Open Records Act and as handed down by the Franklin Circuit Court. The Open Records Act is neither an ideal nor a suggestion. It is the law. Public entities must permit inspection of public records as required or risk meaningful punishment for noncompliance. Rigid adherence to this stark principle is the lifeblood of a law which rightly favors disclosure, fosters transparency, and secures the public trust.

It remains possible for the Cabinet to seek review by the Kentucky Supreme Court.

Jon L. Fleischaker and Michael P. Abate, Dinsmore & & Shohl LLP, Lexington, KY, represented The Courier-Journal in this case.

Recent MLRC Publications

Articles and Reports on Significant Developments
Online Media Protection in California; Newsgathering and Drones: A Year in Review; True Threats and the First Amendment; A Book's Profits as a Remedy for Defamation? And Other Interesting Issues Raised by Ventura v. Kyle; Jordan Litigation Fouls First Amendment Defense; To Give Fees Or Not To Give Fees, That Is The Question (With A Different Answer In Every Circuit): The Circuit Split Over Attorneys' Fees Awards Under the Copyright Act

International Media Law Developments
Why Reading The First Amendment Isn't Easy; To Confront The Assassin's Veto, Or To Ratify It?; Hate Speech Under German Law; Canada: A Middle Ground On Hate Speech?; Speech Offences In England And Wales; Restriction Of Freedom Of Press Under Turkish Media Law; Developments In Ireland; Press Regulation In The United Kingdom; Data Privacy In The United States

Model Policy on Police Body-Worn Camera Footage
Several federal, state, and local bodies are presently considering policies regarding public access to police body camera recordings. The MLRC has developed and adopted a Model Policy on this topic, which states that such tapes should generally be available for public inspection, subject to exemptions in existing public records laws. A set of principles is also offered as a guide for legislators and policy-makers.

NJ Court Says Open Records Law Does Not Extend to Out-of-State Requesters

Judge Stresses Economic Burden of Complying With Requests

By Raymond Baldino

Harry Scheeler v. City of Cape May, decided February 19, 2016 by a New Jersey trial court, held that the State's public records law, the Open Public Records Act ("OPRA"), does not extend to out of state, non-citizen requestors. The Court did not mince words in denying standing to North Carolina resident Harry Scheeler to request records under OPRA - describing Scheeler as an "out-of-state gadfly" who "repeatedly bombard[ed] local governments with demands to produce public records", also calling Scheeler "rude, bellicose [ ]obnoxious" and "bullying." Thus, the Court reasoned that OPRA, whose provisions require that it must be "construed in favor of public access", nonetheless does not extend to the broader, non-New Jersey public to include Scheeler, an "obnoxious" OPRA activist.

Scheeler is indeed a vociferous and pugnacious records requestor, who maintains a blog under the self-explanatory URL www.opracrusades.com. There, he describes himself as an "open government activist", and writes about corruption and waste in New Jersey, which is Scheeler's place of former residence. He is the plaintiff in numerous open records matters in New Jersey, including the case *Scheeler v. Office of the Governor*, in which Scheeler sought production, from the Office of the Governor and other State agencies, of the OPRA requests filed by others regarding the George Washington Bridge -- i.e., the "Bridgegate" scandal implicating Governor Christie's administration. That matter was decided in Scheeler's favor, and is currently on appeal.

Scheeler is a vociferous and pugnacious records requestor, who maintains a blog under the self-explanatory URL www.opracrusades.

As the *Scheeler v. Cape May* Court noted, Scheeler certified that he "'file[s] approximately 100 OPRA requests or more' each year". In this case, Plaintiff had requested from Cape May certain records, "primarily with regard to government spending on legal services by the City." He sued to challenge the City's denial of access (though some records were provided), and the City argued that Scheeler lacked standing to sue as a non-citizen requestor.

Predictably, the 2013 United States Supreme Court Decision in *McBurney v. Young* loomed large as background for Scheeler v. Cape May, however it was not, ultimately, the Court's basis for reaching its decision, which rested solely on statutory construction, and not Constitutional law. Nonetheless *McBurney* overruled authority that previously required that Scheeler be

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permitted to use OPRA, even as a non-citizen. The Supreme Court case upheld Virginia's restriction of its FOIA law to "citizens only" in the face of a Constitutional challenge. Prior to *McBurney v. Young*, the Third Circuit had invalidated such a "citizens only" restriction under Delaware's open records law in *Lee v. Minner*, 458 F. 3d 194 (3d. Cir. 2006), and further, New Jersey's 2009 Attorney General's Position had been that OPRA requestors did not need to be citizens of New Jersey.

McBurney v. Young also held that the exclusion of out of state requestors under Virginia's FOIA was not unlawful under either the Privileges and Immunities clause or the Dormant Commerce Clause of the U.S. Constitution. The Supreme Court reasoned that any burden created by the "citizens only" provision on an out of state requestor was only "incidental", and thus did not violate the Privileges and Immunities clause of the U.S. Constitution; further, Virginia's restriction did not "regulate" or "burden" interstate commerce, and therefore was not offensive under the Dormant Commerce Clause.

Such questions of economic burden pervaded the New Jersey Court's rejection of Scheeler's right to request records under OPRA as an out-of state requestor. However, in a telling sign of *McBurney v. Young's* impact, rather than focus on the burden on the out of state requestor, the Court instead focused on the burden placed on the government. It emphasized the perceived outrageousness of Scheeler's conduct: "Plaintiff's truculence is palpable; his penchant for rebuke is totally inappropriate…It is inconceivable that the [legislators] would find Plaintiff's badgering tactics to be reasonable requests." While such observations would be of little importance for a New Jersey requestor using OPRA, where established doctrine holds that the purpose of an OPRA request is generally irrelevant, the Scheeler v. Cape May Court relied on such reasoning heavily in applying them against an out of state requestor, stating:

> [W]hy should Plaintiff, a non-New Jersey resident, who does not pay taxes within the State of New Jersey or the City of Cape May reap the benefits of a similarly situated citizen? What is more, why should Plaintiff, who is not affected by New Jersey or Cape May's political process, be entitled to the records at issue? And finally, it is likely that the Legislature intended that the City should be compelled to continue its exchange(s), and have the burden to continually explain its position and be required to satisfy multiple inquiries of a non-resident gadfly?

Ultimately, the Court's reasoning was premised on statutory construction, and its rejection of the argument that OPRA, which both expanded the reach of the State's open records law over its predecessor the Right-to-Know-Law ("RTKL") and gave the open records law

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"teeth" (greater enforceability), had also abrogated the standing requirements of the RTKL, which required N.J. citizenship in order to place requests. The Court rejected Plaintiff's argument that the phrase "any person", which appears repeatedly under OPRA's provisions in describing those who place records requests, should be interpreted to mean that OPRA was intended to be used by "any person", and not just New Jersey citizens. For example, in describing the responsibilities of government agencies under the statute, OPRA states that: "[t] he custodian of a government record shall permit the record to be inspected, examined and copied by *any person* during regular business hours." N.J.S.A. 47:1A-5(a). (emphasis added).

Despite this "any person" language, and despite the requirement under OPRA to construe its provision "in favor of public access", the Court focused instead on the initial precatory language to OPRA in order to reach the opposite conclusion about the law's meaning. This precatory language states that "The Legislature finds and declares it to be the public policy of this State that government records shall be readily accessible for inspection, copying, or examination *by the citizens of this State*". (emphasis added).

The New Jersey Supreme Court has held that this precatory section of OPRA is "neither a preface nor a preamble" and, in the context of the sections mandate for government entities to safeguard a "citizen's reasonable expectation of privacy", N.J.S.A. 47:1A-1, held that such language created a privacy exemption under OPRA. However, despite the *Scheeler v. Cape May* court's reading of this precatory language, while it specifically discusses a responsibility for agencies to safeguard privacy, it does not specifically discuss non-citizen requestors being barred from using OPRA. Reliance on the precatory language as a justification for a "citizens only" restriction under OPRA appears weaker than the case that the precatory language creates a privacy exemption.

The Court also considered the legislative history and found that it did not support the proposition that the legislature had intended to expand OPRA to abrogate the citizenship requirement present in its predecessor RTKL. But the Court was not shy of criticizing Scheeler and certainly did not limit its considerations to statutory construction alone. The Court noted, "presently before the Court is a non-citizen Plaintiff who, by his own admission, files 100(+) [sic] OPRA requests per year. Sitting in the comfort of his home hundreds of miles away in North Carolina, Plaintiff types a note at his keyboard, and with the click of his mouse submits an email making demands upon the City Clerk." It then asked, is it fair for such an individual to wield the considerable power of New Jersey's open records law, OPRA, a law greatly expanded in terms of its reach, and with considerably greater "teeth" to be felt by the New Jersey agency?

In the opinion of the *Scheeler* Court, no.

Raymond Baldino is a New Jersey attorney and member of the MLRC Next Gen Committee.

MLRC Miami Conference on Hispanic and Latin American Media

On March 7, approximately 70 lawyers from North and South America gathered at the University of Miami School of Communication for a day of discussion and debate on Legal Issues Concerning Hispanic and Latin American Media.

The keynote address was delivered by Ricardo Trotti, the head of press freedom programs at the Inter-American Press Association, on "Ideology, Power and Freedom of the Press in Latin America," which surveyed press freedom trends in Latin America. (We are pleased to publish the full text of his speech in this issue of the *MediaLawLetter.)*

Ricardo Trotti

Building on the keynote, our first panel was on Press Freedom in Cuba, moderated by Adolfo Jimenez, Holland & Knight LLP; featuring Carlos A. García-Pérez, former Director, Office of Cuba Broadcasting; Earl Maucker, former editor of the Sun-Sentinel and former president of IAPA; Frances Robles, New York Times; and Jose Luis Martinez, Communications Director, Foundation for Human Rights in Cuba.

They discussed examining whether the restoration of diplomatic relations between Cuba and America after more than a 50 year break, has affected press freedom and human rights in Cuba. They also discussed the continuing challenges faced by independent journalists in Cuba and the workarounds used to access news and information.

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Cuba panel, left to right: Earl Maucker, Frances Robles, Carlos Garcia-Perez, Jose Luis Martinez

Olympic panel, left to right: Johnita Due, Roxana Kahale, Prof. Lidsky, Paula Mena Barreto

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They also looked at the ongoing challenges for American reporters to gather news and information in Cuba – especially in connection with President Obama's visit to Cuba.

Our next panel was on Jogos Olímpicos de Verão de 2016 – the upcoming Summer Olympics in Rio. Among other things, the panel considered intellectual property, newsgathering and content challenges in reporting on the world's largest live sporting event. Deanna Shullman, Thomas & LoCicero LLP moderated discussion between panelists Paula Mena Barreto, Barbosa Mussnich Aragao, Rio de Janeiro, Brazil; Roxana Kahale, Kahale Abogados, Buenos Aires, Argentina; Professor Lyrissa Lidsky, University of Florida School of Law; and Johnita Due, CNN, Atlanta.

Our last session was a group discussion of a hypothetical cross-border reality television deal led by Jose Sariego, adjunct Professor Media Law, University of Miami School of Law, and partner at Bilzin Sumberg LLP; and John Aguilar Quesada, Aguilar Castillo Love, San Jose, Costa Rica. Relying on expert discussants from Argentina, Brazil, Colombia and Mexico they discussed copyright protection in formats; use of social media in promotion; moral rights issues; and remedy issues when deals go bad.

The conference ended with a reception sponsored by the McClatchy Foundation, Miami Herald and el Nuevo Herald. We thank all our conference sponsors for their support – and the University of Miami for hosting the event.

Ideology, Power and Freedom of the Press in Latin America

By Ricardo Trotti

When Dave Heller and Adolfo Jimenez invited me to speak about media, law and ideology, I rehearsed a question: Is press freedom threatened by the ideology of the government?

My answer is NO.

The threat does not depend on the orientation of the government – whether liberal, conservative, progressive, left or center – but on its authoritarian character instead.

Pinochet or Castro and Fujimori or Chavez, show that ideology does not make a difference.

Governments will always try to block information that is not positive to them. The difference is in the level of censorship they practice.

In Latin America, after the dictatorships, we thought that democracy would solve everything. We were wrong.

Later we thought everything would change with the neoliberal governments. We were also wrong.

Then we thought it would be better with progressive governments. They promised to democratize communication. Yet again, we were wrong.

Now there is another ideological trend. It began with Macri in Argentina, with the defeat of Maduro in Congress in Venezuela and Evo Morales in the referendum in Bolivia; and Correa will not stand for re-election in Ecuador.

Hopefully this time freedom of the press will prevail.

However, we must recognize we achieved great progress.

In many countries, criminal defamation laws, libel and slander were decriminalized, as well as insult laws.

Criminal defamation was repealed in Argentina, Panama, El Salvador, Costa Rica, Grenada, Jamaica, Bermuda and partly in Chile and the Dominican Republic, in the latter case just last week.

Insult laws disappeared from Argentina, Bolivia, Costa Rica, Guatemala, Honduras, Panama, Paraguay, Peru and Uruguay.

However, in Ecuador and Venezuela actions based on contempt have worsened, further protecting presidents as if we lived in monarchies.

Mandatory licensing for journalists have been phasing out in many countries after a decision by the Inter-American Court of Human Rights of 1985. It also happened with the compulsory right of reply; although today this weapon has been renewed and is

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being used by President Correa through the Communication Act to punish the Ecuadorean media.

On a positive side, with IAPA we have awakened an important trend in Latin America. In 2001 we promoted and supported the enactment of the Access to Information and Transparency Act in Mexico. After that, other countries followed: Peru, Bolivia, Brazil, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Dominican Republic, Uruguay and many countries of the English Caribbean. Last week in his speech before the Argentine Congress, Macri announced he will soon send the bill to Congress, a tool, he said, to fight corruption.

We know these laws are not the only tools to fight corruption. Sometimes they are not effective and they should improve with practice and time. In this country, for example, the sunshine laws are alive and useful, but they require continuous advocacy to be effective.

In Latin America we still need to go a long way to build an open government culture. Media and law need to empower citizens to discuss important issues.

We know that societies react differently, depending on the degree of openness and discussion they can engage.

In this country, for instance, the case of the FBI v. Apple for the content of an iPhone follows an interesting debate in the Congress, who will have to make new decisions on new topics that technology is bringing to our table. The open discussion is about principles of similar value: National security, right to privacy and the right to not disclosure our sources as media companies.

To the contrary, in Brazil, in a similar case, a Facebook executive was incarcerated after refusing to give information requested by a judge about the content of messages on Whatsapp.

On the other hand, populists' governments such as Chavez & Maduro, Correa, Morales, Ortega, and Kirchner were very smart to silence the press. They convinced people that the media outlets are political opponents and enemies of the poor; and, as such, they should be treated.

To make media more "democratic", they disempower it, in the same way as they disbanded unions, the Congress and the judiciary.

They succeed in their communication strategy: They first confronted the media and journalists. Then, they exacerbated propaganda and manipulated reality. Later on, they enacted laws to censor the media legally, as the Communications Law in Ecuador, the Social Responsibility in Venezuela or the Media Law in Argentina. They censored independent media, created their own networks and bought others through front men.

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Today in many countries, media concentration is not a problem of the private sector, but of the government. They did not create public media, but propaganda organs.

In a recent trip to Washington we visited the OAS, the Commission on Human Rights, and the World Bank to get support against the Communication Act of Ecuador, which allows the figure of media lynching, criminal defamation, the compulsory right of reply and it has defined information as a "public service". This means that the government can manage information as if it were water, electricity, or public health. Correa has already fined more than 200 media, several have been forced to close down. He recently sued a cartoonist and before El Universo and a columnist for $40 million. A judge sentenced them to three years in prison, suspended afterwards, due to international pressure.

Laws are not the only way to attack media. The governments of Venezuela and Ecuador are not renewing the overdue operating licenses of thousands of radio and television stations. The intention is clear. Media that criticize the government are threatened that they will be shut down by operating illegally.

Freedom of the press cannot be taken for granted, even in this country. Transparency in the government of Barack Obama has been very dark - we just need to remember the complaints by Snowden and Assange - and now we must pay attention to the threats by Donald Trump.

Ten days ago, after naming practices of bad journalism by The New York Times and The Washington Post, Trump said that if they write "purposely negative", he'll open up libel laws "so we're going to sue you like you never got sued before; and we'll win a lot of money."

Obviously, Trump will have to try to undo the New York Times v Sullivan case and the rule about "actual malice" in order to reach his goal, something that will likely and hopefully not happen.

I know we should not be alarmed by these sarcasms. However, remember that similar mockeries by Chavez became real.

This shows that freedom of the press requires a permanent attention. In our recent trip to DC, we learned that a couple of members of the Inter-American Commission on Human Rights are questioning the Declaration of Principles on Freedom of Expression. They do not believe that officials should be more tolerant to criticism and that the protection for the reputation should be for civil proceedings only.

The Inter American system, as well as democracy, is not perfect, and we know that when justice is slow, it is not justice. Nevertheless the Inter American system is the last shelter to find justice.

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This is important in the fight against crimes against journalists. More than 400 killings occurred in the last 20 years, but the worst thing is that 95% of those cases are unpunished.

Through IAPA we have been fighting hard against this phenomenon. We have achieved legal reforms such as the federalization of crimes in Mexico and perhaps in Brazil; stiffening of penalties and the extension of the statute of limitation in Colombia or the creation of special prosecutors' offices in Guatemala and Honduras, in addition to the creation of systems to protect reporters.

It seems nothing is working.

Now, our greatest hope is focused in our litigation against the State of Colombia before the Inter American Court on Human Rights. We are confident that the Court will rule in our favor on the case of Nelson Carvajal, a Colombian journalist killed 19 years ago. Hopefully the Court will force the Colombian government to financially and morally repay the victims and society.

This ruling will create significant precedents throughout the Americas to combat impunity and violence.

Finally, we, journalists and media lawyers, have some responsibilities.

Journalists must investigate in depth. Watergate, Spotlight, vladivideos during the government of Fujimori, smuggling of arms to Ecuador, corruption in Petrobras in Brazil, the recent fall of the government of Pérez Molina and Baldetti in Guatemala, were responses to allegations made by investigative journalism. Journalism empowers citizens, who through social networks and the Internet, generate additional pressure for needed social change, more justice and less corruption.

Media lawyers have an obligation to be proactive, not reactive, and seek ways to shield and protect journalists, such as the federal shield law we need in this country to protect sources and avoid more journalists from going to jail.

Media lawyers should commit to organizations such as the Media Law Resource Center and the IAPA. We need your help, sometimes to better understand our legal system, and sometimes to write amicus briefs (PLEASE, all pro bono). Not only does Uncle Sam need you, but we need you too.

Journalists and lawyers should be supportive, and speak out, as does IAPA, on important issues such as the new relationship between the US and Cuba. We begged both governments, with no luck whatsoever, that free expression and free press should be a substantial issue in their common agenda, so dictators will not get away with murder as they did for the last 50 years.

As I said at the beginning, freedom of the press is deeply related to the authoritarian level of a government. Ideologies are irrelevant.

Thank you.

Canadian Court Recognizes Publication of Embarrassing Private Facts Tort

By Ryder Gilliland and Thomas Lipton

On 21 January 2016, in *Doe 464533 v. ND* (2016 ONSC 541) the Ontario Superior Court of Justice recognized, for the first time in Canada, the privacy tort of "publication of embarrassing private facts".

This is the second time in the last few years that the Ontario courts have borrowed from the American *Restatement (Second) of Torts* to create privacy-related torts. The first instance was in the leading case of *Jones v. Tsige*, in which the Ontario Court of Appeal recognized for the first time a new tort called "intrusion upon seclusion" that it adopted from the American *Restatement (Second) of Torts*.

While it remains to be seen whether the "publication of embarrassing private facts" will gain traction in Canada, the case signals an increasing willingness on the part of Canadian courts to find civil liability for privacy breaches.

Jones v. Tsige: Canada's First Privacy Tort

In 2012, the Ontario Court of Appeal broke new ground when it recognized the tort of "intrusion upon seclusion" in *Jones*. In that case, a man's girlfriend used her credentials as a bank employee to access his ex-wife's bank account at least 174 times over several years. The ex-wife sued upon becoming aware of the breach (Note: the Inforrm case comment here).

The Ontario Superior Court of Justice recognized, for the first time in Canada, the privacy tort of "publication of embarrassing private facts".

Although Canadian courts had previously chosen not to recognize a civil tort for invasion of privacy, the court in *Jones* broke with precedent and recognized the new tort: "intrusion upon seclusion". The court essentially adopted the *Restatement (Second) of Torts*' definition of the tort's elements: (1) an intentional or reckless intrusion; (2) upon the private affairs of another; (3) without lawful justification; (4) if a reasonable person would view the intrusion as highly offensive causing distress, humiliation, or anguish. Importantly, the court held a plaintiff could succeed on an intrusion claim without showing actual economic losses and win up to C$20,000 in damages.

Jones was successful, and was awarded C$10,000.

The "intrusion upon seclusion" tort has since been recognized, at least provisionally, in other Canadian jurisdictions such as Nova Scotia and Newfoundland. Several class actions have been filed asserting intrusion upon seclusion as a cause of action.

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Doe 464533 v. ND: An Ontario Court Recognizes Another U.S. Privacy Tort

In January 2016, Ontario courts have again drawn from the American *Restatement (Second) of Torts* to create a new privacy tort in Canada.

In *Doe 464533 v. ND* (2016 ONSC 541) the Ontario Superior Court found civil liability for the online publication of an intimate video by an ex-boyfriend.

The plaintiff and the defendant were young adults who had had an on-again, off-again romantic relationship. The defendant spent several months coaxing the plaintiff to send him a sexually explicit video of herself. Eventually, the plaintiff created such a video and sent it to the defendant after he promised he would not share it with anyone. The same day, the defendant posted the video to an internet pornography site and showed it to several of the plaintiff's acquaintances. The video was taken down after being online for about three weeks. It is not known how many times the video had been viewed or downloaded, whether it had been copied onto storage devices, or if it had been otherwise recirculated.

In its default judgment ruling, the court relied heavily on the leading decision of the Ontario Court of Appeal in *Jones*. The court decided the facts of this case did not fit the tort of "intrusion upon seclusion", but rather fit into a second privacy tort recognized in the United States called "publication of embarrassing private facts."

The case signals an increasing willingness on the part of Canadian courts to find civil liability for privacy breaches.

The court defined the new tort as (1) publicizing a matter concerning the private life of another, (2) if the matter publicized or the act of publication is highly offensive to a reasonable person and (3) the matter is not of legitimate public concern. Private matters protected by the tort could include sexual relationships, family quarrels, or humiliating illnesses. The disclosure of the private facts must be a public disclosure — meaning the disclosure must be to the public at large, as opposed to a private disclosure to a small group. The facts disclosed must be private facts — meaning not facts that are generally known. The court noted that although private facts in the Internet and social media age are increasingly rare, they remain worthy of protection.

The court held the plaintiff had proven this cause of action, by showing that the defendant had posted an intimate video of the plaintiff on the Internet without her authorization, which a reasonable person would find to be highly offensive, and because there was no legitimate public interest in the video.

The court awarded the plaintiff C$100,000 in damages, which is the maximum available under Ontario's *Simplified Procedure Rules*. The court also awarded the plaintiff full indemnity for her legal fees.

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Ontario Following U.S. Lead on Privacy Law

The *Doe 464533* decision leaves open questions respecting the scope of the "publication of embarrassing private facts" tort. Along with *Jones v. Tsige*, however, the case appears to signal an increasing willingness to expand the scope of privacy torts in Canada and to follow the United States in doing so.

It is not surprising to see the increased recognition and use of privacy torts in Canada. The recent trend in Canada follows more established trends in other jurisdictions. In the U.K., notably, privacy claims have risen markedly since the turn of the century. What is surprising is that rather than take their historical path and follow the U.K. common law, Canadian courts have taken their guidance from the American *Restatement (Second) of Torts*.

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Texas Has Personal Jurisdiction to Hear Libel Suit vs. Mexican Broadcasters

Signal Bleed Plus Sales of Ads in South Texas Sufficient to Exert Jurisdiction

The Supreme Court of Texas affirmed that a cross border defamation case against two Mexican broadcasting companies and a Mexican television personality can be heard in Texas state court based on defendants' purposeful availment of the Texas market. *TV Azteca, S.A.B. de C.V. v. Trevino Ruiz*, No. 14-0186 (Tex. Feb. 26, 2016). The combination of signal bleed, sale of advertising in Texas, and promotion in Texas, were enough to constitute purposeful availment.

Background

The plaintiff, commonly known as Gloria Trevi, is a Mexican pop singer who currently lives in Texas. She is often referred to as "Mexico's Madonna." In the 1990s, she was the subject of a huge scandal – charged with procuring underage girls who were sexually abused by her then manager/husband. Trevi and her husband were the subject of an international manhunt. She was arrested in Brazil and held in custody there and in Mexico for over four years. She was ultimately acquitted and released. After her acquittal, she married her defense lawyer and moved to Texas. On the ten year anniversary of the scandal, various Mexican broadcasters aired stories revisiting these events.

Gloria Trevi, "Mexico's Madonna"

Trevi sued for defamation in a Texas court, and certain of the defendants—TV Azteca and Publimax, both Mexican broadcasting companies with no physical presence in the United States, and Patricia Chapoy, a Mexican citizen and TV anchor—filed special appearances to contest the court's personal jurisdiction. The trial court denied their motions to dismiss for lack of jurisdiction. The appellate court affirmed, and the defendants petitioned the state supreme court for review.

Purposeful Availment

The Texas Supreme Court began by noting that Texas's long-arm statute allows for personal jurisdiction as far as the U.S. Constitution permits, as determined under the *International Shoe*

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test. Examining the case under the rubric of specific jurisdiction, the court found that jurisdiction was proper because (1) the defendants had established "minimum contacts" with Texas, due to their purposeful availment of the Texas market, from which the plaintiff's claim arose, and (2) that asserting jurisdiction over the defendants did not offend "notions of fair play and substantial justice." The bulk of the court's analysis was devoted specifically to the question of purposeful availment.

In conducting its analysis, the court examined four plausible bases in the record for finding minimum contacts between the defendants and Texas: (1) that the harmed plaintiff was resident in Texas, (2) that the alleged defamation was broadcast into Texas, (3) that the defendants *knew* that it would be broadcast into Texas, and (4) that the defendants *intentionally* targeted their broadcasts at Texas. The court determined that only this last reason, and none of the first three, was sufficient to establish personal jurisdiction.

The court stated that the jurisdictional question is not whether the defendants' alleged tort was directed at an individual within the state but whether the tort was directed at the state itself. The court emphasized that it is the *defendants'* contacts with the state that matter.

The combination of signal bleed, sale of advertising in Texas, and promotion in Texas, were enough to constitute purposeful availment.

Evidence in the record indicated that defendants' broadcasts reached several hundreds of thousands of viewers in South Texas and that defendants were aware of this signal bleed into the United States. This, however, was not enough by itself to constitute a "purpose or intent" to reach the Texas market. But purposeful availment could be found where in addition (1) defendants physically entered Texas to produce and promote some of their broadcasts, (2) defendants sold television advertising to businesses in Texas, and (3) defendants endeavored to popularize their broadcasts in Texas and throughout the United States. Accordingly, the court found that the defendants had purposefully availed themselves of the benefits of the forum.

The court rejected the defendants' argument that purposeful availment in the defamation context requires that alleged defamation center on events and/or sources in the forum state. The court acknowledged that this was *a* test for determining whether a broadcast was "aimed at" a state but clarified that it was not the *only* way to establish specific jurisdiction, noting that the ultimate question was still purposeful availment.

Other Issues

After establishing purposeful availment, the court concluded that the plaintiff's claim arose out of the defendants' contact with Texas, as required for a finding of specific jurisdiction.

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Finally, the court found that exercising personal jurisdiction over the defendants would not be unfair or unjust, and that Texas has a strong interest in adjudicating torts committed within its borders to its residents. The fact that plaintiff is a Mexican citizen was irrelevant to the jurisdictional analysis; since she was also a Texas resident.

In a footnote, the court acknowledged that online publishers may be confronted by similar jurisdictional questions as the defendants here, but refrained from issuing any "advisory" opinion in that respect.

Defendants are represented by Paul Watler, Kurt Schwarz, Jorge Padilla, Jackson Walker LLP, Dallas and Austin; Gil P. Peralez, Peralez & Franz, McAllen, TX; and David F. Johnson and Thomas J. Forestier, Winstead PC, Houston. Plaintiff is represented by Raymond L. Thomas, Kittleman, Thomas PLLC; and Law Office of David H. Jones, both in McAllen, TX.

Texas Court Dismisses Defamation Suit and Awards Attorneys' Fees Under Anti-SLAPP Law

By Adrianna C. Rodriguez

A judge for the District Court of McLennan County, Texas, dismissed with prejudice a lawsuit alleging two local television stations, the local newspaper, and the City of Waco defamed the plaintiff by reporting on his arrest and charging in connection with a shooting. In dismissing the lawsuit against the media defendants under the Texas Citizens Participation Act ("TCPA") and Rule 91a of the Texas Rules of Civil Procedure, the Honorable Jim Meyer also awarded each media defendant the fees incurred in bringing the motion to dismiss, and further ordered that if the plaintiff appealed the judgement to the state court of appeals, each defendant would be entitled to $10,000 in fees, and if appealed to the state supreme court, each defendant would be entitled to $15,000 in fees. *Ruthen James Weems, III v. Waco Police Department, et al.*, Case No. 2015-4824-4 (McClennan County, Texas, March 2015).

Background

Plaintiff Ruthen James Weems, III, sued Gray Television Group, Inc., station KWTX-TV, KXXV-TV, the *Waco Tribune-Herald* and the City of Waco Police Department alleging they had defamed him by reporting on his November 6, 2014 arrest in connection with a shooting. Weems was later indicted on three felony charges related to the shooting—aggravated assault for "intentionally, knowingly, and recklessly" shooting the victim; unlawful possession of a firearm by a felon; and possession of methamphetamine.

Weems filed the lawsuit on December 21, 2015—more than a year after the news reports were broadcasted.

Weems filed the lawsuit on December 21, 2015—more than a year after the news reports were broadcasted. Weems admitted in the Complaint that the information reported by the three media defendants about his arrest and charges had been provided by the Waco Police Department's public information officer. He alleged, however, that the admittedly accurate news reports implied that he acted with murderous intent. He sought $5 million in compensatory damages and $10 million in punitive damages from each defendant.

KWTX moved to dismiss the lawsuit arguing it was (1) filed outside of Texas' one-year statute of limitations for libel and slander claims; (2) barred by the state's Defamation Mitigation Act because the plaintiff had failed to request a timely correction; (3) barred by the

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TCPA—Texas' anti-SLAPP statute; and (4) a privileged fair, true and impartial news report of official proceedings.

Judgment

After a hearing, Judge Meyer dismissed the lawsuit with prejudice. He awarded each media defendant the fees incurred in bringing the motion to dismiss under the TCPA and Rule 91a of the Texas Rules of Civil Procedure, and further ordered that if the plaintiff appealed the judgement to the state court of appeals, each defendant would be entitled to $10,000 in fees, and if appealed to the state supreme court, each defendant would be entitled to $15,000 in fees.

Adrianna C. Rodriguez, Charles D. Tobin and Kevin A. Teters of Holland & Knight LLP, Washington D.C., and Dallas, Texas, represented Gray Television Group, Inc., station KWTX-TV. Michael G. Cosby of Pakis, Giotes, Page & Burleson, P.C., Waco, Texas, represented the Waco Tribune-Herald. James M. McCown of Nesbitt, Vassar & McCown, L.L.P., Addison, Texas, represented KXXV-TV. Roy L. Barrett of Naman, Howell, Smith & Lee PLLC, Waco, Texas, represented City of Waco. Ruthen James Weems, III, appeared pro se.

Circuit Retcons Its "Dancing Baby" Fair Use Decision and Creates More Confusion

By Lance Koonce

> **Retcon /ˈretkän/:** Abbreviation of "retroactive continuity"; "Revise (an aspect of a fictional work) retrospectively, typically by introducing a piece of new information that imposes a different interpretation on previously described events."
>
> - Oxford Dictionaries

Apparently, George Lucas is not the only party in California who can edit his own work after release in order to change aspects he does not like. While perhaps not as culturally significant as changing *Star Wars: A New Hope* so that Han Solo does not shoot first, Judge Tallman, writing for the Ninth Circuit, has now retconned the Court's holding in the important *Lenz v. Universal Music Group* case to muddle what might have become a key protection for copyright owners. While refusing to rehear the motion upon which the original order was issued, the Court's changes likely sow confusion for those seeking to enforce their intellectual property, while providing little additional comfort for ISPs and users who face frivolous take-down notices under the Digital Millennium Copyright Act.

The copyright take-down regime has become a massive undertaking by content owners, web hosts and users, and small shifts in burden can have large effects.

As we described in a prior alert, in Lenz, the Ninth Circuit ruled that when submitting a take-down notice under the Digital Millennium Copyright Act ("DMCA") – which requires an owner to have a good faith belief that the purportedly infringing material "is not authorized by the copyright owner, its agent, or the law" – copyright owners must first consider whether the use might be a fair use. The Court held that failing to do so exposes the copyright owner to potential liability for damages under 17 U.S.C. § 512(f), because "the statute unambiguously contemplates fair use as a use authorized by the law." The Court then stated that the law requires copyright owners only to form a subjective, not objective, good-faith belief of infringement, and that so long such a belief was formed, courts cannot second-guess that conclusion.

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The Court's clarification that copyright owners bear this affirmative obligation of considering fair use was quite significant, because as we noted previously, the copyright take-down regime has become a massive undertaking by content owners, web hosts and users, and small shifts in burden can have large effects. The natural follow-up question that arose was: What does this affirmative obligation to consider fair use entail?

In the original decision by the Ninth Circuit, noting that it was "mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age," the Court took up this follow—on question, at least in part, suggesting that the fair use analysis prior to a DMCA take-down notice "**need not be searching or intensive**" (emphasis added) and did not require an "investigation of the allegedly infringing content." Indeed, the Court went even further and mused (in dicta) that computer algorithms might be employed to make a "first cut" fair use decision, supplemented by human review of "the minimal remaining content a computer program does not cull."

Petitions for Rehearing

Both parties petitioned the full Court for rehearing. While Universal limited its argument to a jurisdictional (standing) issue, Lenz argued that the Court's ruling allowed a content owner to effectively censor speech – especially speech by ordinary individuals – by permitting a subjective belief, even where unreasonably held, to act as a shield for frivolous take-down notices.

Google, Tumblr, Twitter and the owner of Wordpress submitted an amicus brief, arguing that unfounded or abusive take-down notices impose a significant cost on service providers as well as on free speech, and that determining liability "solely on the subjective knowledge of the notice sender … would lead to the illogical result that the more unreasonable a copyright holder is, the more legal leeway it has to send unfounded notices." Two other entities, Public Knowledge and the Organization for Transformative Works – whose earlier brief had been cited by the Court for its reference to algorithms that can identify infringing content – also submitted an amicus brief, notably setting forth numerous ways in which take-down notices purportedly have been abused, including the use of "overbroad" matching algorithms.

Amended Decision

Whatever it thought of the arguments of the parties and amici, the Ninth Circuit declined to rehear its decision affirming the district court's denial of summary judgment, instead taking the opportunity to issue an amended decision. That amended decision deletes almost two full pages

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from the original, most importantly the paragraphs that set forth the type of fair use consideration that the Court originally indicated might suffice.

The decision also adds a footnote disagreeing with the dissenting judge, who believed that there was no triable issue of fact exist on fair use because Universal "did not specifically and expressly consider the fair-use elements." The majority, however, held that the question of whether Universal's fair use analysis was enough to form a subjective good faith belief that the video was infringed was a question for the jury.

Repercussions from the Amendment

What does all of this mean? As a threshold matter, it does **not** mean that in the Ninth Circuit a copyright owner now **must** undertake a searching and intensive fair use analysis before sending a demand. When a decision is amended, the prior decision may no longer be cited for the purposes of precedent, and thus the Ninth Circuit now simply has not defined the type of review that must be undertaken.

Given its insistence that the issue of a copyright's owner's subjective belief is for the finder of fact, the Court may simply believe that trial courts will be better situated to determine whether the fair use analysis was sufficient, in the context of particular facts. Of course, this alone likely tips more cases towards resolution by a jury, rather than on summary judgment. However, given that the Court also stated that merely forming a subjective belief is enough – regardless of whether it is proven correct – one imagines that so long as a content owner can show some proof of a decision-making process that includes fair use consideration, some cases will still be subject to summary judgment on this issue.

It will be interesting to see whether courts can ever become comfortable with treating highly-effective computer tools as analogous to providing the necessary "subjective" belief on the part of owners.

The amended decision does highlight that copyright owners cannot assume that a cursory fair use analysis will suffice. By not defining how careful the review must be, the court has left open the door for plaintiffs to argue that even though a fair use analysis occurred, it was insufficient.

To the extent that frivolous or abusive take-down notices constitute a significant problem for ISPs and their customers, as argued by the service provider amici, it is possible that the Ninth Circuit's amended decision might make it more difficult for unscrupulous or careless parties to claim they formed a good-faith belief as to fair use when they have not done so. However, because the Court did not go as far as those parties wanted and left intact the subjective standard, and has not defined the level of review required by copyright owners to form that

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subjective opinion, it is not clear that the decision provides that much additional comfort for ISPs or users either.

On the other hand, perhaps the most troubling aspect of the revised decision, for copyright owners, is the removal of the Court's language acknowledging the "pressing crush of voluminous infringing content that copyright holders face in a digital age," and discussing the use of computers "for processing a plethora of content." Perhaps the Court felt that requiring an owner to form a "subjective" opinion, while at the same time tacitly blessing computer algorithms to do the bulk of the decision-making, was confusing. Regardless, by deleting the language entirely it has muddled the issue even more. Will review using algorithms be adequate to form a subjective belief that there is no fair use, or are humans always required? The Ninth Circuit has now all but ensured that this issue will have to be litigated.

Practical Considerations

Our prior advisory suggested that copyright owners should have written procedures for identifying what content should be subject a takedown notice, and that those guidelines should expressly require a consideration of fair use. We also recommended that employees responsible for determining what material is infringing should receive information and training about fair use, and document their fair use determinations before issuing a takedown notice. This advice has not changed, although the latter steps have become more urgent in light of the Court's revisions.

To the extent copyright owners employ automated screening algorithms to identify potentially infringing content in the wake of the *Lenz* amended decision, obviously it would be best if human reviewers double-check for fair use before sending take-down notices, which may be possible for owners that do not deal with a large volume of take-downs. However, where this is not practicable given a large volume of content, content owners must be aware that the risk of an unfavorable court decision on an improper take-down notice increases as the algorithms move beyond merely finding exact duplicates and are used to identify content that matches because of titles, key words or the like, and should employ second-level human review as appropriate.

Finally, as copyright owners begin to employ more advanced artificial intelligence tools to perform initial reviews, it will be interesting to see whether courts can ever become comfortable with treating highly-effective computer tools as analogous to providing the necessary "subjective" belief on the part of owners.

This seems unlikely in the near future. But if our prediction proves wrong, we can always retcon this advisory.

Lance Koonce is a partner with Davis Wright Tremaine LLP in New York. A full list of case counsel is available in the linked opinion.

Parody Tote Bag Maker Wins Summary Judgment vs. Louis Vuitton

By Andrew Nellis

A New York federal district court recently granted summary judgment to the maker of a parody tote bag on trademark and copyright infringement claims brought by luxury goods maker Louis Vuitton. *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, No. 14-3419 (S.D.N.Y. Jan. 6, 2016). The court found that the tote bags were an obvious parody of Louis Vuitton's luxury bags and, in fact, were more likely to promote the Louis Vuitton brand than to confuse customers.

Background

Louis Vuitton is one of the world's most recognizable makers of luxury handbags and other luxury goods. The defendant, My Other Bag, sells canvas tote bags with the words "My Other Bag …" on one side and a drawing of a luxury handbag on the other. Several such tote bags feature images recognizable as Louis Vuitton handbags, though with Louis Vuitton's stylized "LV" replaced by a stylized "MOB." The court noted that the tote bags are inspired by and operate in the same way as the "My other car" bumper sticker meme.

The two sides of defendant's Louis Vuitton parody bag

Louis Vuitton sued My Other Bag for trademark dilution, under federal and New York law, and for trademark and copyright infringement, under federal law. My Other Bag moved for summary judgment on all claims, and the district court granted the motion in full.

Trademark Dilution

Louis Vuitton claimed that the defendant's bags diluted its trademarks by blurring—that is, diluting the ability of the plaintiff's marks to uniquely identify its products. The court disposed of the trademark dilution claims on two independent bases: (1) that the defendant's bags were a parody and thus protected fair use and (2) that, under the circumstances, there was no risk of diluting the plaintiff's trademarks.

With regard to the former, the court noted that, under the Lanham Act, trademark dilution claims cannot be premised on the fair use of a mark, which is defined to include parody. (The court also found that a fair use defense to a federal trademark dilution claim would suffice

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against a state trademark dilution claim as well.) The court found that "My Other Bags" were clearly parody and that, rather than conveying that they were Louis Vuitton bags, explicitly communicated that they were *not*.

The court rejected the argument that the allegedly infringing bags were not a parody because they did not need to imitate Louis Vuitton bags specifically, responding that they needed to imitate *some* luxury bag in order to make sense and that the plaintiff's proposed rule would prevent the parody of *any* luxury brand. The court also summarily rejected the argument that defendant's bags used the Louis Vuitton marks as a designation of source.

Although concluding that the bags constituted fair use, the court additionally found that the trademark dilution claims would have failed anyway. After reciting the federal and state six-factor tests for trademark dilution, the court emphasized that the ultimate question under both tests was simply whether My Other Bag impaired the use of Louis Vuitton's marks as unique identifiers of their products.

To this end, the court relied heavily on a Fourth Circuit decision, *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007), in which the appellate court had rejected similar trademark dilution arguments against the makers of a dog's chew toy that resembled a Louis Vuitton bag and was called "Chewy Vuiton" [sic]. Both courts found that, in the parody context, the intentional imitation of Louis Vuitton's marks actually conveyed the message that the allegedly infringing products were *not* made by Louis Vuitton. Accordingly, there was no likely impairment of the plaintiff's marks.

Reasonable consumers would get the obvious joke rather than being confused as to the maker of the tote bag.

Trademark and Copyright Infringement

As for trademark infringement, the court stated that the ultimate question was whether purchasers would likely be confused and recited the Second Circuit's eight-factor test. The court noted that this test was "awkward" in the parody context, but proceeded through the eight factors regardless, finding that each either favored the defendant or was neutral. In sum, the court found that reasonable consumers would get the obvious joke rather than being confused as to the maker of the tote bag.

Finally, the court evaluated Louis Vuitton's copyright infringement claims. Again noting that the standard four-factor test was awkward when applied to a parody, the court concluded that My Other Bag's bags were a fair use of Louis Vuitton's marks, observing again that the message communicated is that the defendant's tote bag is specifically *not* a Louis Vuitton bag.

Andrew Nellis, is a MLRC Intern and 3L at NYU Law School. My Other Bag was represented by David Korzenik and Terence Keegan of Miller Korzenik & Sommers LLP, New York. Louis Vuitton Malletier, S.A. was represented by Jonathan Daniel Lupkin, Lupkin & Associates PLLC, New York.

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next to a report on a sex scandal. (We reported the now-vacated opinion last month; maybe the judges re-read *Stanton* in the interim.)

We'll also call it a win for Jack Dunn, the Boston College High School trustee who was portrayed as part of the sex abuse cover-up in Best Picture winner *Spotlight*. Dunn settled a threatened legal action against the film's distributor, obtaining a public statement that his dialogue and role in the cover-up was fictionalized as well as donations in his name to two charities.

Defense wins

In contrast to the plaintiffs' success rate, we tracked only a couple of defense wins at the trial court level this month. First, in N.D.N.Y., a judge held that ESPN had not acted with actual malice in reporting on sexual abuse allegations against a former Syracuse University assistant coach and his wife. Second, in the Southern District of West Virginia that we covered last month, a magistrate recommended tossing out a New York attorney's claims against a television station that allegedly maliciously edited video of a fight between the lawyer and a reporter.

The results were better for defendants in the appeals courts. The attorney who represented A-Rod in his steroid woes failed to convince the Second Circuit to revive his own defamation case against the *New York Daily News* over two articles relating to fights with other clients; the panel found the statements at issue to be substantially true and/or protected by the fair report privilege. The Eleventh Circuit affirmed the dismissal of a claim by ex-Fugees rapper Pras Michel against the *New York Post* over statements that he blew off charity events, finding that he had failed to allege actual malice (but giving him leave to amend). The Oregon Supreme Court shut down a lawsuit over online consumer reviews, holding that attempts by members of the public to express their opinions are protected by the First Amendment. The New York Appellate Division held that a report by Fox Television on high-calorie content in diet ice cream products was substantially true. A Texas appeals court shut down for the second time a claim against a TV station by a former school superintendent over embezzlement charges. And the D.C. Court of Appeals held that, after obtaining an anti-SLAPP dismissal of a defamation claim over Wikipedia edits, an anonymous defendant was entitled to attorneys' fees without showing that the claim was frivolous or malicious.

New Appeals

A few new appeals on our watch list:

- A Florida real estate lawyer is appealing the dismissal of her claims against the *Sarasota Herald-Tribune* over an article about her mortgages, arguing that she should have been treated as a private figure.

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- We have cross-appeals from an Oklahoma decision reported last month, in which an ex-DA's defamation claim against a newspaper were dismissed under the state's anti-SLAPP law.
- The Michigan Court of Appeals granted interlocutory review in a case we reported on in January, involving an attorney's lawsuit against the *Morning Sun* for its reporting on the attorney's earlier defamation suit over a parody Twitter account.
- The Missouri Supreme Court will hear a case brought by a woman accused of operating one of the worst puppy mills in the state.

Seriously, folks, it's dangerous reporting on pet care; sure, it seems like a cute little fluff piece, but it'll turn around and bite you after making a real mess of your carpet.

Privacy

Invasion of Privacy

So, yeah. Gawker. Any jury trial over a celebrity sex tape was bound to be media circus, but where do we start? The remarkable story of the two Hulks Hogan, one real, one fictional? Questioning the jury over Hogan's use of the N-word? The empty witness chair for Bubba the Love Sponge Clem, who took the Fifth? The length of the plaintiff's penis? A journalism professor made to seem completely out of touch with modern media? A.J. Daulerio's video deposition comment about sex tapes involving 4-year-olds? (Yes, we all know what he was trying to say, but it still made folks cringe.)

And of course that $115 million verdict with the $25 million punitive kicker, oh, my. I'll admit, I was way off with my own prediction; was what happened to Hogan né Bollea all that much worse than what happened to Fox Sports reporter Erin Andrews, who won a $55 million judgment in Tennessee earlier in the month in a case involving a secretly filmed nude video?

There's been plenty written about the impact of the Hogan case and the verdict. (Speaking of which, if you somehow skipped over George's column this month to get here, go back and read it.) An appellate court could be inspired by these facts to start formulating tighter rules about the nexus between a public issue and private information, leading to more judicial second-guessing of the necessity of using particular material in other cases. But they'd have to get around an earlier Florida appellate ruling that the tape was newsworthy, and plenty of First Amendment experts are suggesting that Gawker's looking good on appeal. Toss in the fact that the trial judge in the case is the most-overturned in her county, and Nick Denton's confidence doesn't seem all that misplaced.

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With all of this going on, any other privacy news might seem trivial. Still, let's mention (1) a new lawsuit against Reader's Digest in S.D.N.Y. over the alleged sale of subscribers' personal information to data miners without written consent, (2) a new lawsuit against A&E for trespassing in connection with the filming of its series "Escaping Polygamy," and (3) the New York Court of Appeals affirming the dismissal of a claim brought against ABC over the filming of a patient's medical treatment and death as part of a documentary series. There, mentioned.

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Right of Publicity

In addition to the *Straight Outta Compton* case mentioned up in Defamation, we saw two ROP wins and two losses to report (you decide which are which). The Southern District of Ohio let Amazon and Barnes & Noble out of the *A Gronking to Remember* lawsuit (about a couple's engagement photo used without permission on the cover of a lurid self-published fantasy about Patriots tight end Rob Gronkowski). The court found that the corporate defendants were distributors rather than publishers and were not alleged to know of the offensive content. Meanwhile, the Northern District of California kicked out an ROP claim by golf caddies against the PGA, finding that they had agreed to be human billboards as part of their contracts.

On the other hand, the New York Supreme Court denied motions to dismiss in two right of publicity cases against Take-Two Interactive, the publisher of *Grand Theft Auto V*. Lindsey Lohan and "Mob Wives" star Karen Gravano will each be allowed to pursue claims over the alleged use of their likenesses and personal details in the game.

Government Intrusion

No luck pursuing privacy claims against the government in March. The Ninth Circuit held that a case against the President over illegal surveillance was moot due to changes to Section 215 of the Patriot Act. In D.D.C., a woman who claimed her privacy was invaded in connection with the investigation of former CIA Director David Petraeus dropped her case.

Access/FOIA

We hope you all had an interesting and informative Sunshine Week. Alas, the struggles continue.

New cases

FOIA veteran Judicial Watch took the field again in March against its traditional rivals in D.D.C., with a suit against the DOJ to obtain records concerning former Illinois Gov. Rod

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Blagojevich, against the FBI to obtain records on President Obama, and against the CIA to gain access to porn recovered during the 2011 raid on Osama bin Laden's Pakistan compound. Attorney Eugene Fidell is squaring off in D. Conn against the Department of Defense, with a civil suit in his own name to uncover documents relevant to his representation of alleged deserter Sgt. Bowe Bergdahl. And a media coalition turned Courthouse News Service's attempt to compel the Ventura county clerk to disclose new civil complaints into a full-court press. (Or is that a press-full court?)

In the states, it's a cross-town series as the folks at the *Chicago Tribune* sue the city's police department over its failure to produce former Superintendent Garry McCarthy's emails, while the Better Government Association is also pursuing a claim against the CPD over recordings of fatal police shootings. In Colorado, teacher and bus driver unions are suing to prevent the release of disciplinary records to 9NEWS.

Current cases

While Hulk Hogan might have trounced Gawker with his privacy claims, he came up short in Florida's appellate courts against a coalition of media outlets who successfully reversed impoundment orders related to documents filed in the case. Also in Florida, the media won access to criminal discovery materials released to the defendant in a double homicide. ESPN took home a win against Notre Dame in the appeals courts of Indiana over records maintained by the University's police department, and avoided a late reversal by the state legislature thanks to a last-minute veto by Gov. Pence. The Sixth Circuit held that plea agreements should be public records under the First Amendment absent an overriding interest in closure. TEGNA Media eked out an order from Georgia superior court unsealing the autopsy report of Bobbi Kristina Brown. A Missouri judge has held that the state must reveal the source of its lethal injection drug. In the courts of New Jersey, Raritan Borough cried uncle in a fight with Gannett, forking over $650K to settle a case arising out of denied requests for municipal salary information. The *Seattle Times* is likewise pocketing over $500K of Washington's money, after it won the release of 5,400 pages of documents from the state's Dept. of Labor & Industries. Committees appointed by public bodies in New Mexico must comply with open meetings laws, thanks to a win by open government and press associations in the state's court of appeals. And the Colorado Supreme Court ordered a judge to reconsider an order sealing affidavits of probable cause in connection with a Planned Parenthood shooting in light of "changed circumstances."

From the blooper reel, we have the federal government scoring an own goal by disclosing the target of its 2013 investigation of secure e-mail service Lavabit in documents filed publicly on PACER. Lavabit's owner is still under a gag order about the investigation (which triggered

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the closure of the service), but has been fighting for transparency for years. Turns out the target is exactly whom everyone suspected.

On the other side of the board, the scrappy team at MuckRock is calling a foul on the Department of Defense, which told MuckRock that they'd need to cough up $660 million for records related to systems used to keep seized electronic devices from powering down. Not even Hulk Hogan can afford that. The U.S. Supreme Court rejected media requests for same-day audio in recent controversial cases, and the federal trial courts shut down the "cameras in the courtroom" pilot program. A judge in D.D.C. dismissed a suit to force the DOJ to set up an online "reading room," saying that the case had to be refiled under FOIA instead of the Administrative Procedures Act. Media coalitions were rebuffed in the Tennessee Supreme Court over records related to the Vanderbilt football rape case, and in California Superior Court over Sumner Redstone's medical records. A Pennsylvania appellate panel issued a split decision denying Kathleen Kane's e-mails to the Pittsburgh Tribune-Review. And finally, a New York appellate court held that a newspaper could not learn the name of a mohel who infected a baby boy with the herpes simplex virus during a circumcision ritual.

New appeals

The Detroit Free Press continued its long-running fight to obtain mugshots of criminal defendants, arguing before the Sixth Circuit this month. Meanwhile, the New Hampshire Supreme Court is considering a documentary filmmaker's attempt to access law enforcement records in the case of a Dartmouth student acquitted of rape.

On a related note, if you want to see what's going on in the Supreme Courts of California and Delaware, good news! Both states have announced that they will start streaming oral arguments online.

Legislation

Capitol Hill has been busy with FOIA reform this month. The House passed the Federal Advisory Committee Act Amendments, which would improve public access to almost a thousand advisory committees relied upon by the federal government. Over in the Senate, a FOIA reform bill requiring a central portal for requests and codifying a presumption of openness passed by unanimous consent, with the president stating he would sign the bill in that form – a departure from the adminstration's prior stance according to documents obtained by the Freedom of the Press Foundation in a suit against the DOJ.

In the states: Georgia is considering a sweeping criminal law reform measure that would not only exonerate many first-time offenders, but also give defendants the right to seal away any record of their ever having been charged or convicted. Another Georgia bill has passed the house that would give state athletics departments 90 days to respond to document requests – don't want those pesky open records laws stirring up any controversy during the season, after

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all. Florida, meanwhile, has passed new exemptions to its open records laws, shielding the home addresses of numerous officials and emergency personnel.

Police body-cams remain a hot topic, with no consensus solution emerging. Indiana passed a law allowing police departments to withhold body-cam video under some circumstances, while a senate committee in Missouri is considering a bill that would lock down body-cam video related to pending investigations and non-public areas. Tennessee was on a similar track, but legislation stalled the house. Utah, moving instead toward greater access, saw a measure to make body-cam video public pass the house.

Mississippi's house approved a bill to keep secret the identities of execution drug suppliers, the execution team, and family members of victims and the condemned. The same bill would allow firing squads as a method of execution. But in Virginia, a bipartisan measure was passed in the state senate to overturn a Va. Supreme Court ruling restricting access to records on death penalty procedures. Gov. Terry McAuliffe initially threatened to carve up the bill, but later backed down and agreed to sign it as written.

Newsgathering

Contrary to what you might be expecting, not *all* of the hassles that reporters ran into this month involved Donald Trump, but let's get those out of the way first. Let's see...we have Trump's campaign manager Corey Lewandowski getting rough with a Breitbart reporter and being charged with battery; Lewandowski allegedly blacklisting Politico's reporters from Trump events; Secret Service agents jumping a *Time* photographer at a rally (the Service is investigating the incident); a CBS News reporter getting swept up in the arrests following the cancelled Chicago rally (the charges were later dropped). And those were just the ones we flagged in the Daily. No wonder NPR is sending its political reporters to "hostile-environment awareness training," previously reserved to war and terrorism correspondents.

Actually, if you want a little taste of what a Trump presidency would be like for the media, notoriously thin-skinned Turkish President and Gollum look-alike Recep Tayyip Erdogan brought some of his home-style abuse of the press to Washington D.C. this month, with his security team harassing reporters and protesters. It actually got so bad that the D.C. police had to intervene at one point to tell Erdogan's security to back off. (George suggests in his column that Trump and Hulk Hogan are one and the same, which doesn't explain this photo; but has anyone ever seen Trump and Erdogan in the same place at the same time?)

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Elsewhere, we saw an L.A. Times photographer arrested while covering Nancy Reagan's funeral motorcade. The charge? "Suspicion of resisting and obstructing a law enforcement officer." (What, the cop only *suspected* he was encountering resistance?) A reporter from WBRZ was imprisoned, strip searched, and forced to watch a prison rape video after filming a police incident in Baton Rouge, while a different WBRZ reporter was cuffed and led away while investigating the mayor of White Castle (no, not the burger chain). A freelance journalist lost his case against the California Highway Patrol for violation of his civil rights after he was arrested for photographing protests around a controversial highway bypass, and another freelancer was convicted in Missouri for failure to comply with police orders while filming a protest against police brutality in Ferguson.

Moving on to prosecution of sources, it turns out that the U.S. government has some specific things to look for when evaluating employees as potential whistleblowers, as part of a widespread program to plug leaks. The extent of the "Insider Threat" program was uncovered by Chelsea Manning in a document that she obtained after requesting her own intelligence file under FOIA.

In other news, what's more fun than drones? You got it – drones and guns! A new bill in the Utah legislature would enshrine the concept of aerial trespass, with the side effect of letting police officers shoot down drones. Meanwhile, the so-called "drone slayer" of Kentucky is seeking to get the federal claim filed against him for gunning down his neighbor's drone dismissed. Both are worth keeping an eye on if professional news organizations are ever allowed to use drones; we're one step closer to that, as the U.S. Senate Committee on Commerce, Science, & Transportation approved an amendment to the FAA reauthorization bill loosening restrictions on small drones.

A lawsuit was filed in D. Mass. by the conservative activists/gotcha video makers at Project Veritas, who are seeking to have the Commonwealth's law against the secret recording of conversations declared unconstitutional. The issue of facial invalidity of the Mass. statute was one that media amici attempted to raise in the high-profile *Glik v. Cunniffe* cop-recording case, but leave to file the brief was denied. Speaking of cop recording, the ACLU has filed an appeal with the Third Circuit in connection with that lousy district court decision from Pennsylvania that we reported last month. Godspeed, folks.

Prior Restraint

The Daily has tended to stay away from the morass of Gamergate, but this month the Massachusetts Appeals Court heard argument on the constitutionality of a restraining order prohibiting Eron Gjoni from posting "any further information" online about his ex-girlfriend

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Zoë Quinn. If those names are unfamiliar to you, click here and prepare for your eyes to cross as you learn about one of the nastiest and ridiculous phenomena of the Internet.

Speaking of eye-crossing developments, a state judge in Washington ordered a divorcing mother who had come out as a lesbian not to talk to her children about religion or homosexuality. (Yes, time travelers, you did land in 2016.) The order was almost immediately overturned by the Washington Court of Appeals.

Broadcast/Cable/Satellite

The FCC's spectrum incentive auction has begun; an attempt to stay the auction was rebuffed by the D.C. Circuit, although the court did allow one LPTV station owner to participate on a provisional basis. Meanwhile, the agency is investigating whether cable companies have been unfairly hampering the emergence of streaming video through restrictive clauses with content providers, and leaning towards approval of the Charter/TWC merger. The agency's plan to open up competition on set-top boxes continues to provoke anxiety among incumbents. More on the FCC's goals and priorities was revealed in a statement made by Tom Wheeler before a House subcommittee this month.

A bunch of contract lawsuits to report, including: a battle over the sale of WAGT in Georgia, with the state supreme court weighing in to allow the deal to move forward; Boston station WHDH suing over the loss of its NBC affiliation; and Dish Network suing NBCUniversal over warnings made to Dish viewers about stations going dark if a new retransmission consent deal is not reached.

Internet/New Media

Section 230

A big Section 230 win for Backpage.com this month, as the First Circuit rejects claims from plaintiffs who alleged they were subject to sex trafficking through the website; the court held that Section 230 blocks a civil cause of action under a federal criminal statute. But Backpage still isn't out of the woods, with a Senate subcommittee holding the company in contempt for refusing to testify; this marks the first time in decades that the Senate Legal Counsel has gone to court to force compliance with a subpoena.

Facebook also racked up a win in N.D. Cal., which dismissed a suit over a fake profile of the plaintiff. Curiously, while the decision mentioned Section 230, it relied heavily on the Terms of Service the plaintiff accepted when creating his own (real) profile – including a waiver of any claim that Facebook is responsible for other users' submissions. Does this mean that anyone

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who has signed up with Facebook has agreed to be bound by Section 230-like rules even if 230 itself is eventually repealed or amended? What about IP claims?

Terms of Service

While we're talking about Terms of Service, Google won a case in the New Jersey Appellate Division over its efforts to correct for attempts to manipulate its search results, with the court holding that the claims were barred by Google's Merchant Center ToS. On the other hand, efforts to force ToS arbitration clauses failed in the Seventh Circuit and the California Court of Appeals; both courts offered some words of wisdom as to the formation of binding online agreements.

FCC/Net neutrality

Throttling and zero-rating remain the buzzwords in net neutrality. Comcast was accused before the FCC of violating net neutrality as well as the conditions of the Comcast/NBC merger by zero rating its own Stream TV streaming video service; the cable giant argues that Stream TV isn't subject to those restrictions. AT&T managed to get a class action in N.D. Cal. on data throttling kicked out in favor of individual arbitration. T-Mobile reached a compromise with YouTube on its Binge On program, which had come under fire for reducing video quality in exchange for zero-rating video content; the deal would allow users to opt out more easily.

But a surprise target of net neutrality ire this month was vocal net neutrality proponent Netflix, which acknowledged that it has been reducing the quality of its video streams on some cellular networks. The misguided accusations of hypocrisy died back somewhat when it was pointed out that Netflix was only downgrading its own content, and had taken this step because its customers would otherwise quickly exceed their data caps and incur heavy charges (because Netflix is not zero-rated on the affected networks). The FCC agreed there was no issue.

Meanwhile, opposition to net neutrality in Congress continues, with a new bill that would prohibit the FCC from "rate regulation" of ISPs, and the Republican majority of the Senate Committee on Homeland Security and Governmental Affairs declaring that the FCC would not have reclassified broadband under Title II without the president's support.

Hate, threats & terror

Twitter has moved to dismiss the case in N.D. Cal. that we reported in January, accusing the social network of being complicit in ISIS' murder of the plaintiff's husband. Look for this one in the Section 230 section soon. Over in D. Minn., a man who pled guilty to threatening the life of FBI agents and a federal judge on Twitter after his friend was convicted of plotting to join ISIS was sentenced to three years' probation. One more time, for anyone who still hasn't gotten the memo: yes, the Feds know how to use Twitter.

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Google, Facebook, the ACLU, the Anti-Defamation League, and other activists took the stage at SXSW this month for a summit on online harassment, trying to scope the problem and potential solutions; the panel was planned after two Gamergate-related panels were cancelled following security threats. Rhode Island's attorney general is taking a more direct approach, pushing a bill that would criminalize embarrassing or insulting social media posts because the best way to get people to play nice is to chuck them in the slammer. (Seriously, I know you have that nice hammer, but please put it away.)

Fantasy Sports

Good news for the fantasy sports industry in Virginia, where the Fantasy Contests Act was signed into law; the Act will allow fantasy sport sites to operate legally in the state under specified guidelines. Massachusetts also released final regulations this month governing the field.

In Texas, FanDuel cut a deal with the state AG to stop accepting paid entries, while DraftKings sued the AG seeking a declaration that its operations were permitted under state law. And in New York, all three major players – FanDuel, DraftKings, and Yahoo! – agreed to cease paid entries while the legality of the industry is sorted out in court. DraftKings and FanDuel also agreed to halt college fantasy games across the board.

Miscellaneous

How hard is this to figure out: If you tell your employer you need medical leave, don't post photos from your family vacation to St. Martins.

Internet Privacy

Apple v. FBI

The circus around the San Bernardino iPhone continued this month, as new briefs from the parties and a flood of amicus submissions came rolling in. The government opposed Apple's motion to vacate the magistrate's order; Apple filed an objection to the order to preserve its appeal while also filing a scathing reply to the government's opposition; civil liberties groups piled on, warning about the repercussions of the case; and the San Bernardino District Attorney's Office went off the rails in its amicus brief with bizarre speculation about "dormant cyber pathogens" and accusations that Apple violated victims' due process rights.

There were reports that Apple's engineers were considering some form of civil disobedience if the case went against the company, and a growing sense that FBI support in Congress was weakening. Edward Snowden weighed in, calling claims that the FBI couldn't unlock the phone "bullshit," as did former U.S. Counterterrorism Chief Richard Clarke, who said that the agency could just drop the phone off at the NSA and it would be done.

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Turns out that Snowden and Clarke were on the money. Although we don't know the specifics (and Apple might have a tough time finding out), the FBI succeeded at the end of the month in unlocking the phone without Apple's help, rendering this particular fight moot. In tech-related cases, it's very easy for the factual ground to fall out from under you. Is anyone really surprised that the FBI decided to take a public stand in this case without first checking to see where they were planting their feet?

Nevertheless, several commentators have correctly noted that this issue won't be going away any time soon, especially with the latest attack in Brussels fueling more encryption paranoia (even though it's not clear encryption was used in the attack). Even now, it looks like WhatsApp's encrypted messages might soon be in the DOJ's crosshairs. The FBI has agreed to use its new party trick for the benefit of an Arkansas prosecutor, making clear (if it was ever unclear) that this was never about a single phone. And of course there's the other Apple case in E.D.N.Y., where Apple has sought a delay to see if the FBI's new technique will moot that case as well. Meanwhile, reports have emerged that the U.S. government has repeatedly demanded source code in sealed civil cases and before the FISA court to enable further hacks.

Oh, and Reddit deleted its warrant canary...

Hacking/CFAA

The U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment for the defendant in a civil CFAA case this month, finding that data scraping from an index of county land records did not constitute access to a protected computer with intent to defraud. Meanwhile, in E.D. Cal., the DOJ sought a five-year prison sentence for Matthew Keys, the journalist convicted of giving Anonymous hackers login credentials used to attack the L.A. Times website.

Control of Personal Information

The FCC unveiled its proposal to protect consumer privacy at the ISP level this month, including proposed rules that would ban serving targeted ads without consumers' permission; the rules do not, however, prohibit data collection practices. Along the same lines, the FCC also settled a case against Verizon over its use of "supercookies," persistent bits of tracking code used to serve advertising, for $1.3 million.

Other notes:

- Arizona passed its second attempt at a revenge porn law this month, replacing an earlier law that ran aground in court due to First Amendment problems.

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- Facebook and a collection of health and hospital websites were sued in N.D. Cal. in a potential class action, over claims that the social media site acquired users' health-related communications.
- Google agreed to extend EU takedown notices to all of its Search domains, including google.com; however, geolocation will be used to limit the effects of the restrictions on those outside of the country requesting the removal. France wasn't satisfied, levying more than $100K against Google in fines for not removing links worldwide.

France, can we talk (courtesy of Google Translate)? Tout le monde a essayé de travailler sur cette chose internationale de données, nous avons eu la nouvelle "Privacy Shield" étant forgée, les gens des deux côtés ont essayé d'être raisonnable, et vous avez dû aller lancer Internet Armageddon. Bien joué, France. Voir, c'est pourquoi nous ne pouvons pas avoir de belles choses.

Intellectual Property

Quick quiz: Do you know the claim to fame of the word "uncopyrightable"? Tuck that one alongside "facetiously" and "strengths" in your collection of lexical oddities, and a shout-out next month to the first person who can tell me what's remarkable about each.

Copyright – new cases

Last month, we saw new infringement cases against music streaming services Spotify and Tidal over unpaid mechanical royalties; this month saw two new cases in S.D.N.Y. involving Rhapsody and Google's Play Music service. Spotify is attempting to stem the tide of new complaints with a $30 million settlement with the National Publishing Music Association, but the pending cases will not necessarily be affected. Meanwhile, BMI and ESPN continue to scuffle in S.D.N.Y. over licensing fees for ambient music picked up during broadcasts of sporting events, Justin Timberlake was sued for allegedly sampling Cirque du Soleil, and Princess Cruises is defending a lawsuit in C.D. Cal. claiming that it showed a film of Barry Manilow performing in Las Vegas without permission. No word on whether the passengers will sue for infliction of emotional distress.

Fox is again facing an IP lawsuit over its hit show *Empire*; having fought off a trademark suit last month, it has now been sued in E.D. Va. for copyright infringement by an author who

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claims the show was based on his book. Changing channels, ABC has been sued by a video journalist who claims the network used a clip of Anthony Weiner without permission. The author of a self-help book, surprisingly not proceeding *pro se*, sued Google in C.D. Cal. for copying his "philosophy" in a television ad. The Trump campaign faces a lawsuit in S.D.N.Y. for using a nature photographer's eagle portrait without permission. Finally, publisher McGraw-Hill sued insurer AIG, claiming that the company failed in its obligation to cover settlements of copyright claims over the allegedly infringing use of photographs.

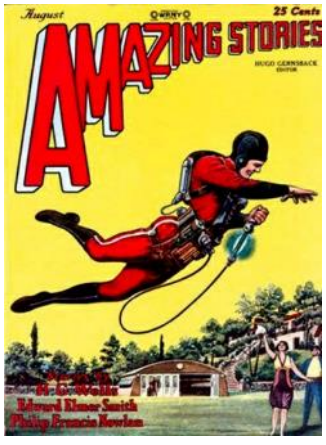
Copyright – trial court developments

Defendants received substantial fee awards in S.D.N.Y., where the Beastie Boys fought off a record label's infringement suit and took home $845K for their lawyers, and in C.D. Cal, where a claim that the TV show *New Girl* infringed the plaintiff's screenplay resulted in the plaintiff forking over $800K to Fox and the other defendants.

In the Northern District of California, a judge defied Copyright Office guidance by holding that the cascading style sheets (CSS) governing the formatting the plaintiff's website were copyrightable; nevertheless, it dismissed the plaintiff's claims with leave to amend because specific allegations of copying were lacking.

Speaking of code, Google and Oracle have been sparring over the jury process for their second trial in N.D. Cal. over API copyrights, from jury selection to jury instructions to how the parties are permitted to research the jurors on social media. The judge actually suggested that the jury questionnaire submitted by the parties was set up so that the loser at trial would have another basis for appeal, and ordered the parties to explain precisely how they intended to track jurors online. These details matter with $9.3 billion at stake.

In C.D. Cal., Paramount told us exactly which elements of the *Star Trek* universe are at stake in its infringement suit against fan film *Axanar*. The lavishly illustrated amended complaint is a fine addition to any *Trek* fan's reference library, with detailed explanations of the first appearances of some of your favorite characters, species, starships, and technobabble. And if you want to know where Vulcans fall in the long history of pointy-eared beings of fact and fantasy, you need merely turn to the defendants' motion to dismiss.



But if your sci-fi fandom runs more toward the pulp era, Buck Rogers was at the center of a case in W.D. Pa. where a filmmaker sought a declaration that the pop hero popsicle was in the public domain. The court rejected the attempt for lack of a case or controversy, finding a planned film project too inchoate.

There was substantial media coverage of a fair use jury trial in C.D. Cal. involving a popular YouTube user who produced a web series making fun of viral videos. A

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last-minute settlement mooted the jury's verdict, which remains under seal, but one juror reported that the jury had unanimously found no transformative use.

In a case with echoes of *Garcia*, a judge in N.D. Ga. held that statements made by Sudanese refugees in interviews were creative works that could provide a basis for suit against a derivative film script.

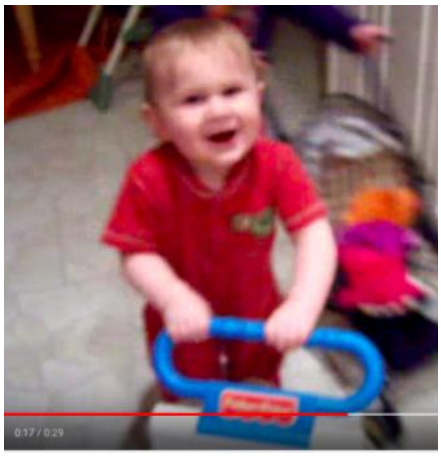
Finally, FilmOn X has lost yet again in the federal courts, with the Northern District of Illinois joining the chorus of jurisdictions holding that it is not entitled to a compulsory streaming license.

Copyright – appeals

The Federal Circuit rejected reconsideration of its ruling that the International Trade Commission cannot regulate intangible goods, quashing the hopes of content creators who wanted to use the ITC as another barrier against international digital piracy.

The closely watched *Fox v. TVEyes* case reached the Second Circuit this month, with the media-monitoring service arguing in its opening brief that its entire model is protected by fair use. Google and Microsoft jumped in with an amicus brief, warning about the consequences of the case for search services.

In the Ninth Circuit: FilmOn X is trying to hold onto its one district court win (well, not complete loss). PETA is continuing to drag out the monkey selfie suit; you'd think they'd be against beating dead horses. And a songwriter asked the court to revive his claim that Jessie J's hit song "Domino" infringed his composition, which he claims the pop star could have accessed through Universal Music.



The Ninth Circuit also refused to rehear *Lenz v. Universal Music* this month, but amended its prior opinion. The result is the same. However, the court hewed closer to its earlier analysis of subjective good faith in *Rossi v. MPAA*, and removed language that seemingly approved automated processes for issuing takedown notices as a method of handling massive amounts of online content.

Patent

Just a few items to note this month, two of which involve patent trolls in the Eastern District of Texas. Known troll Phoenix Licensing has sued more than 100 companies in an attempt to lock down the concept of personalized marketing. Meanwhile, the winner of Biggest Troll of 2014, eDekka, gave up on its appeal of an order shutting down its latest lawsuit campaign against online retailers.

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In the Northern District of Texas, Twitter has been sued over the technology behind its Vine video product, by a company claiming that it was suckered in by the social media giant with discussions of partnership while its tech was being copied. In the Federal Cicuit, Facebook won again on its challenge to an online messaging patent. And in D.N.J., a website that tried to back off on enforcing a transparently invalid patent for online photo contest after EFF got involved in the suit was whacked with attorneys' fees.

Commercial Speech

Trademark

Lawsuits over the names of hit TV shows aren't limited to Fox; this month, the production company behind Netflix hit *House of Cards* was smacked with a trademark lawsuit by the producers of a radio show of the same name. You might very well wonder how the case will be affected by the preexisting and continuous use of "House of Cards" in connection with the syndication and sale of the 1990's BBC television show (on which the Netflix show was based) throughout the United States. I could not possibly comment.

Tech-trance-electro-house maven deadmau5 sued a vape company, claiming its "deadmodz" brand infringed his trademark. Meanwhile, the rapper formerly known as Rolls Royce Rizzy is now just Royce Rizzy, after a judge in D.N.J. hit him with an injunction in a dilution action filed by Rolls-Royce Motor Cars. Lionsgate failed to put TD Ameritrade in a corner, with its trademark suit over ads spoofing *Dirty Dancing* dismissed in the Central District of California. And two different contributory infringement lawsuits against mobile providers over third-party apps failed in N.D. Cal., with the court holding in each case that there was no showing that the defendants had notice of the alleged wrongful acts.

Oh, and the Northern District of Illinois held that you can't smack a critic with a trademark dilution claim just because they mention your name in connection with a bad review. Where's that federal anti-SLAPP law?

In the appeals courts, the Ninth Circuit heard argument over confusion caused by use of the term "Memory Lane" by social networking site Classmates.com. And the USPTO has declared that it will suspend all TM applications that might be affected by the Federal Circuit's ruling in *In re Tam*, including the "Slants" mark, until its appeals are resolved; the Federal Circuit rejected an attempt to force the Trademark Office to grant registrations on scandalous and disparaging marks in the interim.

Advertising Restrictions

The legality of mobile billboards came before the Ninth Circuit this month, with small businesses arguing that their free speech rights had been violated by bans on the billboards in

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Los Angeles and the vicinity. It's an interesting question as to whether a ban based on the distracting nature of the billboards is content-based; after all, what grabs your attention if not the content?

False advertising

Well, this should be fun: The New York Supreme Court has revived the state AG's false advertising suit against Donald Trump in connection with Trump University. The suit accuses the defendants, including Trump, of operating an unlicensed educational institution and deceiving more than 5,000 students regarding the nature of the program. And if you thought we'd eventually see an FTC false advertising claim against Volkswagen over its claims to be environmentally friendly, you're right.

March was not a good month for those looking to undercut their business rivals with bogus online reviews. A laser hair removal service won summary judgment on its Lanham Act claims in S.D.N.Y. against a defendant competitor that was plastering review sites with anonymous negative comments. Meanwhile, in W.D. Ky., a judge held that calling up your competitors' customers and offering them incentives to change positive reviews to negative was punishable commercial speech.

In a case that caught the attention of those concerned about the future of ad revenue, retailer Lord & Taylor settled claims with the FTC that it deceived customers with a native advertising program that did not disclose that participants were compensated for their statements.

Finally, a judge in E.D. Wis. approved a final settlement in the false advertising lawsuit over Subway's "footlong" sandwiches, and explained why sandwiches falling short of 12 inches warranted a settlement that fell far shorter than many outside observers expected. Shorthand version: The short sandwiches weren't all that short; customers weren't shorted because amounts of the raw ingredients were standardized; and really, who gives a short? (Don't worry, the article's almost over.)

Miscellaneous

Signage & Public Display Regulations

The U.S. Court of Appeals for the Fourth Circuit held that North Carolina can issue a "Choose Life" license plate without offering an opposing message, supplanting an earlier opinion in the case that was vacated by the Supreme Court's decision in *Walker*.

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Meanwhile, the Northern District of New York didn't know *what* doctrine applied to the "Wandering Dago" food truck (public forum? employee speech? government speech?), but knew that it was all right for New York to ban the truck from its streets.

The Anthony Elonis Corner

Last December, rapper 2 Chainz escaped a defamation claim over a backstage video in which he called a female fan a "THOT"; now, the fan is suing again, claiming that the video for the rapper's song *Watch Out* contains threats against her life.

The True Miscellany

A California appellate court affirmed the dismissal of a fraud claim against James Cameron and his production company. The plaintiff claimed he was misled into believing his short story would be developed into a motion picture, when instead the defendants intended either to remove the plaintiff's work from the market to clear the way for *Avatar*, or use the story in the development of *Avatar*, or something like that. The court wasn't persuaded by his very copyright-like comparison of the two works.

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As always, thanks for reading. If you actually got this far, drop me a note at jhermes [at] medialaw.org and let me know what you thought. Otherwise, I'll presume that I'm talking to myself again.