What Happens When You Condense a Year of The Monthly Daily into a Single Article?

The 2018 YEARLY Monthly Daily Awards

By Jeff Hermes

Welcome to the 2018 edition of the Yearly Monthly Daily Awards, in which we will celebrate some of the most notable media law developments of 2018 (sublime, ridiculous, and everything in between) and remember that, as serious as our work as media attorneys is, it can be thought-provoking and hilarious as well.

With the exception of our brand-new Readers’ Choice Award, the nominees and winners have been selected in the sole discretion of the author, so don’t blame George or Dave for this (or the MLRC as a whole). As usual, I have barricaded my door and have attempted to complete and send this article before (a) my colleagues break into my office or (b) the air runs out. Either way, selection for an award is never intended as a critique of the fine work done by media attorneys in these cases, only the circumstances in which we find ourselves.

The various YMD Awards will be presented in alphabetical order. We will also give two Special Awards this year, at the end of this article: The Readers’ Choice Award, and that zenith/nadir of recognition, The Extremely Dubious Top Honors.

Let’s get to it. You can click on an award title below to go directly there.

The ARTISTS Award
The CHUTZPAH Award
The CINÉMA VÉRITÉ Award
The FANTASTIC BEASTS AND WHERE TO SUE THEM Award
The FIRST OR SECOND? Award
The GOLDEN STATE Award
The HIDDEN DEPTHS Award
The HONORABLE EXCELLENCY Award
The JASON VOORHEES MEMORIAL Award

The LOATHSOME Award
The PICK ON SOMEONE YOUR OWN SIZE Award
The POP-UP Award
The RESTORED VOICES Award
The SHAGGY DOG Award
The SUPERNATURAL Award
The TENTERHOOKS Award
The WATER COOLER Award
The WEIRD LIBEL Award
The READERS’ CHOICE Award
The EXTREMELY DUBIOUS TOP HONORS

A straight-up copyright infringement lawsuit made interesting primarily because of its subject matter. Artist Duke Riley attached tiny light sources to the legs of more than 2,000 trained pigeons, whom he then released into the night sky over the Brooklyn Navy Yard in order to transform the rats with wings into an amazing—but ephemeral—light sculpture. Riley is not the plaintiff, however; the plaintiff is photographer Byron Smith, who captured a time-lapse photo of the event which is impressive in its own right and licensed the photo to The New York Times. Art news website Art Report also covered the event, and used Smith’s photo without the credit published by the Times; Smith has sued for infringement and for removal of copyright management information.

HONORABLE MENTION: Davidson v. United States, U.S. Court of Federal Claims

A number of interesting facts about this one, which involved the unauthorized use of an image of the plaintiff’s “a little more contemporary..., definitely more feminine” adaptation of the Statue of Liberty for the Las Vegas Strip. First, it’s a media law case from the U.S. Court of Federal Claims, which is a rarity in itself. Second, the United States Postal Service is the defendant, having used the unauthorized image without attribution on a December 2010 postage stamp. Third, the case resulted in a verdict for the plaintiff after a bench trial of more than $3.5 million, with the court finding significant originality in the adaptation and no fair use. All because someone at the Post Office couldn’t tell that this image didn’t look quite right – but that’s strict liability for you.

RUNNER-UP: Munro v. Lucy Activewear, Inc., U.S. Court of Appeals for the Eighth Circuit

This battle between a creator of light sculptures and an activewear manufacturer arose out of collapsed negotiations between the parties for the sculptor to create an installation for an advertising campaign. According to the plaintiff, after he had confidentially disclosed promotional information about his work and a planned installation in Boston, the defendant cut off contact and created its own light-sculpture installation in Boston in the plaintiff’s style, resulting in the plaintiff losing his opportunity in the city. Adding insult to injury, the defendant entitled its installation “Light Forest”; the plaintiff’s best known works were “Field of Light” and “Forest of Light.”
But the sculptor did not claim copyright infringement – instead, he claimed trademark and trade dress infringement, and tortious interference with a business opportunity. The Eighth Circuit affirmed the dismissal of the sculptor’s trade dress and interference claims, holding them preempted by the Copyright Act. However, solely with respect to his trademark claim over the titles of the respective installations, the Court of Appeals reversed and remanded for further proceedings. As an interesting ruling about intellectual property law at the intersection of the creative arts and business matters, this case takes the runner-up spot.


In this novel case under the Visual Artists Rights Act of 1990, a federal judge awarded a total of $6.75 million to twenty-one graffiti artists (whom the court termed “aerosol artists”) whose murals at the famed 5Pointz art space were destroyed. Initially, the plaintiffs had been seeking a preliminary injunction against the demolition of the site by its owner; the court denied the injunction, but before the written opinion could issue eight days later and certainly before any emergency appeals could be lodged, the site’s owner whitewashed over the murals. The subsequent opinion on the preliminary injunction noted that this was the first case to consider the application of VARA to graffiti, and warned the defendant that although an injunction would not issue it faced significant damages if it destroyed the murals and final judgment later entered in the plaintiffs’ favor.

That prediction came true in spades after the case came to trial a few years later. In a state of mind that can only be described as extremely pissed off, Judge Frederic Block bypassed an advisory jury’s award of actual damages and instead awarded the maximum statutory damages of $150,000 for each of the 45 murals destroyed. Finding that the defendant had acted willfully in destroying the murals, the judge expressed particular pain at the method of destruction:

> The whitewash did not end the conflict in one go; the effects lingered for almost a year. The sloppy, half-hearted nature of the whitewashing left the works easily visible under thin layers of cheap, white paint, reminding the plaintiffs on a daily basis what had happened. The mutilated works were visible by millions of people on the passing 7 train. One plaintiff, Miyakami, said that upon seeing her characters mutilated in that manner, it “felt like [she] was raped.”

In a move that must be acknowledged as cool, however, the judge preserved images of many of the works for posterity by including full-color photographs with accreditation and titles in an appendix to his opinion. For its grappling with novel issues and its recognition of the value of public art, Judge Block’s ruling in the case wins the category.

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The CHUTZPAH Award
(given to a party whose defense strategy displayed significant nerve even if unsuccessful)


How do you quickly dispose of a potential class action under the Telephone Consumer Protection Act? Online physician-finding service ZocDoc’s answer was both simple and clever: Proffer full and complete relief to the name plaintiff before a class is certified; deposit that amount with the court when the plaintiff says no; stipulate to judgment in that amount; and then move to dismiss the case as moot. It was a bold move and the Southern District of New York actually bought it, letting ZocDoc off the hook for a relatively paltry $20,000 before the Second Circuit reversed the dismissal.

HONORABLE MENTION: The Coalition for Better Government, for its defense against a trademark claim (Alliance for Good Government v. Coalition for Better Government, U.S. Court of Appeals for the Fifth Circuit)

Check out the two logos below. The Alliance for Good Government, the owner of a registered trademark in the logo on the left, sued its competitor, the Coalition for Better Government, who used the mark on the right.

With an argument that might have worked before Commissioner Bele but was, to put it charitably, a Hail Mary in a U.S. court, the Coalition claimed that its “hawk” facing right in white on a blue background was not likely to be confused with the Alliance’s eagle facing right in blue on a white background. The Fifth Circuit had little difficulty in affirming summary judgment for the plaintiff:

To cut to the chase: Alliance and Coalition have the same logo. Same shape ... .Same lines in the same place ... . Same arrangement of words ... . Same colors ... . And, of course, the same birds. Not similar birds; the same birds—with the same down-pointed beak, gazing over the same wing (the right), sporting the same number of identically-stylized feathers (forty-three).
(Emphasis amusingly in the original.) Frankly, I’m impressed that someone counted the feathers. Guys, next time you think about making a trademark argument, consider whether Mr. Spock would raise an eyebrow at it.

**RUNNER-UP:** CBS Corporation, for its defense against copyright claims based upon remastered versions of pre-1972 sound recordings (ABS Entertainment, Inc v. CBS Corp., U.S. Court of Appeals for the Ninth Circuit)

I have to say, I thought this argument was clever, though it left a lot of our heads spinning. Here’s the set-up: Prior to this year’s Music Modernization Act, radio royalties for pre-1972 sound recordings were not governed by the federal Copyright Act and regulation was left to state law. Plaintiff ABS owned the copyrights in pre-1972 recordings which it remastered when digital recording formats began to replace analog formats. CBS transmitted the remastered sound recordings via terrestrial radio and digital streaming, and paid royalties and compulsory license fees as required under federal law. Notably, this meant that CBS did not pay a licensing fee for its terrestrial radio broadcasts. ABS sued CBS for infringement under California law, alleging infringement and misappropriation of its interests in the pre-1972 works.

CBS responded with a silver bullet argument. Sure, ABS, you claim ownership of pre-1972 recordings, but we played remastered versions that were created long after 1972; the remasters constitute authorized derivative works governed exclusively by the federal scheme, and, therefore, you lose. The federal district court accepted the argument and granted summary judgment to CBS. However, the Ninth Circuit reversed, holding that the district court jumped the gun and erred in multiple respects, including that (1) “a derivative sound recording distinctly identifiable solely by the changes incident to the change in medium generally does not exhibit the minimum level of originality to be copyrightable,” (2) there was a disputed issue of fact as to whether there were any creative contributions in the remasters beyond differences in medium; (3) there was a potential dispute over whether any such additional creative contributions were authorized by ABS, which claimed that it was just looking for digital versions of its catalog; and (4) even if such creative contributions existed and were authorized, federal law would apply only to the new contributions while state law would continue to apply to the pre-1972 recordings re-embodied in the remasters. The whole thing was remanded to the district court for a redo.

**WINNER:** Vacuforce, LLC, for its attempt to recover attorneys’ fees (Bell v. Vacuforce, LLC, U.S. Court of Appeals for the Seventh Circuit)

Photographer Richard Bell sued Vacuforce in the Southern District of Louisiana over the alleged use of his photograph of the Indianapolis skyline without permission. About a month and a half later, Bell dropped the suit and it was dismissed with prejudice; Vacuforce, asserting that it was the prevailing party, filed a motion seeking recovery of its attorneys’ fees under 17 U.S.C. § 505. So far, not too surprising – until you learn that Bell withdrew his claim in exchange for a
settlement payment of $7,000 from the defendant or its insurer. Turns out Vacuforce’s lawyer omitted that pertinent piece of information in the motion for fees, and you have to wonder what the thinking was here. I mean, it’s not like Bell wasn’t going to tell the court what happened, and indeed he did, leading to an award of fees to Bell in defending the motion and Rule 11 sanctions against Vacuforce’s attorney. The Seventh Circuit affirmed in a scathing opinion, but for the sheer effrontery of the attempt, Vacuforce wins the category.

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The CINÉMA VÉRITÉ Award
(given to a lawsuit involving an attempt to capture reality on film that got a little too real)

RUNNER-UP: Taylor v. Viacom Inc., U.S. District Court for the Central District of California

Gangsta rapper Jayceon Taylor, a/k/a “The Game,” starred in VH1 dating show She’s Got Game. I can’t say I’ve ever seen the program, but according to the show’s website, it follows the “rebounding rapper” as he “pursues his perfect love match after splitting with his longtime fiancée” among “10 women specially chosen by The Game’s celebrity friends.” So far, so—well, one hesitates to use the word “good” here, but let’s say—predictable.

What Taylor alleges actually happened is that Viacom “cast [one of the women] as a contestant on the show knowing she had a criminal history, including multiple felony arrests for battery, and that she had suffered from mental health issues.” You’d think this story would next involve the contestant attacking Taylor, but no; instead, the woman filed a lawsuit against him for an off-camera sexual assault. Taylor naturally asserts that the lawsuit was bogus, but she nevertheless obtained a $7.1 million jury verdict against Taylor after he failed to show up for trial (allegedly because of an “emergency dental procedure”).

All of this, he claims, was in fact Viacom’s fault for letting the contestant get anywhere near him, leading to the instant lawsuit. Viacom, living the real world, quickly responded with an anti-SLAPP motion. The district court granted the motion and struck Taylor’s complaint, holding that Viacom’s casting choices were an exercise of its First Amendment rights and that Taylor had failed even to argue the likelihood of success of his claims.

WINNER: Roublow v. CBS Television Studios, U.S. District Court for the Eastern District of Louisiana

So, as I know from my wife and my mother (who both have worked as background actors in TV and film), the job of an extra is to wait patiently, to follow directions to the letter, and above all not to make a fuss or get in the way. That necessarily involves a significant degree of trust as an
extra can find himself or herself called to a wide range of locations, from the elegant to the disgusting, at any time of day or night.

Take, for example, the four extras at issue in this case, who were called to a jewelry store in a strip mall in St. Bernard Parish, Louisiana for an episode of NCIS: New Orleans. The scene involved a jewel theft, and the four extras were all costumed in black suits with ski masks and equipped with fake machine guns. It turns out, however, that the episode’s director was undertaking a little “guerilla filmmaking” and hadn’t bothered to alert the local police – so after bystanders reported an armed robbery, the cops smashed through the jewelry store’s front door armed with laser-mounted machine guns trained on the extras, who were told to get on the ground.

Like good extras, they followed instructions to the letter and no one got physically injured, but an emotional distress claim naturally followed. What really adds pathos to this complaint is the following sentence: “Afterwards, John Doe Defendant routinely gave day rate vouchers to the Plaintiff and his two other extras and took them home.” It’s all in a day’s work for a background actor.

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The FANTASTIC BEASTS AND WHERE TO SUE THEM Award
(given to a noteworthy monster making a featured appearance in the Monthly Daily)

HONORABLE MENTION: Baphomet, United Federation of Churches LLC v. Netflix, Inc.

Whether you consider this androgynous goat-headed figure to be “a historical deity which has a complex history” or a demonic power “associated with evil, cannibalism and murder,” Baphomet deserves a nod for its appearance in a copyright dispute between The Satanic Temple and Netflix over the similarities between a statue commissioned as a work-for-hire by the plaintiff and one appearing in the defendant’s streaming series “The Chilling Adventures of Sabrina.”

HONORABLE MENTION: Bigfoot, Bigfoot on the Strip v. Winchester

This case illustrates the perils of being heavy-handed (or -footed) and thin-skinned (or -pelted) in response to online reviews. A TripAdvisor user left a “meh” three-star review of the Sasquatch-themed “Bigfoot Fun Park,” which became a furious one-star review after the attraction’s owner badgered the reviewer’s daughter over the initial lackluster comments. The owner then sued over the second review. Originally spotted in Taney County, Missouri, this elusive case has since retreated into the wilds of the U.S. District Court for the Western District of Missouri.
**HONORABLE MENTION:** Copyright Trolls, *McDermott v. Monday Monday, LLC* and *Strike 3 Holdings, LLC v. Doe*

Like other cryptozoological specimens, the common or garden-variety copyright troll has long been believed to exist in a variety of habitats around the world (particularly those with broadband internet access). This year, we recognize two distinct subspecies that have been formally identified by judges: *trogloodytarus copyrightensis advocatus*, a/k/a the “Copyright Lawyer Troll,” and *trogloodytarus copyrightensis cliens*, a/k/a the “Copyright Client Troll.” Note that the success of either variety in litigation appears to decrease significantly upon explicit judicial identification of the species at issue, an interesting variation on the traditional defense of turning trolls to stone by exposing them to sunlight.

**RUNNER-UP:** Mr. Nutterbutter, *Marshall County Coal Co. v. Oliver*

The Godzilla of sciuridae, Mr. Nutterbutter the Giant Squirrel tromped across the stage of *Last Week Tonight* and into our hearts with his well-timed assist to John Oliver’s takedown of coal baron Bob Murray. Whether he’s the product of atomic testing or an escapee from a twisted fantasy world, we hope his starring role in Murray’s failed defamation suit isn’t the last time we hear from him.

**WINNER:** RbST, *Eli Lilly & Co. v. Arla Foods, Inc.*

From the 7th Circuit’s decision:

The commercial opens with this caption: “Arla Cheese Asked Kids: What is r[b]ST?” As the audience watches a cartoon of a six-eyed monster and a fisherman, a seven-year-old girl named Leah narrates: “RbST has razor sharp horns. It’s so tall that it could eat clouds. You may want to pet it but the fur is electric.”

Sure, scientists might say that rbST is a perfectly safe artificial bovine growth hormone, but what do they know? When you see this coming for you...
...you know it’s time to launch your giant robot. For its combination of childlike imagination, variable spelling, and sheer terror, the Great Beast RbST wins the category – as well as a ruling from the Court of Appeals affirming a preliminary injunction against deceptive advertising.

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The FIRST OR SECOND? Award
(given to a dispute where claims of “weaponization” crept into a speech issue)

RUNNER-UP: *McCafferty v. Newsweek Media Group*

A Columbia professor interviewed by Newsweek opined that conservatives had “weaponized” pre-teens as shills for Donald Trump. The parents of one child sued, accusing Newsweek of “weaponizing” the kids itself as a tool to attack conservatives. This false light/defamation case filed in the Philadelphia County Court of Common Pleas is long on rhetoric and short on anything looking like allegations of defamatory fact.

WINNER: *Janus v. AFSCME, Council 31*

Justice Kagan, dissenting in this controversial case over compelled funding of union activity by government employees, decried the majority opinion as “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” Quite apart from the merits of this case, Kagan’s choice of words projected a sense of political conflict and polarization at the Supreme Court that (whether justified or not) could complicate the defense of First Amendment interests in the future.
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The GOLDEN STATE Award
(given to a statute that leverages California’s unique influence on the internet in an attempt to fix the ills of the world)

HONORABLE MENTION: Cal. Civ. Code § 1798.83.5 (the “Actor Age Law”)

You might be surprised that this blatantly unconstitutional restriction on the online publication of actor’s ages, targeted at entertainment industry information service IMDbPro and its affiliated websites, is still a live issue. Passed in 2016, enforcement of the law was enjoined by a federal court in 2017, and one might have assumed that California would let it slip quietly into irrelevance. One would be wrong, however; the state AG’s office continues to fight for the statute, with an appeal currently pending at the Ninth Circuit.

HONORABLE MENTION: Cal. Civ. Code §§ 1798.91.04 et seq (on weak default passwords)

The so-called “Internet of Things” is notoriously insecure, and one major reason for that is the common practice by manufacturers of shipping networkable devices with easy-to-guess default passwords. Consumers who are not technically savvy and do not understand the risk of having their smart refrigerators hacked and slaved to a botnet are unlikely to change the passwords even if they realize that is an option, metaphorically leaving an open door to infiltration of other devices. But as of January 1, 2020, shipping a device protected only by the password “123456” will no longer be permitted under California law; instead, all connected devices will be required to have security features appropriate to their nature and function.


Things were touch and go this year for California’s attempt to restore net neutrality to the internet following the FCC’s repeal of the 2015 Open Internet Order. A powerful initial version of the bill was watered down during deliberations before being restored to something like full strength and passed into law in September. The measure quickly drew lawsuits from the federal government and the broadband industry, which claimed that the FCC repeal preempted state efforts to impose net neutrality; California stipulated that it would postpone the law’s effective date until the resolution of the lawsuits.


It took the European Union four years of negotiation to create the General Data Protection Regulation, followed by a two-year grace period for companies to gear up for compliance ending
this May. California’s approach to the same incredibly complex problem was introduced in the state’s legislature, passed, and signed by Governor Brown within a single week in June, with an effective date of January 1, 2020. The haste was apparently necessary to forestall an even more problematic version (!) that would have been introduced as a ballot initiative in November had the legislature not acted.

Needless to say, it’s clear the bill was a rush job. Its terms are in turns vague, contradictory, undefined, and sweeping. Even after a technical amendments bill was passed in September, there remain significant errors and serious questions about the interpretation of the law. Companies still reeling from marathon GDPR compliance efforts are looking at this bill like the tsunami that follows an earthquake. But as an excellent example of what happens when California legislators charge in where angels fear to tread, the California Consumer Privacy Act of 2018 wins the category.

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The HIDDEN DEPTHS Award
(given to a judicial decision or other ruling that digs into concepts of free speech jurisprudence in a thought-provoking way)

HONORABLE MENTION: Daniels v. FanDuel, Inc., Indiana Supreme Court

In this case, Indiana’s top court answered a certified question from the Seventh Circuit in a right-of-publicity case brought by college athletes against for-profit fantasy sports website operators. Specifically, the Supreme Court was asked to consider whether the sites’ use of the athletes’ names, pictures, and statistics required the athletes’ consent under Indiana law. Answering no, the Court held that this information fell within the category of “material that has newsworthy value” – an exception from the reach of the statute – and was thus free to use. The Court’s opinion was interesting both for its consideration of the impact of the defendants’ for-profit activity and its careful parsing of the development of the right of publicity in its various forms.

HONORABLE MENTION: State v. Lopez, Iowa Supreme Court

Does it make a difference if a defendant indecently exposes himself to an unwilling viewer by text message as opposed to in person? Yes, says this opinion from the Supreme Court of Iowa, which notes the significant additional dangers of in-person encounters and the added capacity of the recipient of an explicit image via text to delete the image and block the sender. The Court held that the state’s indecent exposure law did not contemplate long-distance digital exposure and thus reversed the defendant’s conviction. Notably, while the Court did not go so far as to hold that the First Amendment protects indecent text messaging, it did make note of Supreme Court precedents including Pacifica, Schenck, and Erznoznik in reaching its result.
CO-WINNER: *Dallas Morning News, Inc. v. Tatum*, Texas Supreme Court

Implication, innuendo, gist and inference – these are the words defamation defense counsel have learned to fear, as plaintiffs attempt to glean allegedly libelous messages from entirely truthful reporting. The Supreme Court of Texas bravely waded into the morass of case law around this topic, analyzing the different ways in which audiences might draw meanings from a publication other than its explicit message, considering the constitutional implications of each, comparing the doctrines of implication and opinion, determining the applicable standards, and clarifying the roles of the judge and jury. It’s a remarkable opinion that deserves to share the podium with our next case.


Anyone who reads *The Monthly Daily* will not be surprised that this, my favorite opinion of the year, has won an award. The First Circuit (per Judge Selya – today’s vocabulary word: animadversions) conducted an expert takedown of arguments for the constitutionality of post-judgment libel injunctions based on the fact that what is defamatory is entirely dependent on the circumstances in which a particular statement is made. I still get chills when I read this paragraph:

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

Goosebumps, people.

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**The HONORABLE EXCELLENCY Award**
(given to a state governor for a particularly excellent move to protect freedom of expression)

**REDUNDANTLY HONORABLE MENTION:** *The Honorable Nathan Deal*, Governor of Georgia

Governor Deal receives a nod in this category for his veto of a bill passed by the Georgia legislature to add a layer of state criminal penalties to the unauthorized access of computer systems, without even the safeguards of the federal Computer Fraud and Abuse Act. Even more
problematic was a provision of the bill allowing companies to engage in retaliatory hacking against intruders. For realizing the chaos this bill would cause, Gov. Deal deserves recognition.

**RUNNER-UP: The Honorable Jay Inslee**, Governor of Washington

We also recognize Governor Inslee for a veto, this time of a bill that would exempt Washington’s legislature from the reach of the state’s Public Records Act. The bill, which was pushed through in 48 hours as a response to a court ruling holding that the legislature is subject to public records requests, was widely criticized as a “snow job,” a “slap in the face,” and “an appalling display of legislative hubris.” Apparently, Gov. Inslee agreed after receiving thousands of emails and phone calls.

It might seem unfair that Gov. Inslee has edged out Gov. Deal, given that both are being recognized for vetoes and a governor doesn’t have a choice about what lands on his desk. However, Inslee also picked up bonus points for his pithy reaction to threats of a lawsuit over Washington’s state net neutrality law.

**WINNER: The Honorable Andrew Cuomo**, Governor of New York

Kenneth Lovett, the Albany bureau chief for the New York Daily News, was arrested in March for talking on his cellphone in the lobby of the New York State Senate Chamber in contravention of a posted sign. However, he had little to worry about because his “state-appointed attorney” was none other than Governor Cuomo himself, who arrived in person at the State Police substation where Lovett was being held, told the desk sergeant he was Lovett’s lawyer, and spent some time joking with reporters after he and Lovett walked out of the station. True, Lovett’s actual legal exposure was likely trivial, and sure, it was a PR gambit, but when’s the last time you heard about a chief executive of any U.S. jurisdiction getting out of his chair and going out into the world to stand by a journalist?

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**The JASON VOORHEES MEMORIAL Award**

(given to a legal dispute that seems to have died a final death in 2018, yet we can’t quite believe it)

**HONORABLE MENTION:** The prosecution in D.C. Superior Court of numerous individuals in connection with protests at the inauguration of Donald Trump

234 people were arrested and charged with rioting and related violations in connection with their participation in inauguration protests back in January 2017. The government claims that all cases have now been resolved. But for the life of me, I can’t seem to figure out what happened to all of them.
Let’s see... six defendants were processed through the courts for trial first, including freelance journalist Alexei Wood; the judge dismissed the rioting charges against the six, and they were found not guilty of the remaining charges by a jury in December of last year. (228 remaining.) Prosecutors dropped charges against 129 of the remaining defendants in January 2018, saying they were less serious offenders. (99.) Forty others seem to have escaped prosecution in some way by this point, I can’t tell how, because after the mass drop of charges the government says there were 59 left. (59.) Ten individuals had felony charges dismissed in May by a judge for Brady violations by the prosecution, though three still had misdemeanor charges remaining, meaning that only seven were off the hook entirely. (52.) After a second trial of four other defendants ending in June, a jury acquitted one defendant on all charges (51), and issued mixed acquittals/deadlocks as to the other three (whom we’ll treat as off the hook). (48.) A third trial was called off after the prosecution dropped charges against the next six scheduled to be tried. (42.) And finally in July, the government dropped charges against 39 people, including The Santa Fe Reporter’s Aaron Cantú, claiming that all of the cases had been dismissed.

But by my count, there were still three left over at the end. And what happened to that mystery 40? We do know that twenty-one individuals pleaded guilty at some point, so let’s assume they’re part of that block. (Just to show the futility of this whole mess, no convictions were secured via jury trial, and of those who pleaded guilty, only one incurred any jail time and is already out.) By my count that still leaves 22 people unaccounted for, which is why this case seems appropriate to the category. If anyone can spot a flaw in my math or knows what happened to these people, let me know!

HONORABLE MENTION: Martin v. Wendy’s International, Inc. and Martin v. Living Essentials, LLC

Okay, I admit I have a soft spot in my heart for the ridiculous right-of-publicity claims brought by Hacky Sack king Johannes Martin, the holder for more than 20 years of the Guinness World Record for consecutive footbag kicks. In one case, he sued fast-food chain Wendy’s and Guinness World Records over a joint promotion in which certain Wendy’s Kids Meals came with a footbag and a card that explained Martin’s record and invited kids to set their own records with family members. In another, he sued the manufacturer of “5-hour ENERGY” drink over a facetious claim in a commercial that a user of the product “mastered origami while beating the record for Hacky Sack.”

Both claims were dismissed, both dismissals were affirmed by the Seventh Circuit (the 5-hour ENERGY case in 2016, the Wendy’s case in 2018), and certiorari was denied in both cases by the U.S. Supreme Court in October 2018. Undeterred, Martin went on to petition for rehearing in both cases, which petitions were denied earlier this month. It takes perseverance to kick a footbag 63,326 times in a row over a period of almost nine hours, and for that same bloody-
minded perseverance at attempting to chase people away from his claim to fame, we recognize Martin’s efforts here.

**RUNNER-UP: Lenz v. Universal Music Corp.**

Did you even realize that the “Dancing Baby” case was still a live dispute at the beginning of 2018? After years of hard-fought litigation over whether fair use must be considered in order for a copyright holder to be able to assert that it has issued a DMCA takedown notice in good faith, we had a controversial ruling from the Ninth Circuit back in 2016 and a denial of cert in 2017. The case then moved back to the district court, where everyone tried to remember what they had been fighting about.

Then this past June, when the parties were (presumably) staring at each other bleary-eyed and battle-numbed over more than a decade of pleadings, they respectively muttered “point made” and called it quits. At which time the “dancing baby” was a 12 year old middle-schooler.

**WINNER: Naruto v. Slater**

Yes, the “monkey selfie” case, in which PETA, as alleged “next friend” of a crested macaque named Naruto, sued David Slater, the photographer whose camera Naruto apparently used to snap a picture of himself. I actually declared this one dead last year after a report that PETA had reached a settlement with Slater while its appeal of the case’s dismissal was pending – which just goes to prove that I was right not to pursue a career in medicine. The Ninth Circuit rejected the settlement in April of this year, and affirmed the dismissal of case while declaring not only that PETA was not Naruto’s “next friend” (given that it exploited the monkey for ideological ends) but also that non-humans do not have standing under the Copyright Act.

Surely, we thought, that would be the end – but then a judge on the Ninth Circuit sua sponte called for the case to be reheard en banc, leading to what is now known as the “Groan Heard ‘Round the World.” Fortunately, rehearing en banc was denied at the end of August and the ninety-day clock to file a petition for cert ran out on November 29th, so barring something extraordinary, it’s all over.

Or is it? Back in May, Condé Nast Entertainment picked up Slater’s life rights to make a film about the dispute – and one can only imagine that PETA has its lawyers on speed dial...

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The LOATHSOME Award
(given to a libel case exploring the boundaries of our favorite form of defamation per se)


After he was terminated by sports & pop culture blog Barstool Sports (“BSI”), actor Michael Rapaport sued for breach of contract and for defamation per se, alleging that after he joined the blog “BSI employees, personalities and bloggers began a systematic campaign to publicly and privately discredit, disparage and undermine” him. Specifically, Rapaport was upset by being referred to as “a creepy herpes riddled failure” and a “herpe having, race baiting, D-list actor”, and similar comments, as well as BSI’s sale of t-shirts “depicting Mr. Rapaport with a clown nose and what BSI describes as a herpes sore beneath Mr. Rapaport’s lower lip”:

One can understand why he’s upset, but the attacks on his acting are opinion and as for the allegations about herpes, well, BSI responded to Rapaport’s demand letter with this photograph of the plaintiff:

Ouch.

RUNNER-UP: Mullins v. Beasley Media Group, Superior Court of Gwinnett County, Georgia

This might be the first time that I’ve seen a defamation plaintiff who alleges that he was accused not of having a loathsome disease, but of being a loathsome disease. Specifically, property management and entertainment entrepreneur Joe Mullins filed suit against WGAC radio host Austin Rhodes for a variety of critical statements including the following: “He’s like a floatie,
herpes, same thing.” Sadly, Mullins dropped the suit while an anti-SLAPP motion was pending, depriving us of the opportunity to have a court rule on whether the allegation could in anyway be understood to be a question of fact.

**WINNER:** *Nolan v. State*, New York Appellate Division, First Department

Our winner in this category is interesting rather than amusing. In this case, the plaintiff was a model who appeared in a stock photo owned by Getty Images, which was licensed to the State of New York for use in an ad campaign to raise awareness of the legal rights of HIV-positive citizens. The plaintiff succeeded in obtaining summary judgment in her claim for defamation *per se* against the state. The state appealed, arguing that the imputation of HIV-positive status is not properly characterized as an allegation that the plaintiff has a “loathsome disease,” given current social mores and the fact that the ad campaign was itself intended to show the support of the law for those so afflicted.

The Appellate Division affirmed. Rejecting the premise that the plaintiff was required to prove a stain on her character as opposed to other injury such as humiliation or mental anguish, the court held that because “ostracism is a likely effect of a diagnosis of HIV,” it “falls under the traditional ‘loathsome disease’” category. In response to the state’s comparison of the case to imputations of homosexuality, which other New York courts had held not to be defamatory, the court held that society had not progressed so far with respect to HIV or AIDS. However, the court was quick to point out that it did not mean itself to attach any moral censure to HIV-positive status:

>This is not to imply that we in any way regard HIV or any other disease to be “loathsome,” and we disfavor the use of that word. Society aspires to embrace people with various medical conditions .... Accordingly, we prefer a formulation that makes clear that an imputation of a particular disease is actionable as defamation *per se* not because the disease is objectively shameful, but because a significant segment of society has been too slow in understanding that those who have the disease are entitled to equal treatment under the law and the full embrace of society.

Something doesn’t quite sit right with me about saying you have a defamation claim (as opposed to, perhaps, a false light or emotional distress claim) if no one thinks less of you because of the statement at issue but people are nevertheless afraid to shake your hand. It bugs me the same way that a defamation claim over a false allegation that someone has died bugs me – there’s nothing disparaging about being dead, we all do it sooner or later, but a report that you’ve shuffled off this mortal coil can certainly cause clients to stop calling. Because the Appellate Division’s discussion explores the imperfect overlap between moral opprobrium and damage to reputation and gets one thinking about what exactly we mean by defamation, it takes home the award.
The 2018 YEARLY Monthly Daily Awards

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**The PICK ON SOMEONE YOUR OWN SIZE Award**
(given to educators and others that have dramatically overreacted to student speech)

**HONORABLE MENTION:** The Independence School District, for its lack of a sense of humor

* (Scheele v. Independence School District, U.S. District Court for the Western District of Missouri)

Earlier this year, seniors at Truman High School in Independence, Missouri, came up with harmless pranks to blow off steam and celebrate their upcoming graduation. Kylan Scheele came up with the idea of offering his school for sale on Craigslist for $12,725, citing the imminent departure of the graduating class as the reason for the sale (“Reason for sale is due to the loss of students coming up.”) His freaked-out teachers interpreted the reference to a “loss of students” as a threat against the school, and referred Scheele to law enforcement. The cops quickly determined that there was no problem and that the school had misunderstood Scheele’s post, but Scheele was nevertheless denied the ability to march with his class for graduation. The ACLU filed a First Amendment retaliation lawsuit on Scheele’s behalf, and although a judge denied a TRO to allow him to graduate with his class, the case is still pending.

**RUNNER-UP:** Manteno Community Unit School District 5 and the Kankakee County State’s Attorney’s Office, for their attempts to protect school officials’ privacy (*State v. Boron*, Circuit Court of Kankakee County, Illinois)

As I’ve noted before, I would have had run-ins with the authorities long ago had my educators been a little less understanding about the kinds of hijinks that high school students can get up to, particularly when it comes to the use of technology and access to spaces into which students are not typically supposed to enter. (What can I say, I was allergic to secrets.) That’s one reason why our runner-up in this category is so chilling to me – it involves a thirteen-year-old in Illinois who, after disclosing that he had recorded a meeting with his principal and assistant principal, was charged with a Class 4 felony for violation of Illinois’ draconian wiretapping law. The case was dropped in November, but not before sparking international outrage (and ruining this kid’s summer).

**WINNER:** The Hackettstown Public School District, for its protection of the feelings of police officers and their families (*J.G. v. Hackettstown Public School District*, U.S. District Court for the District of New Jersey)

K.C. was a high school student who was cautioned against discussing Black Lives Matter while at school, with her assistant principal admonishing her that “all lives matter.” Subsequently, K.C. volunteered to act the part of a corrupt police officer during a play reading in her English class,
saying she’d be happy to take the role of “the pig.” That bit of commentary netted her a one-day in-school suspension after school administrators determined that the term might have been offensive to another student—apparently not even present at the time—whose father was a cop. The administrators also compared the use of the term to derogatory racial and homophobic epithets. These noble efforts to train young minds that even mild criticism of the abuse of state power is intolerable in turn triggered a First Amendment lawsuit, which a federal judge has now refused to dismiss.

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**The POP-UP Award**

(given to the most unexpected appearance of the President of the United States in the *Monthly Daily*)

**WINNER:** *American Entertainers, L.L.C. v. City of Rocky Mount*, U.S. Court of Appeals for the Fourth Circuit, [in the May 2018 issue](#)

I’ve commented before about how Donald Trump seems to be going for a full card in MLRC Bingo by getting cases into every section of the MLRC *MediaLawDaily*. As such, the number of potential contenders for this award was extremely large. Nevertheless, there was one appearance that surprised even me after all this time.

Let me be clear: This case, in which the Fourth Circuit held that the City of Rocky Mount, North Carolina, granted its Chief of Police unconstitutionally unbridled discretion to deny licenses to adult businesses, has nothing whatsoever to do with Donald Trump that I know of. Nevertheless, as I was reviewing back issues of the *Monthly Daily* to write this article, I suddenly saw him on the page when I looked carefully at the Rocky Mount logo that was used to illustrate the story:

See him? He’s right behind the words “City of Rocky Mount.” If the color of his hair looks off to you, stare at the logo for thirty seconds then blink and look at a white sheet of paper.

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The RESTORED VOICES Award
(given to a ruling striking down a prior restraint, gag order, or statutory prohibition on speech that was breathtaking in its scope)

RUNNER-UP: Toomey v. Indiana Department of Correction, Circuit Court of Marion County, Indiana, for declaring Ind. Code § 35-38-6-1(e)-(f) unconstitutional

Execution drugs are a touchy subject, to say the least. Those involved in producing the drugs don’t want their participation known lest they become the target of protests or boycotts; likewise, the government does not want pharmaceutical companies and others deterred from doing business with the state. Indiana’s legislature took a somewhat drastic approach to this issue, passing a statute that prohibits anyone—not just government officials, anyone—with knowledge of the identities of producers or suppliers of execution drugs from providing that information in response “to any request for information, discovery request, or proceeding, no matter when made or initiated.” Yikes. Luckily, during a battle over public records, an Indiana Circuit Court judge held this November that the statute violates the First Amendment.

WINNER: In re Murphy-Brown, LLC, U.S. Court of Appeals for the Fourth Circuit, for vacating a gag order issued in McKiver v. Murphy-Brown, LLC and related cases

We’ve seen plenty of gag orders, we’ve seen plenty of attempts to shut down reporting about agricultural institutions, but gag order in a pig farming case takes the bacon. In a lengthy series of nuisance lawsuits against members of North Carolina’s hog industry, the court sua sponte issued an order binding on parties, lawyers, representatives, agents, and—all potential witnesses.” As the Fourth Circuit said in declaring the order wildly overbroad,

It included no findings specific to the various individuals it restricted. It treated lawyers no differently from parties, who in turn were treated the same as potential witnesses. It assumed all covered individuals were identically situated vis-à-vis pending and future litigation. Moreover, the gag order applied blanket restrictions to more than twenty cases that will be tried over a period of years. Participants in any given trial appear to remain restricted until the resolution of the final case. What is more, the unclear yet extraordinary reach of the phrase “potential witness” could include almost anyone who is knowledgeable or conversant about the issues in these cases. This breadth alone cannot help but impair legitimate news gathering activities that in and of themselves underlie the proper functioning of the First Amendment.

...
All these people care. This case is about their lives and their livelihoods. Whatever differences the parties and their supporters have, they possess in common a passionate First Amendment interest in debating their futures. It seems very wrong that a court would take that from them.

Amen.

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**The SHAGGY DOG Award**
(given to a case with fascinating facts that settled before our attention paid off)

**WINNER:** *Busch v. Ovitz*, Los Angeles Superior Court

More than a decade of litigation over a broken windshield, a dead fish with a rose in its mouth, and a sign reading “stop.” A journalist who claimed that Hollywood titan Michael Ovitz hired a notorious private investigator (who had a rap sheet for firearms and explosives possession, racketeering, and wiretapping) to intimidate her. Ovitz’s response that it was in fact Steven Seagal—yes, *that* Steven Seagal—who orchestrated the message. They could have sold tickets to the trial, which was scheduled to begin in February, but we’ll never know how the story comes out because the parties settled.

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**The SUPERNATURAL Award**
(given to a dispute involving realms beyond this mortal sphere)

**RUNNER-UP:** *Gaia Inc. v. Greer*

You know that it’s going to catch my attention when a streaming service for “consciousness-expanding” videos sues the producer of films about UFO and crop circles, over the latter’s referring to the former as a “Denver Luciferian coven equals CIA front.” The allegations of satanic government collaboration were derives, claimed the defendant, from allegations made by former employees of the plaintiff who related “grueling stories about these guys and their black magic.”

This might be the first time that a deposition will be conducted by dunking stool.

**WINNER:** *Malarkey v. Tyndale House Publishers*

Sure, our runner-up was ticking all the boxes, but it can’t compare to the allegedly true story of a boy who was in a coma and returned to life after a Danteësque tour of heaven and hell, leading to
a New York Times bestseller and multimedia production deal. Only problem is that the allegations were being made not by the boy but the boy’s (now-deceased) father; the revived lad denied the whole story as a packet of lies, claimed that he was never consulted, and sued the book’s publisher for a wide range of privacy violations.

Really, though, it’s the fact that the plaintiff’s own name summarizes his complaint in a single word that makes this our winner for the category.

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The TENTERHOOKS Award
(given to a pending matter whose results could have far-reaching effects for freedom of expression)

RUNNER-UP: Nieves v. Bartlett, U.S. Supreme Court

Let’s face it – we know them, we love them, but reporters can do stupid things, some of which break the law. They are also experts at irritating the powers-that-be with incisive coverage of matters that police and other government officials would prefer to be quietly forgotten (or, better yet, kept from the public entirely). But what happens when they do both at the same time? Were you arrested for jaywalking, or because you crossed the street to shoot video of a cop beating up a suspect? And if the latter, can you bring a First Amendment retaliation claim notwithstanding your violation of the law?

The Supreme Court is expected to answer that question in Nieves v. Bartlett, which involved a situation where there was probable cause to believe that the respondent was interfering with police but, at the time of his arrest, one of the officers involved suggested that he was being arrested because he earlier refused to talk to the cops. At oral argument, the Court specifically asked how it could draw a line between troubling cases involving retaliation against journalists and cases involving legitimate arrests where there was a not-unusual heated exchange of words between police and arrestee. The case will hopefully resolve a question left open by this year’s Supreme Court opinion in Lozman v. City of Riviera Beach, which involved a similar claim but was limited by the alleged existence of an official municipal policy of retaliation.


These two cases present important issues. Halleck involves the standards to be applied in determining whether a private entity operating public access television channels for the Borough of Manhattan should be treated as a state actor for First Amendment purposes; Knight involves
whether the President of the United States infringed the First Amendment rights of Twitter users by blocking them from the @realDonaldTrump account. Either is of significant intellectual interest, but would not ring any particular alarm bells as presented were it not for statements like this one in the petitioner’s brief in *Halleck*:

> If MNN’s minimal nexus to the government is sufficient to find state action, then entities such as Time Warner, Facebook, Twitter, and National Public Radio...— all of which are subject to some level of governmental regulation—should be concerned.

and this one from the district court in *Knight*:

> Though Twitter also maintains control over the @realDonaldTrump account (and all other Twitter accounts), we nonetheless conclude that the extent to which the President and Scavino can, and do, exercise control over aspects of the @realDonaldTrump account are sufficient to establish the government-control element as to the content of the tweets sent by the @realDonaldTrump account, the timeline compiling those tweets, and the interactive space associated with each of those tweets.

Combine these with the ever-louder drumbeat at the Capitol for regulation of digital platforms’ moderation practices, and you get a pair of cases that have the potential to upend the legal landscape of online communication in the United States. The risk is admittedly slight -- neither court is likely to hold explicitly that digital platforms are bound by the First Amendment in their moderation decisions. Nevertheless, we have already seen decisions such as *Packingham v. North Carolina* with even more tangential language used to leverage arguments that constitutional standards apply to platform operators’ decisions. No wonder, then, that the Internet Association has filed amicus briefs in both cases imploring each court to keep its ruling exceedingly narrow.

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**The WATER COOLER Award**

(given to a decision that, while frustrating, we can debate endlessly)

**HONORABLE MENTION**: *Nwanguma v. Trump*, U.S. Court of Appeals for the Sixth Circuit

This case against Donald Trump over injuries suffered by protestors at a March 2016 campaign rally in Louisville presents some tricky questions about how to interpret the language of a defendant accused of inciting violence. Five times during the rally, then-candidate Trump told attendees to “get ‘em out of here” with reference to the protestors, leading to the plaintiffs being pushed, shoved and in one instance punched in the stomach by audience members. However,
Trump also said “don’t hurt ‘em,” which the Sixth Circuit held negated any interpretation of his words as “incitement to riot” under Kentucky law or as incitement under the Brandenburg standard. One judge on the panel concurred, but expressed concern that the opinion put too much weight on “don’t hurt ‘em” in the Brandenburg analysis – and rightly so. Such countermands might indicate that there was never an intent to cause violence in the first place, but also might just indicate regret after the fact.

[UPDATE: In a late-breaking development, the Awards Committee has decided that this Honorable Mention should be shared with Stricklin v. Stefani, U.S. District Court for the Western District of North Carolina, in which the court denied pop star Gwen Stefani summary judgment on a claim that she negligently caused injury to a concertgoer when she invited the audience at her concert to leave their seats and to move closer to the stage. The court’s rejection of the application of Brandenburg in Stefani’s case makes for an interesting contrast with the Trump decision.]


Well, this one came as a shock. The case involves a claim by a photographer whose image of Tom Brady was posted to Twitter without his consent, and from there embedded into numerous online news articles; the photographer is alleging infringement of his display right under the Copyright Act. The common wisdom, flowing from the Ninth Circuit’s landmark 2007 ruling in Perfect 10, Inc. v. Amazon.com, Inc., was that one does not infringe the display right by embedding content because no copy is made and the original content is being viewed, as a technical matter, at the location on the internet where it natively resides. But Judge Katherine Forrest declined to follow Perfect 10, holding that infringement of the display right does not require copying and could be satisfied by the integrated presentation of the photo in the defendants’ articles without permission. While other quite powerful defenses (including fair use) remain live, the decision shows that the routine use of embedding by newsrooms rests on a less certain foundation than anyone expected. Thus, the case remains a heated topic of discussion.

WINNER: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, U.S. Supreme Court

For an opinion that dodged the First Amendment free speech question entirely in favor of a fact-bound free exercise ruling, MLRC members have sure spent a tremendous amount of time parsing the arguments in this case about the asserted rights of a baker to decline a commission to create a confection for a gay wedding. But the case presents an almost irresistible tangle of questions regardless of which ones the Court actually answered, including the nature of expressive activity and the application of traditional rationales for the protection of freedom of expression in a case that has more to do with competing dignity interests than with the
marketplace of ideas. And there are enough hints in the concurring opinions to wonder what will happen if one of the many parallel cases making their way up through the states is taken up by the Court in the near future.

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The WEIRD LIBEL Award
(given to a party whose allegedly defamatory communication was notable for its unusual medium of expression)

WINNERS: Jeffrey and Dona Hall (Irish v. Hall, Idaho Supreme Court)

We’ve seen a lot of bizarre defamation cases in 2018, such as the former Major League Baseball player suing over reports about his health supplements make from elk antlers, or the journalist who “trolled the web” by tweeting a photo that riffed on a 4chan prank and then sued another reporter when she took the bait.

But Jeffrey and Dona Hall caught our attention not because of the subject matter of the libel claim against them, but due to the method by which they delivered their message accusing the mayor of Harrison, Idaho, and her husband of conducting creepy surveillance around the town. Specifically, by their choice of wi-fi network names. The Halls changed the name of their business wi-fi network first to “Mayor Wanda Irish Terrorist” and then to “she really is a Terrorist.” Their home wi-fi network started out as “dennis and wanda Irish stocking u2,” and later became “Move Irish.”

This is perhaps the least effective method of publication I’ve ever seen alleged in a libel case. Wanda Irish and her husband each claimed to be the third party to which the alleged defamation was published regarding the other, and one has to wonder exactly how these designations came to the plaintiffs’ attention in the first place. Given the nature of the Halls’ allegations, you could see that figuring into a truth defense; meanwhile, the idea of damages is laughable. Nevertheless, the Idaho Supreme Court reversed a directed verdict for the Halls and held that (1) the statement was indeed published and (2) the allegation of “stocking” could be interpreted as a statement of fact. So you’d better rethink your network names, because someone might be stocking u2.

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SPECIAL AWARDS

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The READERS’ CHOICE Award
(given to a judicial decision nominated by the MLRC’s members for special recognition)


Dubbed “CockyGate” by the romance writing community, this case involves an attempt by an author of romance novels to assert trademark rights in the word “cocky” and thereby bar any other writers from using the word in their book titles. A temporary restraining order initially issued in May but was quickly dissolved when the Authors Guild and the Romance Writers of America took up the defense, and in June the plaintiffs’ motion for injunctive relief was denied in a brief order following a hearing.

Eleanor Lackman of Cowan, DeBaets, Abrahams & Sheppard LLP explains her nomination of the court’s decision denying the injunction as follows:

Authors are increasingly using trademark law (or trying to) for purposes of curtailing speech. What often happens is that someone goes to the trademark office, obtains a registration, and then sends notices to Amazon to take down books (and oftentimes, e-books) on the ground that the book title infringes the complaining party’s trademark. Amazon, perhaps not so steeped in the issues ... , seems to be complying. Worse, individual authors who can’t afford counsel are being frightened into relenting to these demands. When we had the argument on the preliminary injunction motion, the courtroom was packed with romance novel writers who then made the transcript famous on Twitter. (Another reason I’m happy that my grandmother isn’t on Twitter. She’d have blushed if she knew the words I had to say in court... including “MFM ménage.” Oy.)

Thanks, Eleanor!

RUNNER-UP: *Wayt v. DHSC, L.L.C.*, Ohio Supreme Court

In this non-media defamation action, Ohio’s top court ruled that Ohio Rev. Code § 2315.18, which embodies the state’s tort reform caps on civil damages, “unambiguously” applies to injury to reputation and to defamation claims. Accordingly, it flipped rulings from the appellate and trial court levels that had allowed the plaintiff to recover amounts far in excess of the caps.
Jack Greiner of Graydon Head & Ritchey LLP tells us about the nomination:

[T]he Ohio Supreme Court case .. is significant, in that it applies Ohio’s tort reform damage caps (compensatory and punitive) to defamation claims. ... It is also interesting to me how under the radar the case was ... It arose in the context of an employment dispute. But the impact, at least in Ohio, will be large for media outlets.

Well, it might have been low-profile but we still flagged this one in the Media Law Daily on December 10th – and we’re glad you called it to our attention again now! Thanks, Jack, for the nomination!

WINNER: De Havilland v. FX Networks, LLC, California Court of Appeal, Second Appellate District

Judge Anne Egerton (formerly an in-house attorney at NBC and, as George says, “one of us”) led off her opinion regarding Olivia de Havilland’s right of publicity claim against FX Networks over her depiction in Feud: Bette and Joan as follows:

Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air -- or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction. That these creative works generate income for their creators does not diminish their constitutional protection. The First Amendment does not require authors, filmmakers, playwrights, and television producers to provide their creations to the public at no charge.

Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star -- “a living legend” -- or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator’s portrayal of actual people.

From there, it’s easy to guess the ending – the Court of Appeal affirmed the dismissal of de Havilland’s claims. David Korzenik of Miller Korzenik Sommers Rayman LLP says:

Not new law at all, but it is particularly well written – a nice read. And it provides an excellent statement of basic principles of 1st Amendment v Right of Publicity –
sometimes ignored/ forgotten by some lower courts that need to be reminded/reversed.

The Court presented ideas that have “oft been thought [by right minded people] but ne’er so well expressed.” As some great writer once said.

Alexander Pope, right? In any event, thanks to David for the nomination, and we’re pleased to present our first Readers’ Choice Award to Judge Egerton’s ruling in the case!

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And finally....

**THE EXTREMELY DUBIOUS TOP HONORS**

(given to an event during 2018 whose effects on media law have earned it a very special place in our hearts/in Hell)

**RUNNERS-UP:** The GDPR Takes Effect; Congress Passes FOSTA; BuzzFeed Wins in *BuzzFeed v. Gubarev*; The Eleventh Circuit Deepens the Circuit Split on Anti-SLAPP Laws in Federal Court in *Carbonne v. CNN*; The Knight Institute Knocks the Block in *Knight First Amendment Institute v. Trump*

What a year this was. So many of the cases and developments that we considered above could deserve a nod for the top spot amidst the chaos of interactions between the press and the government, concerns about the power of digital platforms reaching a boiling point, doubts about the neutrality of the judiciary gnawing away at the roots of the justice system, long-understood rules around defamation and intellectual property being called into question, and more.

Our runners-up reflect particular aspects of these issues, and I could not do them justice in the space I have other than to call your attention to them one more time. But for now, we have to move on.

**AND THE WINNERS ARE...**
CNN and Jim Acosta, for Their Successful Challenge to the Revocation of White House Press Credentials

Many have asked: Was it a good idea for CNN and its chief White House correspondent, Jim Acosta, to file a federal lawsuit over the White House’s revocation of Acosta’s hard pass? Well, at some point a line needed to be drawn in the sand over the Trump Administration’s treatment of journalists, and it’s hard to imagine a better case than this one – Acosta asks President Trump a question he absolutely doesn’t want to answer at a press conference, and the White House yanks his press pass while proffering shifting and dubious justifications, complete with doctored video of the event. True, we didn’t get the ruling some of us wanted declaring that the White House was retaliating against CNN for its exercise of First Amendment rights. But the Fifth Amendment due process ruling we did get was certainly influenced by First Amendment concerns and made perhaps the more critical point that the Executive Branch can’t just act on a whim when dealing with the press.

True, one practical upshot of the case was the enactment of new rules of decorum for White House press conferences that have raised quite a few hackles – including denial of the right to ask follow-up questions without permission. That, to be sure, is ridiculous; but to my mind, it’s also the kind of thing that can be hashed out over time. What is more important is the White House’s acceptance that there need to be rules in the first place, which constrain not only reporters but the ability of the government to take punitive action.

For reinforcing due process and the rule of law in interactions between the President and the press, this year’s top honors go to CNN and Jim Acosta.
That’s it for me this year. Thanks, everyone, and I wish you a wonderful holiday season and a great 2019!

One way to make sure it will be great is to register now for the MLRC’s Entertainment Conference in Los Angeles on January 17, 2019. As my favorite holiday movie says, “Come out to the coast, we’ll get together, have a few laughs.”

Just remember, it’s not Christmas until Hans Gruber falls off of Nakatomi Plaza.