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

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

So, Masterpiece Cakeshop. I spoke with a few of you about the case at the reception before our Annual Dinner and the surrounding events. Here’s how my thinking currently runs:

First: Blanket statements that the baking of a cake is not “speech” are not convincing to me; that seems like a cop out. Some commentators seem to argue that a cake differs from what is colloquially considered as artwork because it is impermanent or intended for consumption. But copyright-like concepts of fixation and permanence are inapplicable to First Amendment jurisprudence; after all, most oral communication is lost on the breeze. Others point to the fact that a cake might be attractive but conveys no specific message; however, we do not judge First Amendment protection for paintings or other artwork based on the specificity of their meaning. Think of it this way – if a city attempted to enforce a decency ordinance against an erotic bakery, would we be okay with that as First Amendment lawyers?

Second: Let’s dispose of the idea that we cannot recognize there is a First Amendment right at stake in this case because of what that recognition would do to antidiscrimination law. That’s not how constitutional principles work – it would be like saying that we can’t recognize a First Amendment issue with defamation cases because of what it would do to efforts to protect reputation. This does not mean, of course, that compelling countervailing interests could not override a First Amendment interest via a properly constructed law, but some level of constitutional scrutiny would still be appropriate. There are no shortcuts out of a First Amendment analysis on this basis.

Third: That being said, the compulsion of expressive activity at issue in this case is unlike that addressed in prior Supreme Court decisions. The Court previously considered
compelled ideological speech in *Wooley v. Maynard* and *West Virginia State Bd. of Ed. v. Barnette*, compelled fairness requirements in *Herald Publishing Co. v. Tornillo*, and compelled commercial disclosures in *Zauderer v. Office of Disciplinary Counsel*. These cases all involved attempts by the government to moderate the quality of information, whether by shaping it (*Wooley* and *Barnette*), balancing it (*Tornillo*), or correcting perceived flaws in it (*Zauderer*). Where these attempts ran afoul of the First Amendment, it was because the government was attempting to put its thumb on the scales in the marketplace of ideas. In contrast, the law at issue in *Masterpiece Cakeshop* is concerned not with quality but with the availability of information: specifically, the availability of commissioned works to those who wish to acquire them.

Fourth: The mandatory acceptance of commissions for cakes might create a misleading appearance of tolerance on the part of bakers, but the bakers are not being directly compelled to voice sentiments with which they do not agree. That is to say, it is the fact rather than the substance of the compelled expression that might produce a potential misunderstanding – and this is no different than the potential message of acquiescence conveyed by compliance with any non-speech related law. (As a side note, this is where it could make a difference that the cake commissioned in the case at bar did not carry a specific message of support for gay marriage that might be attributed to the bakers; the analysis could potentially be different if that were the case. For an interesting discussion of a somewhat related issue, see *Brindson v. McAllen Independent Sch. Dist.*, 863 F.3d 338, 349-51 (5th Cir. 2017).)

Fifth: Because the substantive message is not misleading, the speech interests allegedly threatened by the law are solely those of the bakers, not of their customers. This is a critical distinction. Although we typically think of the First Amendment as a right of speakers, it is actually the listener’s interest which drives much of First Amendment theory, whether we are talking about Holmes’ marketplace of ideas or Meiklejohn’s emphasis on the need for an informed electorate in a democracy. Where a listeners’ interests are not threatened by a law, we are left with theories of freedom of expression that depend on a speaker’s interests, i.e., protecting speech as a tool to express one’s personality, or to achieve some other desired goal.

Sixth: A speaker’s interest in producing creative output for a financial return is no less legitimate than other interests. It does not render the output “commercial speech,” any more than
a for-profit newspaper is commercial speech. Moreover, the fact that a creative work is sold does not derogate any artistic or self-expressive interests that an artist has in the act of creation.

Seventh: While a speaker’s interests might be legitimate, theories of freedom of speech based solely on speakers’ interests are not necessarily robust. Such theories have been criticized as not sufficiently distinguishing interests in speech from other liberty interests. That is, interests in self-expression and personal achievement are not unique to acts of communication; rather, just about any activity in which a person voluntarily engages can be “expressive” in this sense, whether it involves deciding which kind of car to drive, playing basketball rather than baseball, or selecting a career. While we might protect these the freedom to engage in such activities against arbitrary interference, these liberty interests do not command such deep deference as structural interests in democratic government and the search for truth, and typically give way when necessary to prevent some cognizable harm. (In fact, Alexander Meiklejohn argued that only listeners’ interests in information necessary for self-governance should be protected by the First Amendment, while speakers’ personal interests were more properly protected through a Fifth Amendment due process analysis.)

Eighth: Speakers’ interests might therefore be overcome on a standard less rigorous than strict scrutiny, even if a state’s interest in preventing discrimination in the marketplace might also be characterized as compelling. Consideration of the burden imposed by a compelled speech regulation, as in Zauderer, could prevent the application of such laws to artists who do not extend an offer to work on commission to the general public in the first place. However, those who do throw open their doors to the world could be held to the consequences of that choice. That is not to say that the commercial transaction undermines the nature of a speaker’s interests, as discussed under point six; but the practical burden may be less on a business that is geared to accept commissions from all comers.

Ninth: I’m not 100% happy with this conclusion. There’s a gut reaction I have that creative types shouldn’t be compelled to accept commissions, regardless of their reasons (good, bad, or nonsensical) for declining. But if you’re upset at the results of putting your creative skills on sale, I suppose you always have the option to close up shop and make cakes for your friends and family instead.

Moving on...
Supreme Court

Pending Cases

The Supreme Court heard argument in digital privacy blockbuster *Carpenter v. United States*, with an apparent majority of the justices concerned about the government’s ability to collect digital information from third-party intermediaries without a warrant. Here’s hoping they rule in time for us to discuss the opinion at the Digital conference in May.

The Court also heard argument in *Oil States Energy Services v. Greene’s Energy Group* on the constitutionality of the USPTO’s inter partes review process – specifically, whether the process allows deprivation of private property rights by a non-Article III tribunal without a jury. The issue of particular interest to the tech and media sectors, which have seen many communications and computer processing patents fall in the face of review.

Petitions

Three First Amendment cases were granted review this month, bringing the running total up to six by Bloomberg’s count (and that doesn’t include important media-adjacent cases like *Carpenter, Oil States, or U.S. v. Microsoft*). The new entries are *National Institute of Family & Life Advocates v. Becerra*, on compelled speech at “crisis pregnancy centers” about the availability of abortions, *Lozman v. Riviera Beach*, on retaliatory prosecution for First Amendment activity in cases where there is independent probable cause, and *Minnesota Voters Alliance v. Mansky*, on restrictions on ideological clothing at polling places.

Plenty of others didn’t make the cut, including: *Hill v. Service Employees International Union* (7th Cir., associational rights in labor bargaining case); *Phelps-Roper v. Ricketts* (8th Cir., constitutionality of Nebraska law on picketing near funerals); *Antonick v. Electronic Arts* (9th Cir., copyright in computer code for original John Madden Football video game); *Tobinick v. Novella* (11th Cir., anti-SLAPP win in federal district court); *Samsung Electronics v. Apple* (Fed. Cir., smartphone patents); and *Sprint Spectrum v. Prism Technologies* (Fed. Cir., patents for managing access to protected information over untrusted networks).

Miscellaneous

The Supreme Court has introduced electronic filing and online access to court documents. Well, good.
Reporters’ Privilege

Good news from Tennessee: An appellate panel has reversed an order directing a Nashville reporter to turn over material to the plaintiff in a defamation action against him. The appeals court held that where a defamation defendant asserts the fair report privilege as a defense, Tennessee’s Shield Law protects a journalist against being compelled to reveal information beyond the sources on which the assertion of that privilege depends (at least until the validity of the defense is determined).

Al Jazeera has resisted a discovery request for information gathered by an undercover reporter for a report on sports doping, telling a judge in D.D.C. that the reporter rather than the outlet controls the documents sought.

The plaintiff in a lawsuit against BuzzFeed over its publication of the Trump Dossier has argued in S.D. Fla. that the site does not qualify for the protection of Florida’s shield law because it is not “a newspaper, news journal, news agency, press association, wire service, radio or TV station, network, or news magazine.” He also argues that the qualified privilege of Florida’s law should not block access to necessary information in a defamation case against a publisher. (For its part, BuzzFeed is seeking information from the Democratic National Committee and the Department of Justice to support the Dossier’s claims that a hack of the DNC originated from servers controlled by the plaintiff.)

Speaking of definitions of journalism, we have a new federal shield bill in the hopper. The bipartisan “Free Flow of Information Act of 2017” eschews convoluted definitions of journalism in favor of a functional definition that does not depend on the nature or corporate status of the medium used for publication; however, it does limit covered individuals to those who engage in acts of journalism “for a substantial portion of the person’s livelihood or for substantial financial gain.”

Defamation

Let’s start this section with a few face-palms. First, Senate candidate and alleged creeper Roy Moore threatened Alabama Media Group over its coverage of accusations made by five women, via a lawyer’s letter that was, shall we say, not a model of excellence. (It seems that Moore might have hired an attorney whose suspension from practice Moore upheld while he was Chief Justice of the Alabama Supreme Court, though given how Moore’s
As the tenure as a judge played out, I don’t know how that cuts.) AMG was not impressed.

Then we have bit-player-in-the-apocalypse Anthony Scaramucci, who kept up his standards of grace under fire by threatening to sue a student at Tufts University over a pair of opinion pieces in the school’s paper that called for the Mooch’s ouster from the advisory board of Tufts’ Fletcher School of Law and Diplomacy. The ACLU of Massachusetts appeared to defend the student, and Scaramucci resigned from the board.

Finally, do you remember the mockery a few lawyers received some years back over threat letters that included a copyright warning against disclosing the threat? Apparently Taylor Swift’s lawyer didn’t, firing off a letter containing an eyeroll-inducing copyright clause to a little-known California blogger who accused the singer of being a poster child for the alt-right. Once again, the ACLU stepped in; seems the lawyer hadn’t heard of the Streisand Effect either. [Photo: Jana Zills, CC BY 2.0]

New Cases

Roy Moore’s threat might be laughable, but we’re likely to see many more of these cases in the wake of the #metoo movement. Already we have director Brett Ratner suing an accuser in the District of Hawaii over a rape accusation made via Facebook, and comedian Aaron Glaser suing an accuser in New York state court after she called him a rapist on social media. [Photo: David Shankbone, CC BY 3.0]

The Chair of the Board of the Philadelphia Parking Authority sued in state court over a Philadelphia Daily News report that allegedly either confused him with the Authority’s disgraced former executive director or implied that he attempted to reward the ex-director’s pattern of sexual harassment.

In Texas, we’ve got two cases filed by lawyers. In state court, we’ve got the Ivey Law Firm, which claims that a one-star review on Google was penned by someone who was never a client. Sure, whatever.

Then we have this fellow in the Eastern District of Texas: Jason Lee Van Dyke, whose typical mode of responding to critics has been to fire off death threats and bigoted slurs of every variety on Twitter. However, since he’s been suspended from Twitter for threatening to kill a “f**king n****r,” he apparently decided to try something different, suing a journalist who characterized him as a neo-Nazi based on his alleged ties to white supremacist groups. (Turns
out, that move wasn’t popular at his workplace – his boss told him to knock it off, so Van Dyke has already dismissed the complaint.

Finally, a doctor has filed suit against an NBC affiliate in Virginia state court over a series of news reports about his care of inmates at Middle River Regional Jail.

Plaintiff Wins

Speaking of judges, a Pennsylvania judge convinced the Eastern District of Pa. to remand his defamation case over a book criticizing his handling of a murder trial to state court, after he successfully argued that the only Pennsylvania defendant in the case had not been joined solely to defeat diversity.

TMZ reports that Bobby Brown managed to eke out a cash settlement over a biopic of his daughter that allegedly defamed him, although he had admitted that he never in fact saw the film in question before filing suit and a judge in S.D.N.Y. had said in denying a preliminary injunction against the film that accusations of improper parenting were a matter of opinion. (I should note that it’s not entirely clear where TMZ gets the idea that there was cash paid to end the case. That said, it’s a dangerous time for biopics in New York, what with the Porco ruling kicking around.)

Janice Dickinson’s defamation suit against Bill Cosby is firing on all cylinders after a California appellate panel allowed her to proceed on claims the trial court had held were precluded by the litigation privilege, and also flipped the trial court’s refusal to allow her to amend to add claims against Marty Singer. [Photo: Toglenn, CC BY-SA 3.0]

Defense Wins

In N.D. Cal., a judge ruled that an Australian court’s takedown order directed at the Electronic Frontier Foundation’s “Stupid Patent of the Month” feature was unenforceable in the United States under the SPEECH Act.

A judge in N.D. Ohio has denied a plaintiff’s request to issue subpoenas to the family of Daily Stormer publisher Andrew Anglin. The plaintiff had wanted to question the neo-Nazi site operator’s relatives in an attempt to locate the elusive Anglin for service of a defamation lawsuit.

Rosie O’Donnell defeated a suit in New York state court brought by a producer for The View whom O’Donnell suggested was responsible for leaks about the program to the press; the court held that the statements at issue were opinion rather than implications of fact.
On appeal, the Second Circuit upheld a Jewish organization’s anti-SLAPP win against Sheldon Adelson over the text of an online petition, after the Nevada Supreme Court ruled on certified questions that hyperlinks to information about judicial proceedings could support a fair report privilege defense and that the Nevada anti-SLAPP law was not limited to statements to a governmental agency. The Third Circuit affirmed the dismissal of claims by the former head of an amateur radio network over the group’s statement regarding his removal, finding that the alleged defamation was true. Similarly, the D.C. Circuit held that a software developer accused by James Risen of peddling useless code had failed to produce any evidence to show that his software had ever worked.

YouTube won an interesting ruling in California’s appellate courts, which held that the company could not be sued for generic statements that a video was removed for violations of its terms of service; such statements, held the court, do not imply that the poster of the video necessarily ran afoul of the company’s bans on unsavory content. (Google quickly parlayed that ruling into a motion for summary judgment in another YouTube removal case in the Central District of California.)

Also in California’s Courts of Appeal: A model who posted a “blacklist” on Tumblr of employers using the website ModelMayhem (you might remember the site from a troubling Section 230 decision a while back) had an anti-SLAPP win affirmed against one of the employers, who had sued her for defamation; and the author of a web article erroneously reporting the arrest of actor Andrew Keegan Heying was held not to have acted with actual malice.

The Pennsylvania Supreme Court declined to intervene in a lawsuit filed against The Scranton Times by two former Lackawanna county commissioners who were alleged to have been “less than cooperative” with a grand jury; the plaintiffs had appealed the trial court’s decision to try the issues of falsity and actual malice separately.

Finally, a Texas appeals court held that you can’t dodge an award of fees under the state’s anti-SLAPP law by voluntarily dismissing your lawsuit. And rightly so.

**New & Pending Appeals**

Sarah Palin has appealed to the Second Circuit from the dismissal of her suit against the New York Times over an editorial connecting a political ad from her PAC to the Gabby Giffords shooting. Here’s hoping the Court of Appeals waives away any procedural irregularity below with a finding that allowing her to amend her complaint would have been futile.
The California Supreme Court has granted review on the anti-SLAPP dismissal of a defamation case brought by streaming service FilmOn against DoubleVerify, a company that sells information about websites to potential advertisers. FilmOn had claimed that it was defamed by its classification by DoubleVerify as “Copyright Infringement-File Sharing” and “Adult Content,” but with FilmOn’s service blocked by preliminary injunctions in pending copyright lawsuits, it’s hardly likely to win on the merits. The only real issue on appeal is whether anti-SLAPP sanctions were appropriate, with FilmOn arguing that California’s anti-SLAPP law does not apply to DoubleVerify’s sale of market information.

Miscellaneous

AIG’s disputes over the defense of defamation cases continue, with Bill Cosby filing a brief at the First Circuit arguing that the company has a duty to defend, and the Central District of California ruling that Disney can take AIG to arbitration over coverage in the “pink slime” case.

There’s apparently a settlement in the offing in the long-running fight between Jesse Ventura and the estate of author Chris Kyle, at least according to a docket entry in the Eighth Circuit.

Privacy

Rights of Publicity

The Sixth Circuit dismissed right of publicity claims against Apple, Amazon and Barnes and Noble for their distribution of “A Gronking to Remember,” an erotic novel that used a couple’s engagement picture without authorization. The court held that the plaintiffs had failed to plead that their likenesses had commercial value, as required under Ohio’s conception of the tort.

In an unusual reversal of a typical ROP case, a Texas appellate panel denied a preliminary injunction to a restaurant company that is trying to enforce an exclusive assignment of personality rights by a celebrity chef, allowing the chef to continue to monetize his name and likeness during the pendency of the case.
Disclosure of Private Information

The Florida Supreme Court struck down a statute governing post-mortem access to medical information in malpractice cases, holding that the state’s constitutional right to privacy on medical matters does not terminate at death.

Infliction of Emotional Distress

Shock jock Erich “Mancow” Muller has filed an emotional distress lawsuit in Illinois state court over the hiring of Marv Nyren, who had previously supervised Muller at a prior job, into another position with authority over Muller. The radio host had sued Nyren previously for defamation, resulting in a settlement; the new suit alleges emotional distress from the prospect of Nyren again being in a position to disparage and torment him. [Photo: Jaddwooka, CC BY-SA 3.0]

Wiretapping/Eavesdropping

A former reporter for CBS news who claimed that she was wiretapped by Obama administration officials for more than a year had her claims trimmed by a judge in the Eastern District of Virginia, which held that Bivens actions did not extend to this context, that the Stored Communications Act did not apply to the interception, and that the Electronic Communications Privacy Act only applies to those who intercept communications and not those who procure others to do so.

Miscellaneous

In bankruptcy, Gawker is searching for information on Peter Thiel’s motivations for financing privacy and defamation lawsuits against it, on the theory that there might be a claim against Thiel if his motivations were purely to destroy the company. A bankruptcy judge in S.D.N.Y. assured Gawker that it would be allowed to pursue that investigation.

Access/FOIA

New Cases

Starting in D.D.C., we have a government watchdog asking the DOJ for records on whether the White House leaned on Justice with respect to the AT&T/Time Warner merger in order to retaliate against CNN. (More on that later.) Speaking of First Amendment retaliation, Chesapeake Bay area media outlet Bay Journal Media sued the
Environmental Protection Agency for records on the EPA’s decision to cut funding to a regional newspaper covering environmental issues. And Judicial Watch continues its investigations into the Obama-era State Department, with a new FOIA suit directed at State’s record on connections between the Podesta Group and a pro-Vladimir Putin think tank.

In other federal cases: In D. Nev., media outlets have joined together to challenge the sealing of warrant materials related to Las Vegas shooter Stephen Paddock. In N.D. Ill., Courthouse News Service sued the Cook County Circuit Court over delays in access to electronically filed documents. In the same court, the Aurora police have sued the city and its records manager for releasing personal information on department personnel to a prison inmate, arguing that the disclosure was not required by the state’s public records law. The Freedom of the Press Foundation sued the DOJ in S.D.N.Y. for more information about how and when the government obtains journalists’ communications. And in W.D. Wash., the EFF and Seattle-based alt-weekly the Stranger teamed up to challenge the sealing of court dockets in criminal cases in which government agencies have used surveillance technology or compelled tech companies to assist in their investigations.

In state court, the Colorado Independent sued for access to sealed records in a death penalty case. North Carolina saw a new lawsuit filed against Ashe County officials by WBTV; you might recall that last month we reported on the Ashe County Sheriff’s attempt to intimidate county officials who were attempting to respond to WBTV’s requests for information about county business. In Virginia, freelancers have sued for access to the Charlottesville police department’s plans for the August 12 Unite the Right rally. And in Kentucky, the state’s Finance Cabinet has sued a reporter seeking to overturn a ruling by the state AG that certain committee meetings are subject to the state’s open meetings law.

Access Granted

In D.D.C., the judge hearing a battle between the House Intelligence Committee and the firm that commissioned the Trump Dossier over access to the latter’s bank records has declared that too much of the case has been litigated secretly, and that further briefing must be on the public record.

In S.D.N.Y., Time and the Reporters Committee for Freedom of the Press won access to documents related to the settlement of a lawsuit over the construction of Trump Tower, successfully arguing that constitutional and common law presumptions of access overrode conflicting interests. [Photo: Jorge Láscar, CC BY 2.0]
The Foreign Intelligence Surveillance Court, sitting en banc for the first time in its history, held that the ACLU and Yale’s Media Freedom and Information Access Clinic had standing to challenge secrecy around FISC opinions on the legality of bulk data collection by the U.S. government’s intelligence apparatus under Section 215 of the Patriot Act. Notably, the court stressed that the secrecy of its opinions was in the context of a judicial proceeding, subject to rights of access to such proceedings, and not controlled by Executive Branch classification decisions. The court stressed that finding standing was distinct from whether the plaintiffs might be entitled to relief, but still, I offer Yale and the ACLU a high five.

In the states, the Georgia Supreme Court ruled that a private non-profit hospital doing work on behalf of the state authority that created it could be subject to state transparency laws. Meanwhile, a New York appellate court held that a trial court erred in rejecting a convicted sex offender’s effort to obtain public records connected to his case in an attempt to clear his name, remanding for rehearing.

Access Denied

A judge in S.D.N.Y. rejected the New York Times’ attempt to obtain FBI records on the 2009 “Underwear Bomber” skyjacking case, finding the records exempt from FOIA.

A Massachusetts Appeals Court panel flipped a trial court order directing the State Police to turn over troopers’ birthdates to the Boston Globe, based on a recent Supreme Judicial Court ruling on the scope of the state’s public safety exemption.

Pending Cases & Appeals

The D.C. Circuit heard argument on a challenge brought by the AP and the Reporters Committee to the adequacy of the FBI’s search for documents responsive to a request about the agency’s impersonation of journalists; the panel seemed concerned with how the press could evaluate the sufficiency of a search when not told how the FBI conducted it.

The Illinois Supreme Court has received briefing on whether the public is entitled to sealed records in the murder case of Kirk Zimmerman, who is alleged to have shot his wife.

Legislation

More limitations on police video are making their way through state legislatures, with a new bill in New Mexico designed to protect the mentally ill, and Wisconsin’s assembly moving forward with limits on body cam footage.
Newsgathering

Prosecution of Journalists

The felony trial of freelance photojournalist Alexei Wood for allegedly participating in a riot at Donald Trump’s inauguration began in D.C. Super. this month, raising the hackles of journalists and press organizations who see this prosecution as a tactic to be expected from repressive regimes overseas rather than the United States. Another journalist at the protests, Aaron Cantú, has a trial date in late 2018.

St. Louis police officers are receiving a special reminder of the rights of journalists, with a recurring order that they must read and acknowledge every month. Let’s face it, if police “forget” about reporters’ rights so easily that they need a monthly reminder, it’s because they don’t want to remember. [Photo: Daniel Schwen, CC BY-SA 4.0 International]

Speaking of beating up reporters, Roy Moore’s staffers apparently got confused and roughed up a couple of Fox photojournalists.

Punishment of Sources

A data point from Jeff Sessions: the DOJ has 27 active investigations into leaks of classified information. That the DOJ is willing to tell us about, that is.

Trump Administration

So, not satisfied with undermining the free press as a pillar of democracy in the United States, the deranged man-child that squats in the Oval Office—so horrible and embarrassing that to do anything about him would only call attention to the inexcusable failure to have done something about him already—has moved on to placing journalists in danger overseas, telling foreign countries that CNN International is a source of fake news. Sure, most countries by now know who is lying in this situation, but the comment could be read to suggest that Trump won’t defend U.S. journalists overseas against abuse or worse. After all, he’s clearly indicated he has little interest in protecting U.S. citizens who do not suck up to him.

Meanwhile, we’ve got some limitations on press access to report. The Pentagon’s chief war crimes prosecutor has stopped holding press briefings and news conferences. The White House says that it tried to get more pool reporters into events at a regional economic conference in Vietnam, but succeeded only in gaining admission for Fox News as the pool TV representative and the official White House photographer.
Lawsuits

Utah’s Attorney General has settled a lawsuit over the state’s unconstitutional ag-gag law with the Animal Legal Defense Fund and People for the Ethical Treatment of Animals, agreeing to pay $349,000 for the organizations’ attorneys’ fees and costs.

Credentials

As a result of a determination that Russian state-funded TV network RT was required to register as an agent of a foreign government under the Foreign Agents Registration Act, the Executive Committee of the Congressional Radio & Television Correspondents’ Galleries declared RT ineligible to hold Capitol Hill press credentials.

Prior Restraint

This first one’s from October, but it escaped notice back then and it’s a howler – a defamation TRO issued in W.D. Wis. that is directed not only at a John Doe defendant but at non-party social media sites. What the hell is going on up there, folks?

Also in “WTF?” territory: The Arizona Republic, the AP, and local television stations have appealed an Arizona state court order forbidding them from publishing the name or picture of a prosecutor – not a juror, not a witness, a prosecutor – in a high-profile murder case while the case was still pending. And in Ohio state court, a judge issued an injunction on about an hour’s notice barring two customers of the Barley House restaurant from publishing false or misleading statements about the business or publishing any statements whatsoever about the business on social media platforms.

In other news, there’s an arrest warrant out in New Hampshire for a defamation defendant who was on the wrong end of a $274.5 million judgment for accusing local businessmen of being drug dealers via billboards, radio, and social media. Seems that he didn’t comply with an order to stop making the defamatory statements, leading to a contempt citation.

A judge in D. Md. upheld the enforceability of a gag order in a settlement agreement entered into by the Baltimore Police Department over accusations of police brutality; the ACLU had argued that the PD’s pattern of asking for gag orders violated the First Amendment rights of victims.
John Steinbeck’s daughter-in-law is opposing a motion in C.D. Cal. to keep her from talking to the press following a $13 million verdict against her in a dispute with Steinbeck’s stepdaughter over movie deals for the author’s works.

Meanwhile, after inadvertently releasing the photos of six firefighters terminated for their involvement in hanging a noose over pictures of a black lieutenant’s family in the fire station, the city of Miami has demanded that the press stop displaying the photos.

Specifically, these photos:

![Image](image_url)

**Information Infrastructure**

**Net Neutrality**

So, the FCC has released its final proposal to repeal the 2015 Open Internet Order, with a vote planned for December 14. Chair Ajit Pai has brushed aside the majority of pro-net neutrality comments submitted through its website as being light on substance, while also discounting the raw number of comments in support of net neutrality as the probable product of fraud. If you’re interested in whether your identity was stolen for a fraudulent comment, the New York AG’s office has a site where you can check; the FCC has been accused of not cooperating with New York’s efforts to determine how the fraud took place and what effect it had on the FCC’s docket. Chairman Pai has, however, taken the time to criticize Hollywood actors for rallying people against the repeal.

Of course, a legal challenge to the repeal is likely. This won’t be a simple determination of whether the repeal is supported by sound policy, a question on which commentators differ to say the least. Rather, the revocation of an existing order must be supported by a satisfactory explanation for the repeal based on relevant data, which could be interpreted as requiring the
agency to be able to present facts rather than policy opinions as to why the 2015 Open Internet Order wasn’t working.

Pai’s plan also includes preempting state laws that would mimic aspects of the 2015 order, a move requested by Verizon last month and echoed by Comcast in November. Charter is already invoking the anticipated repeal in an attempt to block a lawsuit brought by New York’s attorney general, who alleges that Time Warner Cable promised New Yorkers speeds that it knew it could not deliver. Charter argues that the repeal indicates an intent to preclude these kinds of lawsuits; the state AG naturally takes a different point of view.

In any event, Chairman Pai made clear that he feels that it is Silicon Valley, not ISPs, that we should beware when it comes to blocking and filtering content, arguing that their public advocacy on issues like net neutrality is intended “to cement their dominance in the internet economy.” This, of course, loses sight of the fact that net neutrality is much more important for digital startups than it is for the large incumbents. But really, what do we need a free and open internet for anyway? Pai separately took shots at social media this month, accusing services like Twitter of eroding American society by creating spaces for “harassment,” “threats,” and “unfiltered rage.” He then connected the polarization of online debate to the travails faced by MAGA hat wearers on U.S. college campuses.

Yes, those poor people.

Federal Communications Commission

In other FCC news, the agency continued to advance its deregulation agenda by relaxing broadcast cross-ownership rules, opening up the possibility for greater consolidation of media in local markets. The FCC also voted to allow broadcasters to roll out ATSC 3.0, a next generation TV standard designed to support mobile, 3D, 4K UHD, HDR, HFR, and WCG. Yowza.

In court, the FCC defeated a challenge to its decision not to allow a New Jersey radio station to switch channels based on the agency’s rules on channel spacing, and defended its decision to reinstate the UHF discount while still in the process of reconsidering the 39% national audience reach cap.
**Mergers & Antitrust**

The Department of Justice filed suit in D.D.C. to block the AT&T-Time Warner merger, and has attempted to rally state attorneys general to join in the fight. AT&T has proclaimed itself ready for the fight, and wants it to move quickly (as in, a trial by February quickly). In particular, AT&T plans to push on whether Donald Trump is improperly influencing the DOJ’s actions in retaliation for CNN’s coverage of the White House (which Trump denies), and has stated that it will not sell CNN as a condition of the merger. AT&T’s answer in the case also states that CNN and TBS will not go dark on any pay TV services as a result of the merger.

Meanwhile, the Sinclair-Tribune merger is still hanging out there. Four state AGs asked the FCC to reject the merger based on the national reach of the combined company – but, as discussed above, the FCC is in the midst of considering whether the current cap is a good idea. For its part, the DOJ has been pushing Sinclair to agree to dump thirteen Tribune stations after the deal; reportedly, Sinclair would prefer that number be closer to 10, but it’s prepared to accept the DOJ’s conditions.

The DOJ settled with Entercom over its acquisition of CBS Radio, with Entercom divesting thirteen stations in three markets to make the deal work.

Finally, Missouri’s AG has launched an antitrust probe into Google, investigating whether the company’s search results have been designed to disadvantage its competitors.

**Digital Content**

Россия Вперёд

Russian intervention in online political advertising continued to pick up a few headlines this month, with Google calling on the Federal Election Commission to clarify how platforms are supposed to handle foreign ad purchases, and fifteen Democratic senators demanding that the FEC impose a requirement to identify the purchasers of online political ads.

**Section 230**

A “Manager’s Amendment” to S. 1693, the Stop Enabling Sex Traffickers Act of 2017 (SESTA), was issued at the start of November, making significant changes to the bill that would amend Section 230 and create new civil and criminal liability with respect to sex trafficking. Eric Goldman has the blow-by-blow on the changes, which improve but do not eliminate some of the
problematic exceptions to Section 230 for state criminal prosecutions and scienter standards related to federal liability for third-party content. The changes were apparently sufficient to win the support of the Internet Association, which is now backing the bill. Senator Ron Wyden (D-OR), on the other hand, is not convinced; he has placed a public hold on the bill.

There’s also a new federal revenge porn bill on the table that would create a new exception to Section 230, but it seems intended to be a narrow one: “This section shall not apply to any provider of a communications service with regard to content provided by another information content provider unless the provider of the communications service intentionally solicits, or knowingly and predominantly distributes, content that the provider of the communications service has actual knowledge is in violation of this section.” One could even read that as falling within the category of behavior outside of Section 230 under cases like FTC v. Accusearch. But there’s a mismatch in the framing of the bill, which does not declare any “content” to be “in violation of this section” – instead, it makes certain acts of posting illegal. Rather than take up more time here, I’ll leave this as an exercise to the reader: Compare section (d)(2) of the bill to section (b), then tell me how to make sense of the “actual knowledge” requirement in section (d)(2).

In other news, Google successfully invoked Section 230 in N.D. Cal. to block enforcement of a worldwide Canadian injunction in the United States. The case involved a Canadian company who obtained an injunction up north to block Google from displaying search results for a third-party website selling products that allegedly used the plaintiffs’ stolen trade secrets. For those who might be wondering, the SPEECH Act of 2010 did not apply because that law only bars foreign libel judgments that do not comport with the First Amendment or Section 230 – but apparently Section 230 is fully capable of doing the work on its own.

A family suing Google in N.D. Cal. over its alleged role in supporting the terrorists behind the 2015 Paris attacks has taken its third shot at getting over a motion to dismiss after Section 230 scuttled their first two attempts. This time, the family pinning its hopes to alleged ad revenues that ISIS earned from videos hosted on the site. These terrorism-support cases are like the Lernaean Hydra, though – two seem to appear for every one disposed of. This month, we have a new case in this mold from C.D. Cal., this time from victims of the 2015 San Bernardino shooting.

Finally, in N.D. Cal. a purveyor of anti-malware software scored a comparatively rare Section 230(c)(2) win against a software manufacturer upset with the fact that its content was
being blocked. Notably, as Professor Goldman points out, the provision of filtering software is covered by Section 230(c)(2)(B), not Section 230(c)(2)(A) which has a “good faith” requirement for immunity.

**Hate, Terror, and Other Internet Nastiness**

Turns out that spamming the mayor’s personal email address can be prosecuted as harassment, thus preventing you from succeeding on a First Amendment retaliation claim. At least, so the Sixth Circuit held this month.

A Florida legislator is the latest pol to think about taking a weedwhacker to nastiness on social media with new legislation. State Rep. Stan McClain wants to make it a second-degree felony to threaten to kill or injure someone via online communications, but wants to eliminate any requirement that the threat be sent to or received by the target. Um, no.

The Illinois Supreme Court struck down the state’s stalking and cyberstalking statutes as being wildly overbroad; the laws prohibited any speech “about” a person that would negligently cause emotional distress.

The Maryland man who intentionally caused Kurt Eichenwald to have an epileptic seizure by tweeting a flashing image at him had federal charges dropped against him without prejudice, but it’s not a cause for him to celebrate – it merely clears the decks for state felony charges to proceed in Eichenwald’s home state of Texas (with a hate-crime enhancement to boot).

**Miscellaneous**

Yelp is cracking down again on fake reviews and review solicitation. Among other steps, it has asked a judge in N.D. Cal. to find that a company that sells fake reviews to businesses is in violation of an earlier settlement agreement, and to award $2 million in stipulated damages under the agreement.

The American Council of the Blind has sued Hulu in D. Mass., alleging that the streaming service fails to provide audio-description support for some videos and had menus incompatible with screen readers.

A Facebook user sued the company and various media outlets in D.N.J. pro se for violation of his First Amendment rights, after others flagged his posts in support of Kellyanne Conway as spam and the company removed them. Well, Facebook might be big, said the court, but it’s not a state actor; nor is his political affiliation either a disability or a protected class for a discrimination claim. (Personally, I’m still trying to decide whether the plaintiff’s reference in
his complaint to the “Sword of Demosthenes” was a mistake or a particularly clever twist for a speech-related case.)

Milwaukee County announced plans to settle a case brought by an augmented reality game developer against the enforcement of an ordinance requiring game companies to get a permit to allow AR games to be played in the county’s parks. The county is looking for approval to pay the plaintiff $83,000 in fees and costs and to transform a preliminary injunction against enforcement of the ordinance into a permanent one.

Digital Privacy

Anonymity

Here’s one that will split the opinions of the MLRC’s membership: A John Doe defendant was found liable for copyright infringement in E.D. Mich. and an injunction issued, but the district court held that the Doe defendant’s did not have to be disclosed as a result of the judgment. On appeal, the Sixth Circuit remanded for reconsideration of the unmasking decision, holding that revelation of a Doe’s identity in these circumstances is usually warranted while leaving room for an argument to the contrary.

We also had a rough decision from the Ninth Circuit this month, with the court ruling that Glassdoor’s effort to protect its users’ identities against a grand jury subpoena is governed by Branzburg v. Hayes and thus failed absent a showing that the subpoena was not issued in good faith. The Court specifically rejected Glassdoor’s attempt to distinguish its own position (which the court compared to a reporter with a confidential source) from its users’ First Amendment interests in anonymity, finding that both wanted to conceal the identity of a speaker in order to avoid chilling speech. The court further held that Glassdoor’s users waived any right to hide their identities by posting to a website whose privacy policy stated that it would comply with subpoenas or court orders.

Lots to unpack here. Does this signal that reporters’ privilege and online anonymity cases could collapse together (at least at the Ninth Circuit)? Branzburg was specific to the grand jury subpoena, but it formed the basis for much of the reporters’ privilege law that followed in other contexts. More to the point, does the court’s conflation of the interests of Glassdoor and its users make sense? After all, contrary to the court’s suggestion, anonymous speakers usually don’t want to remain anonymous because of hypothetical concerns about chilling future speech –
they’re concerned about direct retaliation. I wouldn’t be surprised if we eventually get a rehearing en banc in this case.

Meanwhile, a California appeals court signaled a widening rift between the Golden State and states that apply the Dendrite standard to anonymous speech issues. While allowing Yelp to assert its users’ rights in anonymous speech, the appellate panel held that the plaintiff in a defamation action need only show a prima facie case and a need for a poster’s identity; it declined to undertake Dendrite’s third step, i.e., balancing the First Amendment rights of the anonymous speaker against the plaintiff’s need.

CFAA/Hacking

The author of bestselling novel “The Girls” and her ex-boyfriend are locked in cross-complaints in N.D. Cal., with author Emma Cline being accused of hacking into her ex’s computer, emails, and online accounts to steal details from his work for her novel (and yes, there’s a copyright claim in there too), while she in turn accuses the ex of domestic violence.

A Canadian citizen pleaded guilty this month in N.D. Cal. to participation in a 2014 spear-phishing operation targeting Yahoo employees in aid of a hack of individuals of interest to Russia’s internal security service. Around half a billion accounts were compromised as a result. In S.D.N.Y., an Iranian hacker has been indicted for stealing unreleased episodes of HBO series, alongside other materials, and attempting to extort the company.

Oh, and here’s an interesting example of how simple it might be to run afoul of the CFAA, starring Donald Trump the Junior.

Control of Personal Information

The Second Circuit has affirmed the dismissal of Illinois Biometric Privacy Act claims based on facial scanning used to create avatars in Take-Two Interactive Software’s “NBA 2K” series of videogames. The court held that the plaintiffs had pleaded neither injury-in-fact to support standing nor violations of the Illinois statute, though it gave the plaintiffs a shot to amend their pleadings after remand.

The Ninth Circuit held that disclosure of information about an individual’s online viewing preferences could form the basis of a Video Privacy Protection Act claim, but held that ESPN had not shared any identifiable information about the plaintiff in the case at bar.

For the third time, Facebook dodged claims in multidistrict litigation that it unlawfully tracked users’ behavior after they logged off of the service; in this go-round, the court held that
contract claims against the company failed for lack of any provision prohibiting the challenged tracking.

**Encryption**

Well, the FBI is complaining again about being unable to access an iPhone – this time, the one belonging to the shooter who killed 26 people in a church in Sutherland Springs, Texas. But this time the fault seems to be the FBI’s, which didn’t tell anyone about problems with the phone until it was no longer possible to use the (dead) gunman’s fingerprint to unlock it; even iPhones using fingerprint recognition require a pass code if not unlocked for more than 48 hours. Apple has claimed that it reached out immediately when informed of the issue, but it was too late.

The Texas Rangers, however, might have a bit more on the ball. They’ve issued a search warrant to Apple for the shooter’s iCloud account, including a list of items sought that could have been created with Apple’s help.

**Internet Surveillance**

The House Judiciary Committee advanced a weak Section 702 reform bill this month, while the Senate Intelligence Committee seems more interested in simply renewing the NSA’s domestic surveillance powers without modification. In related news, a lawsuit in D.D.C. challenging the legality of the NSA’s separate telephone metadata gathering program (under Section 215) was dismissed as moot now that the agency has ended that program voluntarily.

We got a rare effort at transparency from the Trump Administration this month, with respect to the Vulnerability Equities Process – i.e., the process that the government uses to decide whether to tell people about vulnerabilities in computer systems or to retain those exploits for its own use in data gathering. The overhaul of the program doesn’t actually prevent the government from keeping potential hacks to itself, but certain information about the nature of the process has been made public and there is at least a nod toward annual reporting.

A judge in D.C. Superior Court once more limited law enforcement access to digital records in connection with the investigation of disruption at the January inauguration, placing limits on how the government may search and use information from Facebook about alleged participants in illegal activity. Meanwhile, a judge in New York joined the ranks of jurists holding that the use of cell-site simulators to track your phone requires a warrant.

But not to worry, the DOJ is still pursuing that case we mentioned last month over the dire case of a smiley emoji. And IRS (like everyone else, apparently) has become interested in
cryptocurrency, obtaining an order in N.D. Cal. compelling bitcoin broker Coinbase to turn over information on everyone with more than $20,000 in annual transactions between 2013 and 2015.

**Intellectual Property**

**Copyright – New Cases**

In this month’s hopper we have:

- C.D. Cal.: The holder of rights in *The Cosby Show* sued the BBC in for use of *seven-second clips of the show in a documentary on rape allegations* against the actor.
- C.D. Cal.: Playboy Entertainment Group sued a website purporting to offer “Every Playboy Playmate Centerfold Ever” for free.
- C.D. Cal.: Disney sued movie sales kiosk company Redbox for *dispensing digital codes used to purchase or stream Disney films*, in violation of copyright and contracts between the parties.
- C.D. Cal.: Chilean musician Jaime Ciero has sued Disney, Demi Lovato and Idina Menzel over the hit song “Let It Go” from *Frozen*, claiming that it infringed his 2008 song “Volar.”
- D. Colo.: Moving from the frozen north to the Caribbean, Disney has also been sued for allegedly *copying aspects of the character of Jack Sparrow* from a freelance screenplay. Arrr, there be a motion to dismiss ahead, me hearties.
- D. Mass.: Jimi Hendrix’s estate has wandered into a bar in Marlborough, Massachusetts looking for a fight, filing suit over the *performance of Hendrix’s music* during live events. Not a town I would have picked a fight in, but there you go.

**Copyright – Plaintiffs’ Victories**

The Ninth Circuit affirmed the dismissal of copyright claims brought by John Steinbeck’s daughter-in-law and granddaughter against his stepdaughter, as part of a larger intrafamilial spat over control of the author’s works; the claims related to the *movie rights for “Of Mice and Men” and “The Red Pony,”* which the court held had been previously adjudicated and thus blocked by issue preclusion.

The owners of photo and image copyrights did well in court this month. Online print shop Zazzle was held liable in N.D. Cal. for *infringement of photograph copyrights*, but succeeded in having statutory damages reduced on the basis that the plaintiff did not establish willful
infringement. You might recall that Zazzle had attempted to invoke the DMCA for products created with user-submitted designs, but the court held that the DMCA applied only to the appearance of those designs on Zazzle’s website and not to the physical goods it sold.

The complex saga around the control of late photographer Vivian Maier’s work continues, with a judge in N.D. Ill. denying a motion to dismiss a copyright claim brought by Maier’s estate against a collector of her work who has attempted to commercialize his collection. (The short version: The collector thought he’d found the secretive artist’s last living heir and obtained permission for his efforts, the estate claims to have found another heir with supervening rights in France.)

After a three-week trial in E.D.N.Y., a jury awarded graffiti artists damages ranging between $750 and $80,000 under the Visual Artists Rights Act for the destruction of their work by a property owner who whitewashed the sides of his buildings. And in S.D.N.Y., the owners of copyrights in celebrity photographs won a bench trial against a gossip website for unauthorized use of the photos, with the judge rejecting a fair use defense.

In a non-image related lawsuit, Sci-Hub, the Russia-based free database for scholarly works, was hit with a $4.8 million default judgment for infringement in E.D. Va.; the court also issued an injunction directed at “Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries to cease facilitating access to Sci-Hub and to render its “names/sites non-resolving.” Let the game of whack-a-mole begin.

Copyright – Defense Victories

The copyright lawsuit over Disney’s Zootopia ended in dismissal without leave to amend this month, with a judge in C.D. Cal. following up on a tentative ruling I reported back in October.

A duel over the plot of romance novels resulted in a win for the defendant author and Amazon.com in the Northern District of Illinois. While the plaintiff successfully proved that many details between the books were similar beyond the scènes à faire, the court found that the overall approach and feel of the works was very different.

In S.D.N.Y., a comic book author’s claim against Cartoon Network over cartoon Steven Universe fell apart for lack of substantial similarity. You get the impression that the judge enjoyed writing this one, with detailed
examinations of superpowers, magic gemstones, storytelling tropes, and art styles.

And in the same court, a photographer who sued ABC for its use of his snapshot of the NYC Halloween truck attack suspect was ordered to explain why he should not post security for ABC’s costs after the judge held that ABC’s use was likely fair.

Copyright – New & Pending Appeals

The Second Circuit has declined to allow tech and media giants to argue at an upcoming hearing on the question of whether BMI’s sale of fractional licenses in musical works violates an antitrust consent decree with the DOJ.

The Ninth Circuit heard argument on appeal of a ruling in favor of CBS regarding copyrights for newly created remasters of pre-1972 musical recordings, with CBS arguing that the remasters were new works and that the original recordings are not protected under federal law.

The Eleventh Circuit heard rapper Rick Ross’s argument that defects in the registration process for his song “Hustlin” should not impair his infringement action against LFMAO, because there was no skullduggery behind the registration errors. And in the same court, the ACLU has filed a brief in support of Public.Resource.Org’s fight to make the official compilation of Georgia’s state laws publicly available for free.

Idea Theft/Trade Secrets

The producer of a TV show starring celebrity chef Emeril Lagasse has sued the Florida House of Representatives to block its attempt to subpoena records about funding for the series from the state’s tourism branch, arguing that the records contain trade secrets. Forgive me, but this one sounds half-baked.

Commercial Speech

Trademark

The New England Anime Society (producers of the annual Anime Boston convention) have sued competing organization Fantastic Gatherings in D. Mass. over the latter’s use of “Boston Anime” and “Boston Anime Fest” for its own annual event.

Invoking trademark law, The New York Times sued a woman for Queens in N.Y. state court for misrepresenting herself as a Times reporter in order to gain access to various events.

In S.D.N.Y., AM General, the manufacturer of the Humvee, has sued Activision Blizzard for depicting the “trade dress” of the truck and using the marks “Humvee” and “HMMWV” in its
*Call of Duty* video games. As I recall, trade dress can’t be functional...so is AM General going to concede that the way the truck looks isn’t function-driven?

Fox scored a win in the Ninth Circuit over its use of “Empire” for a fictional music label in the TV series of the same name, with the court applying the *Rogers v. Grimaldi* test to claims by real music label Empire Distribution. (Empire has petitioned for rehearing.) The Ninth Circuit also heard argument over trademark rights in a squirrel-like character in Fox’s *Ice Age* movies, with an artist seeking to revive claims that were dismissed in California federal court after a loss on related issues in the courts of New York.

Aggressive trademark litigant 1-800 Contacts has run afoul of antitrust law according to an administrative law judge at the FTC. The ALJ held that 1-800 Contacts had engaged in anticompetitive practices by entering into more than a dozen settlement agreements in trademark cases that included restrictions on the parties’ ability to purchase keyword-based ads triggered by each other’s trademarks.

Finally, a round of applause for The Slants, whose trademark was finally registered this month – exactly six years after the application was filed.

*False Advertising*

There might be many entities who can sue for an online ad company’s sale of deceptive advertisements, but a judge in D.N.J. held that a rival digital ad broker who finds it can’t compete against illegal offerings isn’t one of them. The court held that there was insufficient connection between the harm caused to consumers by the deceptive ads and the decline in plaintiff’s business to support a Lanham Act false advertising claim.

A California appeals court ruled this month that while a post-judgment injunction against deceptive speech might be constitutional, such orders are still subject to narrow tailoring requirements so as not to restrict more speech than necessary.

*Miscellaneous*

*Academia*

A Bay Area high school escaped liability in N.D. Cal. for its decision to discipline students who liked and/or commented on racist posts on Instagram comparing their black classmates to gorillas. While finding that the students’ online activity was within the scope of the
First Amendment, the court held that it also constituted “school speech” that could be the basis for disciplinary measures.

Threats & Incitement

The Sixth Circuit has granted interlocutory review of a W.D. Ky. ruling that denied Donald Trump’s motion to dismiss a claim that he incited violence against protesters at a 2016 campaign rally.

A Colorado appellate panel ruled that a middle school student did not incite a breach of the peace against a classmate by displaying the classmate’s photo with a phallus scrawled thereon. Accordingly, the student’s adjudication of delinquency was reversed. The Colorado Supreme Court denied certiorari on the ruling.

Pennsylvania’s top court heard argument on whether a Pittsburgh rapper’s video referencing violence against police officers – and naming two officers in particular – could support his threats conviction.

A Texas county sheriff threatened to prosecute the driver of a truck with a vulgar anti- Trump sticker in the back window, calling on citizens to identify the driver. Completely coincidentally, I am sure, the driver was arrested shortly thereafter on an outstanding fraud warrant.

Hollywood Hijinks

If no party to a lawsuit is named, does it exist? A woman claiming to be in the entertainment industry filed a lawsuit in California Superior Court as a Jane Roe, alleging that Doe defendants impersonated her in emails and calls to production company executives that were of a sexual nature. A tough decision as to the approach, perhaps: The situation is embarrassing, surely, but it would also seem to be in the plaintiff’s interest to reveal her name so that people know they haven’t been talking to her.

In the same court, the producers of 1970’s Peter Falk vehicle Columbo are suing for long (and we mean long) deferred payment of profits from the series, alleging that a $2.3 million payment in 2016 did not satisfy Universal City Studio’s contractual obligation to pay them between 10 and 20 percent of net profits from the show.

The Weinstein Company will be allowed to sell off its assets in the wake of the Harvey Weinstein’s ouster, thanks to a California bankruptcy judge’s ruling this month.
Adults Only

In a split decision, the Seventh Circuit rejected the appeal of a woman who claimed that her First Amendment rights were violated when she was issued a citation for appearing topless in public on “GoTopless Day.” The majority rejected her argument that appearing clad only in body paint from the waist up was protected as expressive conduct, because the act was not inherently capable of being understood to convey a message.

In a similar case, bikini-wearing baristas in Everett, Washington argued in W.D. Wash. against the enforceability of two new ordinances that would prohibit their activity in order to prevent “proliferation of crimes of a sexual nature” and prevent destructive “sexual self-objectification.” [Late-breaking update: Judge Marsha Pechman issued a preliminary injunction against enforcement of the ordinances on First Amendment grounds.]

The True Miscellany

The Kentucky Supreme Court will hear argument on whether enforcement of the City of Lexington’s “fairness ordinance” against a t-shirt company that refused to print shirts for a gay pride festival is constitutional. Seems like I opened this article with a discussion of a case that might address this question.

Conclusion

That’s it for November...which means that it’s time to start making decisions about the 2017 Yearly Monthly Daily Awards! I’ll be reviewing all of the Monthly Daily issues from 2017 for the most interesting, outrageous, dangerous, and inspiring developments that we’ve seen pass across the MLRC’s radar. If you’ve got nominees, feel free to let me know!