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

The 2017 YEARLY Monthly Daily Awards

By Jeff Hermes

Welcome to the 2017 edition of the Yearly Monthly Daily Awards, in which we will celebrate some of the most notable media law developments of 2017 (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.

The various YMD Awards will be granted in four general categories: Decisions (including the rulings of courts or other tribunals); Disputes (including matters pending before a court or other tribunal); Government (including both government officials and agencies); and Miscellaneous (including individuals and...other...kinds of winners). We will also give two Special Awards this year: The Takedown of the Year, and that zenith/nadir of recognition, The Extremely Dubious Top Honors.

I keep saying “we,” but the nominees and winners have been selected in the sole discretion of the author, so don’t blame George or Dave for this. 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.

Before we get started, a special note for 2017. I could have turned this year’s awards into one long list of horrible things Donald Trump did. But that would get as depressing and tiresome as 2017 itself – and besides, as I mentioned last year, I don’t give Trump awards. Of course, he likes to preemptively remove himself from consideration for such things anyway, so everybody wins. Except Trump.

Let’s get to it.
DECISIONS

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The LANDMARK Award
(given to a Supreme Court ruling likely to become a touchstone for future free speech cases)

HONORABLE MENTION: Expressions Hair Design v. Schneiderman

This ruling may seem like it deals with a trivial and non-speech-related issue: Can a state ban surcharges by merchants for the use of credit cards while allowing financially equivalent discounts for use of cash? But the Supreme Court recognized a First Amendment issue buried in the dispute because the law’s effect turns on how merchants communicate the surcharge or discount to consumers; the decision sets forth a roadmap for identifying hidden speech questions in other contexts.

RUNNER-UP: Matal v. Tam

After six years of legal wrangling, Simon Tam has finally been able to register the name of his band, The Slants, as a federal trademark. The U.S. Patent and Trademark Office had refused registration, deeming it a disparaging mark (despite the all-Asian band’s intent to re-appropriate and change the meaning of the term). But the Supreme Court ruled that this was a plainly viewpoint-based standard and that trademarks are not government speech; query what this will mean for viewpoint-based restrictions in other contexts, such as the ban on charitable organizations supporting or opposing political candidates.

WINNER: Packingham v. North Carolina

In a decision striking the petitioner’s conviction for use of Facebook in violation of limitations imposed on registered sex offenders by the state of North Carolina, Justice Kennedy’s rousing discussion about the central role of the Internet, and social media in particular, to modern life is a strong reaffirmance of the hopeful view of the Internet espoused by the Court twenty years prior in Reno v. ACLU. The Court’s decision in Packingham will form the cornerstone for future arguments against the constitutionality of laws targeting online communication.
The MISSED OPPORTUNITY/DODGED BULLET Awards
(a pair of awards given to decisions by the Supreme Court to deny certiorari)

MISSED OPPORTUNITY:  *Elonis v. United States*

This question has been lingering for far too long: Under the “true threats” doctrine, does the First Amendment require that a defendant subjectively know or intend that a statement will be understood as a threat? Particularly galling is the fact that the Court punted on this question in its 2015 decision in this same case, and then chickened out of dealing with the problem when it inevitably re-emerged after remand.


DODGED BULLET:  *Jane Doe No. 1 v. Backpage.com, LLC*

If ever there were a case where you could see the Supreme Court seriously altering the digital media landscape, this was it. The First Circuit held that Section 230 barred a federal civil claim brought by victims of sex trafficking against Backpage.com, holding that Section 230’s exception for federal criminal laws did not extend to civil claims created as part of the passage of these laws. The Supreme Court has never opined on the proper interpretation of Section 230, and the terrible facts in this case would have made it a dangerous place for the Court to start.

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The PRETZEL LOGIC Award
(given to a judicial decision or other ruling that winds itself in knots to reach a twisted conclusion)

HONORABLE MENTION:  *Gresk v. Demetris*, Court of Appeals of Indiana

Dr. Cortney Demetris believed that A.V., a minor, was a victim of medical child abuse, and pursuant to her obligations under Indiana law reported her diagnosis to the Department of Child Services. A.V.’s parents later sued for defamation, in response to which Dr. Demetris moved to strike under the state’s anti-SLAPP law. Seems like a no-brainer, and the trial court granted the motion, but an appellate panel found a way to reverse by zooming in on the facts until an issue as publicly important as child abuse became a private dispute between a family and their doctor. Then, to top it off, the appeals court held that because the doctor had a legal duty to speak, she was not acting in furtherance of any “free speech or petitioning right.” Yikes.
HONORABLE MENTION: *Samsel v. Desoto County School District*, U.S. District Court for the Northern District of Mississippi

This case involved, inter alia, alleged defamation by the content of an email message; problem is, the defendant wasn’t the author of the email but someone who forwarded it without comment. “Section 230,” you might say, and so did the defendant. Alas, the judge was clearly not happy about extending the statute’s protection to users of digital services; problem is, it’s kinda right there in the text: “No provider *or user* of an interactive computer service...” But, said the judge, the person forwarding the email was alleged to know whether the content was true or false, and by forwarding the email *without* comment, he implied it was true – therefore, he changed the email’s meaning and Section 230 doesn’t apply. There’s a phrase for this kind of piling of inference upon unfounded inference: “a rope made of sand.”

RUNNER-UP: *In re Grand Jury Subpoena*, U.S. Court of Appeals for the Ninth Circuit

The First Amendment right to speak anonymously took it in the neck in this opinion, which involved a grand jury subpoena to employer-review site Glassdoor for information about its users. Comparing Glassdoor to a reporter with a confidential source, the Ninth Circuit held that the subpoena was governed by *Branzburg v. Hayes* and thus enforceable absent a showing that the subpoena was obtained in bad faith. The court rejected the argument that a separate First Amendment analysis needed to be conducted due to the interests of Glassdoor’s users (as in the *Dendrite* line of cases), finding the platform’s and the users’ interests to be identical and that any such interest on the part of users was waived when users agreed to Glassdoor’s Privacy Policy. But platforms and their users do not have the same interests – platforms want to avoid a chilling effect on the use of their services, while users have the much more direct interest in avoiding retaliation for their speech. Nor does agreeing to a privacy policy waive rights against the government, as opposed to against the platform. All in all, a troubling result in a case where the Ninth Circuit also sealed much of its proceedings and rejected amicus briefing.

WINNER: *Raytheon Co. v. Cray, Inc.*, U.S. District Court for the Eastern District of Texas

Judge Rodney Gilstrap of the Eastern District of Texas long enjoyed a position as “America’s Patent Judge,” handling more than 20% of patent cases filed in 2016 across the entire nation and more than 4,000 patent suits in total since taking the bench in 2011. That all looked like it would come to a crashing halt, however, when the Supreme Court tidied up the rules on proper venue in patent cases this year in *TC Heartland LLC v. Kraft Food Brands Group LLC*. No longer could patent lawsuits be filed anywhere that a defendant sells its products, such as the plaintiff-friendly Eastern District of Texas – only where the defendant “resides.” But Judge Gilstrap wasn’t about to let go of the reins without a fight, ruling in this case that a defendant doesn’t actually need a physical presence in a state to “reside” there and creating a new multifactor test for venue that
would produce results a whole lot like the pre-\textit{TC Heartland} test. Less than three months later, the Federal Circuit granted mandamus relief and flipped the judge.

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\textbf{The HIDDEN DEPTHS Award}

\textit{(given to a judicial decision or other ruling that digs into concepts of free speech jurisprudence in a thought-provoking way)}

\textbf{HONORABLE MENTION: \textit{Funk v. Scripps Media, Inc.}, Court of Appeals of Tennessee}

This ruling reflected careful consideration of the old question, when is it necessary for a reporter sued for defamation to reveal the identity of confidential sources? Reversing a trial court ruling, the Tennessee Court of Appeals held that (1) under the state’s shield law, that point is not reached until potentially dispositive defenses not requiring disclosure have been resolved, and (2) Tennessee’s fair report privilege is not overcome on a showing of actual malice, and thus evidence of a lack of sources intended to prove actual malice is not relevant to that defense. Thus, the court ruled that an investigative reporter sued by the District Attorney General for Davidson County would not have to reveal his sources unless and until the trial court had determined that the defendants’ assertion of the fair report privilege was without merit.

\textbf{HONORABLE MENTION: \textit{Alexander v. Falk}, U.S. District Court for the District of Nevada}

This decision was notable for how it dealt with the concept of reputation in a context in which a plaintiff maintains two separate identities. Randi Alexander is a romance novelist; Jackson Young is a country music singer. Both of those names are pseudonyms. Alexander and Young filed suit for defamation, alleging that Alexander’s rivals in the romance business were conducting a smear campaign against the pair— but did so under their pen/stage names, and sought leave of court to proceed without revealing their real identities. In a thoughtful opinion, a magistrate judge granted the motion on the basis that the alleged harm had been done to the plaintiffs under their pseudonyms, and that revealing their real names would cause them to suffer that harm in their non-professional lives as well. However, the court said that it would revisit that question if the case were to reach trial.

\textbf{RUNNER-UP: \textit{Western Watersheds Project v. Michael}, U.S. Court of Appeals for the Tenth Circuit}

The Tenth Circuit’s opinion in this case raises interesting issues about whether activity that would otherwise be protected by the First Amendment can support enhanced criminal or civil penalties when it follows a separate criminal act. The case involved a First Amendment challenge to a Wyoming “ag-gag” law that created enhanced civil and criminal penalties for
trespassing across private land to reach adjacent or proximate land where the trespasser “collects resource data.” On a challenge by environmentalists, animal rights activists, and journalists, the Court of Appeal held that while trespassing may constitutionally be punished and speech-related activity on private land restricted, Wyoming’s laws targeted protected First Amendment activity by effectively imposing heightened penalties over and above regular trespass liability based on the gathering of information on public land after the trespass was complete.

**WINNER:** *Signature Management Team, LLC v. Doe*, U.S. Court of Appeals for the Sixth Circuit

In this case, the Sixth Circuit demonstrated a nuanced approach to the question of whether a Doe defendant who is adjudicated to have violated the plaintiff’s copyrights loses the right to remain anonymous. Reversing and remanding a district court order which held that it was not necessary to unmask a Doe in order to issue final injunctive relief, the Sixth Circuit held that the district court should have considered the presumption of public access to the courts – including to the identities of litigants – and the potential need for Doe to be unmasked to ensure compliance with an injunction. But the Court of Appeals also rejected the plaintiff’s argument that Doe had no legitimate interest in anonymity once his infringing speech was held not to be protected by the First Amendment, because under the circumstances unmasking might also chill non-infringing speech on Doe’s blog. Thus, the Sixth Circuit instructed the district court to consider all of these factors and to craft an order accordingly.

**DISPUTES**

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**The TENTERHOOKS Award**

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

**HONORABLE MENTION:** *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, U.S. Supreme Court

The implications of this case for the conflict between gay rights and religious freedom might well place it at the top of an overall list of most-watched cases, but even focusing solely on free speech issues, it still warrants recognition here. What are the limits of expressive conduct protected under the First Amendment? Can the law compel the creation of artistic works, and what effect does an artist’s decision to accept commissions from the public have on the analysis? The Court could dig deep into these issues, or avoid them entirely by focusing on the Free
Exercise clause, but for now the case has the potential to shake up our understanding of the outer reaches of freedom of expression.

**RUNNER-UP: FTC v. AT&T Mobility LLC**, U.S. Court of Appeals for the Ninth Circuit

Last year, the Ninth Circuit held that the Federal Trade Commission lacks authority to take action against AT&T for throttling data speeds for its unlimited data customers, because the FTC’s enabling statute exempts common carriers from its authority. This exemption applied, held the court, even if the action challenged by the FTC was outside of the target’s activities as a common carrier. But then, the full Ninth Circuit granted rehearing en banc and declared the panel decision non-precedential. The implications of the case are significant now that the FCC has voted to repeal the 2015 Open Internet Order, because under the new regime the FTC will be the only agency left with the authority to take action against overreaching ISPs. Indeed, everyone except AT&T seems to be pulling for the FTC to win this case – including FCC Chairman Ajit Pai and other ISPs who will inevitably have to defend the repeal of the 2015 Order in court.

**WINNER: Carpenter v. United States**, U.S. Supreme Court

This case, which involves the warrantless acquisition by the government of historical data from wireless carriers relating to the location of a criminal defendant’s cell phone, has the potential to rewrite the laws of privacy for the digital age. Will the Court revisit the third-party doctrine, in recognition of the massive amounts of very personal information that Americans now entrust to private corporations due to the ubiquity of online services and communication? Or do the limits of privacy from the government end at the digital frontier?

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**The ECDYSIAST Award**

(given to a dispute involving interesting questions arising out of the baring of skin as a medium of communication)

**HONORABLE MENTION: The Strip Club Cases**, various courts

2017 saw a remarkable series of right-of-publicity cases across the country filed by women against strip clubs and swingers clubs for the unauthorized use of their images in online advertising. I’m not usually a fan of right-of-publicity cases, but regardless of how you view the adult entertainment business, these clubs seem to have taken the commoditization of performers a step too far.
RUNNER-UP:  *Edge v. City of Everett*, U.S. District Court for the Western District of Washington

Bikini-wearing baristas sued and won a preliminary injunction blocking the enforcement of a dress code ordinance that compelled them to cover their “upper and lower body (breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of the legs below the buttocks, pubic area and genitals).” The ordinance was apparently motivated in part by concerns over the “impact of wearing a swimsuit on the wearer and the observers,” including “sexual self-objectification” and “sexualization of women” – which sounds to me a lot like blaming women for others’ reactions and removing their discretion to choose how they present themselves.


These are two cases with very similar facts. In *Brennan*, a man stripped naked at an airport security checkpoint to protest his treatment by TSA officers; in *Tagami*, a woman appeared topless apart from body paint in public on national Go Topless Day in protest of decency ordinances that allow men to go shirtless while women cannot. In both cases, a U.S. Court of Appeals decided that their conduct would not have been clearly understood as expression by observers, and thus did not require the protection of the First Amendment. But how, in context, could it have been interpreted as anything else?

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*The HOT MIC Award*

(given to a dispute arising out of the mistaken belief that one is not broadcasting)

RUNNER-UP:  *Kanongataa v. ABC*, Southern District of New York

So this happens to everyone, right? You’re streaming video of your son’s birth, and you think it’s only going to your relatives in Tonga, but in fact the entire internet is watching and the video gets picked up by major news organizations. Oops. The copyright lawsuit that Dad filed thereafter was doomed on fair use grounds, and now he’s looking at paying the defendants’ attorneys’ fees on top of his medical bills.

WINNER:  *Barrigas v. United States*, U.S. District Court for the District of Massachusetts

An IRS agent on the phone with a taxpayer is simultaneously on hold on another line while attempting to call into *The Howard Stern Show* – and with that set-up, you already know what
happens next. Howard’s team picks up the line, and somehow finds itself listening in on the call with the taxpayer. Rather than ending the call, they let the rest of the taxpayer’s conversation play out on the air while Stern makes jokes inaudible to the parties to the call. The taxpayer sues the United States and the show for disclosing her tax information to an audience of more than a million listeners. Ugh.

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The PUZZLER Award
(given to a dispute plagued by paradox)


Journalist Kevin Powell sued Lionsgate alleging that the Tupac Shakur biopic All Eyez on Me violated his copyrights in a series of articles that he wrote for Vibe magazine in the 1990s. How does Powell know he was copied? Well, it turns out that he engaged in a little fiction writing as part of his reporting, creating a character named “Nigel” who never existed – and “Nigel” showed up in the biopic as well. Which leads to the question: Does the idea/expression dichotomy block a claim based on a character presented in the original work as factual and believed by the defendant to be factual, but who is actually a creative work?

RUNNER-UP: Naruto v. Slater, U.S. Court of Appeals for the Ninth Circuit

The “monkey selfie” copyright case sputtered to an ignominious end in 2017, but not without one last bit of absurdity. PETA, which filed this case claiming to be the crested macaque’s “next friend,” asked the Ninth Circuit not to rule on a pending appeal of its lower court defeat because the parties had settled the case. But not content to escape without an adverse appellate ruling, PETA also asked the Ninth Circuit to vacate the lower court decision holding that Naruto had no rights in the “selfie” (a move to which the defendant did not object). Specifically, PETA argued that it might never have been a “next friend” with the standing to file suit, and thus there might never have been an actual case or controversy in which the district court could have ruled. But as an amicus brief opposing the settlement pointed out, if PETA isn’t Naruto’s “next friend,” where does it get the authority to settle the case?

WINNER: In re Ashley Madison Customer Data Security Breach Litigation, U.S. District Court for the Eastern District of Missouri

As you will recall, Ashley Madison, the website designed to assist its users to cheat on their spouses, was hit with a massive hack in 2015 that resulted in up to 37 million users’ identities being exposed. While many felt that the users were simply getting what they deserved, a class action was filed that, in 2017, resulted in an $11.2 million settlement. Which itself presents a
problem: How are the users who haven’t yet been caught by their spouses supposed to explain receiving a notification about their entitlement to proceeds from the settlement?

GOVERNMENT

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The EXCEPTIONAL Award
(given to government entities attempting to create new access/FOIA exceptions out of thin air)

HONORABLE MENTION: The National Aeronautics and Space Administration, for its “personal mailing address” exception

If I had to pick a government agency that I thought I could get along with most of the time, it would have been NASA. I mean, who doesn’t like NASA? But then they go and categorically reject requests submitted by FOIA service MuckRock because it does not include its users’ personal mailing addresses with the requests – information which is not required by law. I suppose even a cool government agency is still a government agency.

RUNNER-UP: Judge Richard G. Stearns, for his “The Times They Are a-Changin’” exception

When faced with a media request for jurors’ home addresses in a high-profile criminal trial, Judge Stearns labeled a 1990 First Circuit decision indicating that the information should be made public the product of “a more innocent age,” stating, “In the turbulent times in which we now live, I would no more consider ordering the public disclosure of a juror’s home address than I would my own.” But how, exactly, was 1990 “more innocent”? More optimistic, sure – but more innocent? Whether the judge is being driven by technophobia, despair over tribalism, or simple curmudgeonliness, this decision doesn’t deserve a place in the survival bunker.

WINNER: The Department of Justice, for its “Jason Leopold” exception

BuzzFeed’s Jason Leopold has certainly made a name for himself in recent years as a prolific user of the Freedom of Information Act – to the extent that the DOJ stated that it would start delaying responses to his requests. Apparently, the DOJ isn’t thrilled with people who file FOIA suits simply because it isn’t complying with its obligations under the law, seeing the exercise of one’s legal rights as a tactic to jump the queue ahead of requesters who are prepared to languish indefinitely. Um, what?
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The THERE OUGHTA BE A LAW Award
(given to legislators who don’t understand why punishing speech has to be so complicated)

HONORABLE MENTION: New York State Sen. Tony Avella (D-11) for S.B. 4561 and Assemblyman David I. Weprin (D-24) for A.B. 5323

These parallel bills would have brought a European-style right to be forgotten to the Empire State, resulting in a widespread outcry. Fortunately, Sen. Avella struck the enacting clause from S.B. 4561, rendering the bill moot, and the parallel Assembly bill also seems to have faded into limbo as a result. This is an import we’re pleased didn’t clear customs.

HONORABLE MENTION: California State Assemblymember Ed Chau (D-Monterey Park) for A.B. 1104

Inspired by complaints about “fake news” on social media influencing election results, this legislative gem would have criminalized the knowing publication of false or deceptive statements designed to influence a vote. Just imagine what would have happened had it become law, with politically motivated prosecutions every time a candidate or party yells “fake news.” Luckily, the bill was unceremoniously pulled from consideration, the proper fate for a bad idea.

RUNNER-UP: Utah State Sen. Daniel W. Thatcher (R-12) for S.B. 118

A particularly egregious example of an overbroad cyberharassment law, S.B. 118 prohibits, among other things, electronically publishing without permission the “personal identifying information” of another person in a public online site or forum, with the intent to abuse or harass another. “Personal identifying information,” in turn, includes items as basic as someone’s name, photograph, or place of business. Worse, this mess actually survived the legislative process to become law in Utah. Senator Thatcher very nearly won the award for this category, but the nature of the law’s outrageousness isn’t particularly novel and courts have become skilled at trimming provisions like these back to something constitutional; moreover, our winner came up with something very, shall we say, special.

WINNER: Texas State Rep. Ken King (R-Canadian) for H.B. 3387 and H.B. 3888

Representative King was tired of journalists covering politicians, particularly those he felt are politically biased against their subjects (or, at least, against Rep. King). So, he introduced two bills: H.B. 3387, which would compel journalists to explain how particular stories regarding public officials relate to those officials’ public duties; and H.B. 3888, which would deny the protection of the state’s powerful shield law to any journalist who had contributed to or worked for a political campaign in the previous five years. The bills currently languish in committee,
where hopefully they will die. Aside from the obvious unconstitutionality of these proposals, H.B. 3387 in particular betrays a fundamental misunderstanding of the public figure doctrine, presenting that special combination of idiocy and futility which we look for in the winners of this category.

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The ROSCO P. COLTRANE Award

(given to a county law enforcement officer who insists on living up to the stereotypes in cases involving freedom of expression or media rights)

HONORABLE MENTION: Sheriff Troy E. Nehls, Fort Bend County, Texas, for protecting us from bad language and reasonable anger

When Sheriff Nehls heard about a white pickup truck with a sticker reading “Fuck Trump and Fuck You for Voting for Him” in the rear window, he know what he had to do: take to social media and crowdsource an effort to find the culprit, while threatening potential disorderly conduct charges if the truck’s owner would not agree to a “ modification.” After someone suggested he read Cohen v. California, the sheriff changed his tune and denied threatening anyone with arrest, while still indicating an intent to lean on the truck’s owner in order to avoid “a breach of the peace.”

RUNNER-UP: Sheriff Terry Buchanan, Ashe County, North Carolina, for attempting to make sure that what’s under the rug stays under the rug

When CBS affiliate WBTV had the temerity to submit a public records request for Ashe County records relating to the appointment of Sheriff Buchanan to his position, the good sheriff promptly instructed his deputies to begin investigating county employees attempting to respond to the requests. For his tireless commitment to his duty, Buchanan has been suspended and is facing felony charges for interfering in public records requests.

WINNER: Sheriff’s Captain Corey King, Washington County, Georgia, for being a pluperfect asshole

Pardon my language; sometimes paler terms just don’t suffice. This paragon of the responsible exercise of authority had his ex-wife and her friend arrested and thrown in jail for trading frustrated Facebook comments about his lack of parenting support. Worse, he had them hauled before a magistrate judge who called their posts criminal defamation and threatened to ban the ex-wife from social media. Eventually, a real judge proclaimed the case frivolous and the prosecutor dropped the charges. Captain King’s award will be delivered courtesy of the Streisand Effect.
The 2017 Yearly Monthly Daily Awards

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The TOOTHPASTE Award
(given to a government official or entity that attempted to recall information inadvertently provided to the press)

HONORABLE MENTION: The Hon. Joan Kenney, formerly of Manhattan Superior Court, for telling reporters to watch their mouths

Justice Kenney apparently likes to think out loud, which is a problem when you don’t want other people to hear what you’re thinking. Her solution was to tell reporters who were in her courtroom to cover a noise dispute regarding a New York gym not to humiliate her, and that they “can’t write everything I say.” Eventually, she moved the hearing into her robing room to dodge the press; Kenney herself was moved to Civil Court shortly thereafter, though court officials would not explain her demotion.

RUNNER-UP: U.S. Immigration and Customs Enforcement, for trying to cover up the ugliness in the human soul

In April, ICE opened up its Victims of Immigration Crime Engagement (“VOICE”) hotline to the public. The hotline, which was apparently intended as a place for victims of crimes committed by undocumented immigrants to seek information, quickly mutated into a tip line where callers indulged their worst impulses by attempting to rat out their acquaintances, friends, neighbors and family. Then, compounding the embarrassment, ICE inadvertently released the personal information of callers to the VOICE line in response to a FOIA request. ICE demanded that reporters return the information that it provided, and for good measure shut down its entire FOIA reading room online.

WINNER: The City of Miami, for attempting to prevent anyone from seeing these photos:
Sure, it could be seen as a “bad” thing when six firefighters stage a mock lynching of photos of a black lieutenant’s family in the firehouse, but that’s no reason to embarrass these scamps after their termination, right? Well, that’s what the City of Miami seems to think, demanding that the media cease publishing the firefighters’ photos. As the images above demonstrate, the press decided not to comply.

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**The COLSON Award**

(given to a governmental entity for its efforts to compile a list of its enemies)

**HONORABLE MENTION:** The Department of Homeland Security, for its efforts to identify the operators of the @ALT_USCIS Twitter account

Following Donald Trump’s inauguration, there appeared Twitter accounts operated by people claiming to be government employees frustrated by efforts to clamp down on agencies’ communications to the public. One such “alternative agency” account was @ALT_USCIS, which was portrayed as being operated by employees of the U.S. Citizenship and Immigration Services unit of the Department of Homeland Security. DHS wasn’t about to tolerate that, so it served an administrative summons on Twitter through the Department’s Customs and Border Protection unit for records that would identify the operators of @ALT_USCIS. Twitter, to its credit, quickly moved to quash, noting both that the demand threatened the First Amendment and also that the summons was issued under authority that was limited to seeking records related to the importation of merchandise. In the end, though, it was the widespread public condemnation of DHS’ efforts that led it to drop its demand.

**RUNNER-UP:** The Department of Justice, for its efforts to identify visitors to a website coordinating protests at Donald Trump’s inauguration

Following protests and other disturbances at Donald Trump’s inauguration, the Department of Justice served warrants on website hosting service DreamHost and on Facebook for records that would identify any and all visitors to the website DisruptJ20.org as well as related social media pages. Tech and civil liberties groups turned out in force to support DreamHost and Facebook in fighting the warrants. While the D.C. Superior Court allowed the warrants to stand, it held that DreamHost would not have to turn over any identifying information about users unless the government could connect a specific user to specific illegal activity; the DOJ subsequently dropped any effort to identify the 6,000 or so people who “liked” the Facebook pages at issue.
WINNER: The City of Coral Gables, Florida, for its efforts to identify online critics

The nominees discussed above are all egregious in one way or another, but for sheer childish flailing they can’t compare with this effort by a Florida city to lash out at its perceived enemies. Upset by anonymous social media posts critical of the city’s decision to employ private security guards, the calm and rational government of Coral Gables fired off C&Ds to Facebook and Instagram threatening them with fines of $500 per day for trademark infringement if the posts were not removed. After the platforms politely explained that this was nonsense for so many reasons, the city sued them in order to obtain the identities of the individuals who allegedly “cast the city in a false light.” Aside from the fact that a municipality doesn’t have privacy interests protectible in a false light lawsuit, Florida doesn’t recognize the tort of false light (thank you, MLRC 50-State Survey!), making this effort doubly insane.

MISCELLANEOUS

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The RAINING CATS & DOGS Award
(given to four-footed nominees featuring prominently in a legal dispute)


When you let your dog escape from your yard, you risk someone else adopting it. That’s the theory behind a complaint filed by Spuds Ventures, which claims that it took over the character of “Spuds MacKenzie” after the Bull Terrier was abandoned by Anheuser-Busch in 1989 as the mascot for Bud Light beer. Spuds Ventures, which now claims use of the partying pooch as a trademark for pub and restaurant services as well as various merchandise, alleged infringement by a Bud Light ad aired during Super Bowl LI that revived the character for a one-off appearance.

RUNNER-UP: Professor Meowingtons, from Meowingtons, LLC v. Zimmerman, U.S. District Court for the Southern District of Florida

When Joel Zimmerman, a/k/a electronica DJ deadmau5, attempted to trademark the name of his cat Professor Meowingtons, he was hit a lawsuit from a woman using the “Meowingtons” name for her website selling cat-themed merchandise. He responded with a petition to rescind her registration, giving a new definition to the term “catfight.”
WINNERS:  Tripper and Valentine, from U.S. v. Brown, U.S. Court of Appeals for the Sixth Circuit

Our winners in this category were the key to solving the mystery of who attempted to extort $1 million from PricewaterhouseCoopers in 2012 with a threat of disclosing copies of presidential candidate Mitt Romney’s tax returns (which were allegedly stolen from the company). The threat was backed up by flash drives sent to various parties containing encrypted files, the key to which the extortionist said he would disclose if his demands were not met. But there was additional data in the unallocated space on the flash drives, of which the criminal was apparently unaware: two photos of cats. Further inspection of the data on the drives led the Secret Service to the neighborhood of one Michael Brown, where agents identified the cats as Tripper and Valentine – the pets of one of Brown’s neighbors, whom Brown had once helped with computer problems. A conviction rapidly followed. The moral of the story is twofold: (1) don’t assume digital files are gone just because you move them to the trash bin; and (2) cats will turn you in. Every. Freaking. Time.

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The GUMSHOE Award
(given to individuals for investigations into the shadowy and mysterious corners of media law)

HONORABLE MENTION:  Prof. Eric Goldman, for his attempt to discover “Who Cyber-Attacked Ken Zeran, and Why?”

Those who rely upon Section 230 all know the result of Ken Zeran’s lawsuit against America Online, in which he claimed that the service should be held liable for damages he suffered as a result of someone impersonating him on the internet. But no one knows who, way back in 1995, was actually guilty of harassing Zeran. Prof. Goldman took a shot at solving the mystery by diving back into the case documents, and while he didn’t find a solution, it was fun to see him try.

RUNNERS-UP:  Gene Quinn of IPWatchdog, Prof. Dennis Crouch of Patently-O, and Mike Masnick of Techdirt for their investigation into and coverage of the question of who is actually in charge at the U.S. Patent and Trademark Office

You’d think this question would be easy: Who, if anyone, is the director of the USPTO? But for a while following the inauguration of Donald Trump, no one in the government would definitively answer that question. Conflicting online sources said on the one hand that Obama-era director Michelle K. Lee was still in the role, and on the other hand that the position was vacant, while the Commerce Department was avoiding comment on the issue. Sources reported
seen Lee roaming the halls, but not what she was doing. A couple of months and a couple of FOIA requests later, the USPTO did finally confirm that Lee maintained her position – after which Lee promptly resigned. Our runners-up in this category deserve recognition for pursuing this story through its twists and turns.

**WINNERS:** Paul Alan Levy of Public Citizen and Prof. Eugene Volokh of Volokh Conspiracy for their investigation of fraudulent litigation

Many major online platforms voluntarily agree to remove or delist content if presented with a court judgment finding that the content is in violation of the law; however, the judicial process can be long, expensive and complex, particularly if the poster of content is anonymous. This has led to the phenomenon of fraudulent litigation in order to generate judgments designed solely to enable takedowns. Our winners conducted an extensive investigation into the many forms that this fraud can take, including suits filed against fake defendants or in the names of plaintiffs who claim to know nothing about the case, suits filed against sources in news articles to secure stipulated injunctions against publication of the articles, and the straight-up forging of court orders. For pulling back the curtain on this skullduggery, the winners in this category deserve our thanks.

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**The DAVID ST. HUBBINS Award**

(given to litigants or potential litigants whose legal strategy treads the fine line between stupid and clever)

**RUNNER-UP:** Zillow, for its copyright litigation strategy

*The Stupid:* Real estate website Zillow drew widespread criticism this year for issuing a cease-and-desist letter to the popular blog *McMansion Hell* over the blog’s use of photos allegedly taken from Zillow to illustrate (often hilariously) architectural blunders and follies. Zillow alleged that the blog violated its copyrights as well as a clause in its terms of service banning negative commentary; the Electronic Frontier Foundation quickly responded with a scathing letter pointing out that Zillow didn’t have exclusive rights in the photographs (which were supplied by users), that *McMansion Hell* had one hell of a fair use argument, and that the ToS claim was barred by the Consumer Review Fairness Act.

*The Clever:* And yet...we can’t entirely mock Zillow’s decision to send the letter. *McMansion Hell* agreed to stop using photos from Zillow to resolve the threat. The C&D also arguably set up Zillow to hit the blog with a Computer Fraud & Abuse Act claim under *Facebook v. Power Ventures* if it went back on that promise. And the C&D was sent shortly after Zillow itself was hit with a multimillion dollar infringement verdict for the unauthorized use of a real estate
photography company’s work, so the company had a vested interest in chilling third parties from calling any undue attention to photos on Zillow’s site. All in all, it might have been worth the PR hit.

**WINNERS:** The plaintiffs in the social media & terrorism cases, various courts

*The Stupid:* This year saw a spike in lawsuits claiming that social media sites should be held liable for giving terrorists a platform to communicate, recruit, and/or generate revenue, leading to death and destruction around the globe. So far, these suits have uniformly run aground on the rocky shores of Section 230, notwithstanding ever more convoluted efforts to plead around the statute. One might wonder whether the lawyers for these plaintiffs are doing more harm than good by leading their clients into fights they cannot win.

*The Clever:* But that presumes that the purpose of these suits is to obtain a plaintiff’s verdict. We can’t help but remember the string of state statutes designed to target Backpage.com for its alleged role in facilitating sex trafficking, which led to a series of rulings striking down those statutes in 2012 and 2013. The statutes were doomed from the start -- but the very fact that they were declared unenforceable provided the foundation needed to mount a federal legislative attack on Section 230, leading to the SAVE Act of 2015 and the currently pending SESTA/FOSTA bills. Will terrorism-related claims be the next subject of an effort to chip away at Section 230’s protection?

**SPECIAL AWARDS**

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**The Takedown of the Year Award**

given to our favorite response to a lawsuit or other legal threat in 2017

**HONORABLE MENTION:** The American Civil Liberties Union of Northern California, for its response to a legal threat by Taylor Swift against a blogger

When Taylor Swift fired off a C&D letter to a small-time blogger who interpreted her lyrics as a dog whistle to the alt-right, her lawyers probably realized that they risked bringing scorn and derision down upon their client’s golden locks by calling attention to a blog that few if any people read. Presumably, that’s why the letter included a threat of a copyright lawsuit if the recipient dared to republish the singer’s baseless demands. Of course, such things never work, as the ACLU of Northern California explained to Ms. Swift and her team in excruciating detail –
including this wonderful line: “Not in her wildest dreams can Ms. Swift use copyright law to suppress this exposure of a threat to constitutionally protected speech.”

**RUNNER-UP:** The *New York Daily News*, for its response to a prior restraint in *ERL Partners v. Pelletier*, Supreme Court of the State of New York

A New York woman was sued by her former employer for defamation after she filed a sexual harassment claim against him. Bad enough, but then a justice of the New York Supreme Court issued an order directing the *Daily News* to remove the name of the employer from its coverage of the dispute and from any “associated keywords and Facebook posts.” To which the *Daily News* responded in an editorial as follows:


From the *Daily News*’ decision to drop its appeal of the prior restraint, and the fact that the original story remained untouched, it seems the judge withdrew the order shortly thereafter.

**WINNER:** The *American Civil Liberties Union of West Virginia*, for its amicus brief in *Marshall County Coal Company v. Oliver*, U.S. District Court for the Northern District of West Virginia

Called by some commenters the “snarkiest legal brief ever,” the ACLU of West Virginia takes home the trophy in this category for its incisive and hilarious brief attacking the complaint filed by Robert Murray and his company against HBO and John Oliver over their report about Murray on *Last Week Tonight*. The section titles of the brief alone warrant recognition:

- Anyone Can Legally Say “Eat Shit, Bob!”
- Courts Can’t Tell Media Companies How to Report, Bob.
- You Can’t Sue People for Being Mean to You, Bob.
- You Can’t Get a Court Order Telling the Press How to Cover Stories, Bob.

And that’s before you even get to the substance, which includes these gems:

It is apt that one of Plaintiffs’ objections to the show is about a human-sized squirrel named Mr. Nutterbutter, because this case is nuts. Which also begs the question: is Mr. Nutterbutter one of the 50 Doe Defendants included in this action?

and

Yes, the photo was included in the brief. It is truly a shame that the brief was rendered moot by the remand of the case to state court for a lack of diversity, but hopefully we’ll see more from the ACLU of West Virginia as the case progresses.

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And finally....

**THE EXTREMELY DUBIOUS TOP HONORS**

(given to a contender in any category whose contributions to the *MediaLawDaily* have earned them a very special place in our hearts/in Hell)

**RUNNER-UP: Sean Spicer**, former White House Press Secretary

Oh, Sean. Even knowing about Donald Trump’s past behavior, how could anyone have imagined the impossible positions in which you would be placed day after day? One could almost pity you, if it weren’t for the outright falsehoods and your discriminatory and abusive treatment of the press. In your six months on the job, you redefined the relationship between the Press and the Presidency, and inspired the news media to cover the White House with even greater depth and vigor – just not through official channels.

And, oh dear, the bushes. Oh, Sean – the bushes.

**AND THE WINNER IS...**
Federal Communications Commission Chair Ajit Pai

You may love his policies or you may hate them, but FCC Chair Ajit Pai has been possibly the most effective government official under the Trump Administration. After years of dissenting from FCC policy as a minority commissioner under Democratic leadership, Pai wasted no time in pursuing a deregulatory agenda after taking the helm. Let’s take a look at just a few of his initiatives, which he has either accomplished or made significant progress on:

- Increasing transparency by releasing the text of agenda items in advance of meetings, and limiting the scope of edits to orders after a vote
- Granting permission for certain broadcast stations to be wholly controlled by non-U.S. citizens
- Loosening the national cap on broadcast audience share
- Reinstating the UHF discount for TV station ownership
- Loosening or eliminating cross-ownership rules for local media
- Declining to review the AT&T/Time Warner merger and approving Time Warner’s sale of WPCH to Meredith
- Reversing a merger condition imposed on Charter requiring the buildout of broadband service
- Allowing broadcasters to roll out a next-generation TV standard
• Relaxing rules over the rebroadcast of AM radio
• Accelerating 5G network deployment
• Turning control of the Lifeline affordable internet program over to the states
• Rescinding the Wheeler-era determination that AT&T and Verizon violated net neutrality rules with their zero-rating/paid data-cap exemptions
• Lifting net neutrality transparency rules for ISPs with fewer than 250,000 subscribers
• Staying the application of customer privacy rules for broadband providers
• Proposing to reclassify broadband to include wireless communication
• Eliminating price caps on business broadband providers

Oh, and of course, Chairman Pai led the successful effort to repeal the 2015 Open Internet Order, the Wheeler-era measure imposing net neutrality principles on internet service providers. Some commentators thought that Pai was hell-bent on the repeal, disregarding the massive popularity of net neutrality, a history of throttling and blocking of services by ISPs, and the analyses of independent technical and policy experts. Others took the view that fears of deregulation are unfounded because market forces and the FTC would control ISP behavior, and that the repeal will spark much-needed investment in infrastructure.

For good or ill, Chairman Pai’s FCC has had an undeniable impact on the information landscape. For that reason, he has earned the Extremely Dubious Top Honors for 2017.

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Thanks, everyone, and have a wonderful holiday season and a great 2018! And one way to make it will be great is to register now for the MLRC’s Entertainment Conference on January 18th, before you miss out on the Early Bird pricing!