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

It’s January at last, and that means that it’s time to put 2016 to bed – or, depending on how you feel about last year, in a shallow unmarked grave somewhere off I-95. I hope you all enjoyed whatever holidays you celebrate and are ready to get this thing done, because once we finish this, we can get to the fun stuff -- the 2016 Yearly Monthly Daily Awards (see p. 20)!

Oh, and for goodness’ sake, please register for the MLRC’s Entertainment Law Conference on January 19th – particularly if you have any interest in music, China, the internet, or Star Trek. Surely we can tempt you with at least one of those, and if nothing else, it’s an excuse to be in L.A. in January!

Supreme Court

A win for Samsung at the Supreme Court, as the justices ruled that a design patent violation can involve a single component of a product rather than the entire device. As a result, Samsung will be able to argue on remand that it shouldn’t be on the hook for its total profits from the sale of phones infringing Apple’s design patents; rather, it can claim that its liability is limited to profits attributable to discrete infringing elements.

I know, be still my beating heart. But we’ve got the hearing in Expressions Hair Design v. Schneiderman (commercial speech in context of surcharges for credit cards) on January 10th, and the hearings in Lee v. Tam (USPTO ban on disparaging trademarks) and Ziglar v. Abbasi (level of specificity for determining whether a constitutional right is clearly established) on January 18th, so things will get more interesting soon!

Turning to petitions, the justices have agreed to hear a case about jurisdiction in patent cases, which will have the potential to shut down forum shopping (and possibly the economies of the towns of Marshall and Tyler in Texas, which have made a bundle off of plaintiffs headed to
the Eastern District). On the other hand, the Court denied cert on a decision of the Tenth Circuit holding that the Commerce Clause does not bar a Colorado law requiring internet retailers who do not collect sales tax to report the obligation to pay tax to consumers and to report consumer identities to the state. And in pending petitions, Capitol Records has asked the Court to review the Second Circuit’s determination that the Digital Millennium Copyright Act safe harbors apply to pre-1972 sound recordings.

**Reporters’ Privilege**

Oscar winner Mark Boal settled with the federal government over its demand for tapes of his interviews with U.S. Army Sgt. Bowe Bergdahl. The subpoena will be withdrawn and Boal will be able to withhold all confidential material; in exchange, Boal will testify as to the authenticity of the tapes and release portions of the tapes that have been publicly disclosed.

And a reminder that not all confrontations over confidential sources happen in court: In New Jersey, New Brunswick police served a warrant on journalist Charlie Kratovil and seized a water meter that he reported could provide evidence of corruption at the city’s water department. The police pressed Kratovil about where he got the meter, but he refused to disclose his source.

**Defamation**

A bright point in the dark of winter: President Obama signed the Consumer Review Fairness Act into law this month, barring contractual clauses that require consumers to waive their right to review businesses. Congratulations to Yelp, TripAdvisor, and all of the other review sites and their users who have changed the landscape of consumer information.

**New Cases**

Just a handful of new cases this month. In Michigan state court, Burke Ramsey sued CBS for suggesting that he killed his sister JonBenét in a network special.

In New York state court: A Manhattan life coach sued website Gothamist over reader comments suggesting she was a prostitute after the site ran a racy picture; and a former executive for Donald Trump’s companies who spoke to the New York Times about her experiences sued the Daily Mail over an article that allegedly painted her as an ex-employee seeking revenge.
In New Jersey state court: A lawyer sued Google for failing to remove a negative review of his firm, citing Google’s own policies; and a Jefferson, NJ, man sued six individuals over Facebook comments naming him as the killer of local “celebrity” Pedals, a black bear who walked on his hind legs.

And in the Northern District of California, radio personality and conspiracy theorist Art Bell has sued conservative radio pundit Michael Savage over broadcast statements allegedly referring to Bell’s fourth wife as having been a “10-year-old hooker” when they met.

Defense Losses

2016 couldn’t end without getting in a few more kicks in the pants, could it? I’m still reeling over Carrie Fisher and Debbie Reynolds, never mind George Michael -- any kid of the 1980’s has a few Wham! tunes locked somewhere in the brain (wanted or not), and Faith was an essential cultural experience.

Defamation losses in December were perhaps not quite as painful, but they still stung. Where shall we begin...how about the appellate courts of California, which held that republication of an “outdated” newspaper article did not concern a matter of public interest for the purposes of the state’s anti-SLAPP law? Or the D.C. Court of Appeals, which waited two years to drop its opinion in the “global warming” defamation case? The court held that D.C.’s anti-SLAPP statute requires a Rule 56-style analysis of the evidence and that the denial of an anti-SLAPP motion is immediately appealable, but found that Michael Mann carried his burden with respect to statements suggesting that he manipulated climate change data.

Minnesota’s appellate court followed Washington’s dubious lead in holding the Minnesota anti-SLAPP law to be unconstitutional. The statute required the plaintiff to present “clear and convincing evidence” in support of its case, which the court found to violate the plaintiff’s right to a jury trial. I have to wonder why this issue didn’t come up in Anderson v. Liberty Lobby, in which the U.S. Supreme Court held that a “clear and convincing evidence” standard must be applied at the summary judgment phase in actual malice cases. (We’re also watching the Nevada Supreme Court on this issue, where that state’s powerful anti-SLAPP law is facing a challenge.)
We also have an appeals court in Texas which found some statements in a Corpus Christi newspaper regarding accusations of financial impropriety by a Chamber of Commerce member to be defamatory per se, and the Eleventh Circuit holding that an ex-police officer could pursue a defamation claim for defamation after the county sheriff reported him to other officers as dangerous and a “loose cannon.”

Finally, there was a settlement in a lawsuit by a Louisville, Ky., public relations firm against a pair of local radio personalities; the radio hosts publicly acknowledged that they misreported that the head of the PR firm had leaked information about the University of Louisiana’s basketball team.

Defense Wins

It wasn’t all bad. It’s never all bad. In California state court, we saw an interlocutory win for the producers of a Univision series about deceased singer Jenni Rivera; the plaintiffs were denied discovery in advance of a pending anti-SLAPP motion, and an attempt to block the series from airing was rejected (more on this under Prior Restraint, below).

In the Northern District of Illinois, the court held that a woman who sued the Hollywood Reporter over an article on the 2014 Sony hack was not identified as being involved in the cyberattack. Meanwhile, in Louisiana state court, U.S. Rep. Charles Boustany (R-LA) dropped a lawsuit over a book claiming he was a client of murdered prostitutes.

A Wisconsin appeals court held that statements on Megyn Kelly show “Kelly’s Court” about an ex-firefighter receiving disability benefits while still performing strenuous activity were protected as opinion based on disclosed true facts. Walt Disney’s ex-son-in-law Bill Lund was dealt a loss in the California Court of Appeal in a case against a trustee of the Disney family fortune; the court affirmed an anti-SLAPP ruling below, holding that the claim was time-barred.

And finally, the Third Circuit affirmed the dismissal of claims against Bill Cosby, his wife, and his lawyer, holding that their public denial of sex abuse charges against the performer was protected as opinion based on disclosed facts. I’ve commented on this kind of thing before; I would have held that a denial of public charges doesn’t by itself equate to calling the accuser a liar because there are so many other reasons an accusation may be mistaken, but you take what you can get.
Miscellaneous

The last act of Eramo v. Rolling Stone is playing out in the Western District of Virginia. The judge stayed enforcement of Eramo’s verdict while he considers a JNOV motion; a coalition of media companies jumped in with an amicus brief supporting the motion.

Privacy

Rights of Publicity

A right-of-publicity class action in N.D. Cal. against Twitter and the defunct purveyor of mobile app Famous was dismissed with an eye to refiling in state court, after a district court judge suggested in a hearing on a motion to dismiss that the claims had merit but the lead plaintiff lacked Article III standing. The claims involved an app that allowed users to invest fictional currency in people whose names and images were drawn from Twitter.

Disclosure of Private Information

The Hulk Hogan/Gawker saga is now finally over, with the bankruptcy court in S.D.N.Y. approving Gawker’s bankruptcy plan. Writers for Gawker have been let off the hook for personal liability in pending lawsuits as part of the plan, so that’s at least a sliver of a silver lining.

Access/FOIA

New Cases

We’ve got another batch of federal government FOIA cases out of D.D.C. this month, including: a reporter’s lawsuit against the DOJ for records on the Department’s compliance with its guidance to prevent cronyism under the Foreign Corrupt Practices Act; VICE News suing the FBI for records related to its behavior leading up to the presidential election; Pro Publica suing the Department of Veterans Affairs over correspondence with a consultant about Agent Orange; the Institute for Justice suing the IRS and Customs and Border Protection for blocking access to information about forfeiture actions; perennial plaintiff Jason Leopold sued the Office of the Director of National Intelligence over a request for documents related to Russia’s hacking of the election; and the James Madison Project sued the DOJ for documents on foreign interference in the election more generally.
Beyond that, we have a new case in Illinois state court, where the Chicago Tribune seeks police records on the shooting of teenager Laquan McDonald, and in Missouri state court, where a non-profit seeking birth and death listings from the state’s Department of Health has sued after the department allegedly spent months blocking the request with a moving target of fees and denials.

Access Granted

There was continued fallout from the election in the D.C. Circuit, which ruled that the State Department should have requested the assistance of the Attorney General in recovering Hillary Clinton’s emails, and in S.D.N.Y., where a judge ordered the release of the FBI search warrant for Huma Abedin’s emails.

Also in New York: Courthouse News won a ruling in S.D.N.Y. that the New York City Clerk was violating the First Amendment by withholding newly filed complaints until after processing; the San Antonio Express-News and the New York Daily News won access to court documents regarding Maxim magazine in an order from the state’s Appellate Division; and Mayor Bill de Blasio ceased efforts to avoid disclosure of future emails between his administration and outside advisors (though past communications are still being fought over in court).

Coincidentally, fellow Mayor Rahm Emanuel in Chicago also gave up a fight over his emails this month, releasing almost six years of email from private accounts and announcing a city-wide prohibition on the use of private accounts for public purposes.

We also reported a pair of state supreme court rulings on video, with Oklahoma ordering the release of a surveillance video showing Joe Mixon punching a woman, and Ohio ruling that police dash-cam videos are public records (albeit subject to redaction). Tangentially related, the Eleventh Circuit has decided to release recordings of its oral arguments on its website, leaving the Tenth Circuit as the only federal appeals court not to do so.

A few steps toward access in D.D.C., where a judge ordered a White House science policy official to preserve his emails in a private account pending the outcome of a FOIA suit, and in Michigan, where a judge warned the U.S. government that reliance on a pending
investigation to withhold records about a probe of the Detroit Land Bank would not work for much longer.

A media coalition won access to documents in the case of former U.S. Rep. Chaka Fattah in E.D. Pa., while a judge in D. Ariz. ruled that executions by lethal injection in the state must be open to journalists and witnesses.

Access Denied

Speaking of executions (though I’d rather not), the Sixth Circuit upheld a protective order that allows Ohio to withhold the identities of manufacturers of drugs used in lethal injections. Also in Ohio, the state’s supreme court held that a six-day delay was not unlawful in the release of body-cam footage of the shooting of a man during a traffic stop (which delay gave a grand jury time to return an indictment).

The Second Circuit denied the ACLU access to DOJ records on drone killings, marking a major defeat in the ACLU’s long fight for this information. The Supreme Court of Wisconsin held that the state Department of Justice did not have to disclose prosecutor training videos. The Pennsylvania Supreme Court dropped a bombshell that could disrupt FOIA law in the state, holding that the home addresses of public employees are protected as a matter of the state’s constitutional right to privacy, overriding the state’s public records law.

Of smaller impact but even perhaps more disturbing is a Virginia trial court judge’s decision to kick the press out of a hearing that was otherwise open to the public, in which most of the criminal charges against state delegate Rick Morris were dismissed.

Pending Cases

In pending cases, we’ve got three state supreme court matters to watch. In California, the court heard argument on whether public employees can expect privacy in personal email accounts used for public business (the smart money says little to none, following a virtually unbroken trend across the country). Georgia is debating whether the records of publicly owned hospitals are subject to the state FOIA. And Nebraska is considering whether judicial branch continuing education materials must be made public.

Legislation

Crime victims in South Dakota have a powerful new tool to block the release of information about them, with the state’s passage of a constitutional amendment guaranteeing their privacy and the right to prevent the disclosure of certain records. Georgia is trying to cap the number of public records requests any person makes in a year. But in Texas, lawmakers are
trying to expand public access to records in a response to rulings by the state’s supreme court that denied disclosure of public contracts.

**Newsgathering**

*Prosecution of Journalists*

The big question of the moment is whether the DOJ under Jeff Sessions, or another Trump pick, would abide by the Media Guidelines or shy away from prosecuting journalists (under the Espionage Act or otherwise). But that will play out in future issues.

For now, we’ve got the arrest of a reporter during a protest at the North Carolina legislature; Joe Killian apparently did not leave quickly enough when the police cleared the public gallery after NAACP protesters began chanting.

**Punishment of Sources**

The Fourth Circuit heard argument on the appeal of ex-CIA officer Jeffrey Sterling’s conviction for leaking information to the *New York Times*, with at least one judge questioning whether the prosecution’s trial tactics tainted the verdict.

**Drones**

The U.S. Department of Transportation has released a scathing audit report by its Inspector General about the FAA’s oversight of commercial drones, finding that the agency is insufficiently trained and has not enforced the law properly. In particular, it criticized the FAA’s streamlining of commercial licensing for drones as too rapid, resulting in poor tracking and education of operators.

**Credentialing & Access to Places/Events**

Just as we’re watching the new DOJ for its treatment of the press, so are we concerned about how the new White House will treat journalists and media outlets in the briefing room and otherwise. Mouthpieces for the Trump administration have suggested that media outlets won’t be blacklisted and that Trump’s White House intends to continue to engage with the press, but that still leaves a lot of room for shenanigans.
In other news, the *New York Times* is scuffling with the District of Columbia Department of Corrections over the [paper’s interview with Edgar Welch](https://www.nytimes.com/2016/12/11/us/senate-document-egar-welch-comet-pizza-electorate-debacle.html), the gunman in the Comet Pizza gun discharge case (a/k/a the “Pizzagate Incident”). The DOC claims that the *Times* reporter didn’t properly identify himself as such when he conducted the interview; the *Times* says that’s nonsense and its reporter suggests this is just sour grapes from the DOC about a lost chance to control information.

**Miscellaneous**

A new danger for journalists in the digital age made the news this month, with reports that Vanity Fair contributing editor Kurt Eichenwald was [physically attacked via Twitter](https://www.vanityfair.com/style/2016/12/kurt-eichenwald-social-media-assault). Eichenwald received a tweet containing a strobing light that was intended to, and did, trigger an epileptic seizure. Eichenwald survived the attack, and [filed suit in Texas state court](https://www.rare.foxnews.com/2016/12/07/kurt-eichenwald-files-suit-against-twitter) seeking to learn the attacker’s identity; Twitter has agreed to provide the relevant subscriber information.

**Prior Restraint**

As mentioned up in Defamation, a California Superior Court judge denied an injunction in the Jenni Rivera case to block Univision from airing a series about the singer; however, the judge [granted a TRO](https://www.latimes.com/local/la-me-ln-jenni-rivera-univision-20161205-story.html) requiring her former manager to withhold more information about Rivera until a further hearing in February. And a [grand juror in Ferguson, Missouri](https://archive.is/NRJJG), lost his bid to speak to the press this month, with a state court dismissing his challenge to laws prohibiting him from disclosing information about the grand jury proceedings.

Back in October, a family court judge issued a [prior restraint](https://www.bing.com/search?q=Jenni+Rivera+Trentonian+prior+restraint) against the *Trentonian* publishing stories on a particular case, and a hearing on a permanent injunction was [supposed to be heard](https://www.nj.com/trentonian/2016/12/jenni-rivera-trentonian-prior-restraint-hearing-postponed.html) before a Superior Court judge on December 14th. Sadly, it appears that the *Trentonian* and its reporter may have parted ways on how to resolve the matter, and the hearing was [postponed](https://www.bing.com/search?q=Jenni+Rivera+Trentonian+prior+restraint+postponed) leaving the original temporary injunction in place.

Twitter is still fighting with the U.S. government over the release of a user surveillance report marked as “Classified”; the social media site is arguing that [deference to the government’s classification decisions is improper](https://www.washingtonpost.com/news/posteverything/wp/2016/12/05/twitter-fights-back/). Given that the government carries an extraordinary burden to justify a prior restraint on a third party’s publication of information.
Finally, several efforts to publish National Security Letters have borne fruit, now that the FBI has lifted the gag orders that used to accompany NSLs.

**Information Infrastructure**

*Federal Communications Commission*

It’s anyone’s guess what happens next at the FCC, as the two Republican commissioners announced that they will revisit net neutrality and the whole Open Internet proceeding as soon as possible. A [last-minute offer by Chair Tom Wheeler](https://www.fcc.gov/commission-staff) to resign immediately in return for renewing Democratic commissioner Jessica Rosenworcel’s appointment fell flat. Undaunted, Wheeler kept pressing on net neutrality and zero-rating, raising new issues with AT&T and Verizon – but unless something remarkable happens, all those companies have to do is wait a month.

But before moving on, there was one last echo of one of Wheeler’s pet projects, opening up the market for set-top devices. While it wasn’t exactly a breakthrough on that issue, the FCC did authorize the importation and sale of the AirTV, a device that can receive over-the-air digital TV signals as well as over-the-top content. The device, designed for cord-cutters, needed an FCC waiver because TV receivers are technically required to receive analog signals as well until August 31 of this year. But the FCC found that the utility of the device and its potential for increasing market competition warranted an exception to the rule.

**Antitrust & Media Consolidation**

Sure, Donald Trump promised to block the AT&T/Time Warner merger, but that was then and this is now. Trump’s team has told AT&T that it doesn’t have to worry about heightened scrutiny.

Meanwhile, two members of the House Energy & Commerce Committee have introduced a bill to junk the ban on cross-ownership. Again, this might seem to contradict the President-Elect’s campaign promises, but to paraphrase Catullus, the words of a candidate to his ardent followers should be written in the wind and flowing water.

And a different kind of consolidation of power is in the works for the Broadcasting Board of Governors (which oversees VOA, Radio Free Europe/Radio Liberty, Radio Free Asia, and the Middle East Broadcasting Networks). Congress is phasing out the “board” structure of the BBG and...
concentrating power in its CEO, a presidential appointee. The major concern here is that, instead of countering foreign propaganda with reliable fact, Trump will use this power to spread his own brand of reality-indifferent propaganda around the world.

**Digital Content**

**Section 230**

As expected, the California Superior Court dismissed all charges against Backpage.com’s executives in the notorious “pimping” prosecution, holding that Section 230 was an insurmountable hurdle.

Never one to give up just because of little things like federal law, former state AG (and now Senator) Kamala Harris has filed a new complaint against the same defendants for money laundering. Ironically, the new complaint appears largely to be based on Backpage.com’s efforts to continue to do business after another overzealous state law enforcement official (our old friend Sheriff Thomas Dart) unconstitutionally threatened credit card companies into cutting off payment processing for Backpage.com users.

In addition, Harris apparently took a cue from N.D. Cal.’s recent decision in the Airbnb case, and added some new pimping claims based on the defendants’ alleged receipt of a cut of the proceeds from alleged prostitution activity across the site. As in Airbnb, the complaint does not explicitly rely on the carriage of advertisements or their content, attempting a similar end-run around Section 230. Ugh.

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

Facebook, Google, Twitter and Microsoft have joined forces to compile a database of terrorism-related content on their platforms, which they will use to facilitate and to expedite the removal of this material. Google is also fighting hate with alterations to its autocomplete suggestions, removing suggestions to search for anti-Semitic and sexist content. However, that didn’t stop Facebook, Twitter and Google from being hit with yet another lawsuit accusing them of providing material support to the Islamic State, this time in the Eastern District of Michigan.

South Carolina has different concerns about online content, considering a new bill that would require manufacturers of online devices sold in the state to install blocks to prevent obscene content and websites that facilitate prostitution. It’s patently unconstitutional under the First Amendment and probably the Commerce Clause as well, but it’s also probably a stunt. Just like that stupid journalist-licensing bill that was floated through the South Carolina legislature last January, to illustrate some malformed point about the Second Amendment.
Finally, a Colorado appellate panel held that an escalating Twitter fight between two teens did not reach the level of true threats (because the recipient of the alleged threats didn’t react as if threatened) or constitute fighting words (which the court held must occur face-to-face). Thus, the court reversed a lower court finding of juvenile delinquency.

Miscellaneous

The usual gallimaufry:

- The Ninth Circuit has heard argument on the remand of Spokeo v. Robins, involving minor factual errors about the plaintiff in an online database; several other courts have attempted to interpret the Supreme Court’s oracular pronouncement on Article III standing in the case, but now we’ll see what happens in Spokeo itself.
- The Ohio Supreme Court ruled that Ohio could impose sales tax on some online transactions.
- Ripoff Report defeated a case in S.D. Ohio on personal jurisdiction grounds, with the court holding that the site couldn’t be sued just because of the presence of one of its users in a given state.
- Facebook rolled out its plan for combatting fake news, a multivector approach including reporting tools, third-party fact checking, removal of financial incentives for purveyors of junk, and improved metrics to detect bad information.

Digital Privacy

Hacking

The Ninth Circuit denied rehearing en banc in Facebook v. Power Ventures, leaving in place the panel’s decision that accessing an online service after receiving a cease & desist letter could constitute unauthorized access under the CFAA.

The Seventh Circuit, meanwhile, reinstated a husband’s Wiretap Act claim against his soon-to-be ex-wife. Unbeknownst to the husband, the wife set up his email account to forward messages to her automatically, which probably also could constitute a CFAA violation under the right circumstances.
Control of Personal Information

Oregon’s new revenge porn law has racked up its first conviction, with the defendant sentenced to six months in jail and five years of probation.

Internet-connected devices brought us a couple of new issues in December, with a complaint to the FTC about toys that listen to kids a little too closely, and a complaint in the Northern District of Illinois over personal sexual devices that record...other kinds of information.

Google has reached a tentative settlement over its scanning of Gmail accounts, with an agreement not to collect data for advertising from emails before they are accessible to users. But Google is facing another fight before the FTC over a policy change that would allow it to combine personally identifiable information with browsing data from its subsidiary advertising service, DoubleClick.

Anonymity

We discussed Kurt Eichenwald’s efforts to unmask a Twitter assailant up above. We also saw a Michigan appeals court reject an effort by a scientist to identify people who commented on his research on Pubpeer.com, a platform for the discussion of scientific studies.

And we’ve got two new efforts to unmask anonymous defendants in New York, with Highland Capital seeking the identity of a user who accused the company of “tried and true criminal behavior” on Dealbreaker.com, and a lawyer demanding that Google reveal the name of the author of a three-word review of his services (“It was horrible”).

Encryption & Data Security

According to a ruling in W.D. Ark., if you disclose your computer passwords under police questioning without having heard your Miranda rights, the passwords themselves should not be introduced into evidence but anything discovered on your computer is still fair game. And a Florida appeals court held that the Fifth Amendment does not prevent a defendant from being compelled to disclose a passcode if the prosecution can show that he knows it.

If you can get the information you need from the defendant, it doesn’t really matter if they’re using strong encryption; a Congressional report has found that the U.S. will be better served by encouraging strong digital security than building backdoors into devices.
Internet Surveillance

While some tech giants have built a database to aid their own efforts in suppressing terrorism-related content, no one is biting on Donald Trump’s suggestion that they help build a registry of Muslim-Americans. Twitter has also cut off a social media monitoring service, Dataminr, that was passing information to law enforcement.

But digital surveillance is, if anything, on the rise, with government requests for user data from Facebook up 27% in the first six months of 2016. Law enforcement and intelligence agencies will also be emboldened by the Ninth Circuit’s ruling this month that warrantless e-mail surveillance of people in the U.S. is constitutional, so long as they are communicating with non-citizens abroad and the non-citizen is the “target.”

There was also a somewhat odd ruling under the Stored Communications Act from Magistrate Judge Orenstein in E.D.N.Y., stating that the government can’t get a warrant to search e-mail if the holder of the account is cooperating and consents to the search. While I appreciate Judge Orenstein’s efforts generally to rein in government overreach, this one doesn’t make a whole lot of sense.

Intellectual Property

Copyright – New Cases

Three, count ‘em, three new cases reported this month. In the Central District of California, Warner Bros. was hit with a lawsuit by a screenwriter who claimed that The Hangover Part II infringed his screenplay treatment. In the Southern District of New York, CBS sued the operators of a YouTube channel for posting episodes of The Andy Griffith Show.

And also in S.D.N.Y., a Broadway playwright has sued Dr. Seuss Enterprises for causing the shutdown of the production of his one-woman play “Who’s Holiday!” by complaining to the theater owner that the play infringed Seuss’s “How the Grinch Stole Christmas!” The playwright argues that his work is highly transformative and protected by the fair use doctrine.
Copyright – Plaintiffs’ Victories

A blow to digital platforms this month, as the Second Circuit declined to reconsider its decision in the MP3Tunes case adopting a broad definition of a “repeat infringer” and the circumstances that could trigger red-flag knowledge under the DMCA. It’s anyone’s guess what the Supreme Court would do with the DMCA given the chance, making this a tricky situation (though arguably it couldn’t get much worse for MP3Tunes itself).

Disney and other studios obtained an injunction against VidAngel, a family-friendly service that edits out the adult bits of films and digitally streams the result. VidAngel had tried to work around the need for a license by “selling” the movies for $20 and “buying them back” for $19, but the court wasn’t buying it – nor did it buy the need to stay the injunction pending appeal.

It’s a slight victory, but a victory nonetheless: After remand from the Supreme Court, the Southern District of New York held that John Wiley & Sons did not have to reimburse Supap Kirtsaeng for his attorneys’ fees. You’ll recall Kirtsaeng successfully defended the publisher’s infringement suit over the importation and sale of foreign editions of textbooks.

A couple of settlements to report as well. The photographer whose image of a bowl of Skittles was used by the Trump campaign without authorization settled with the campaign on “amicable” terms. Presumably less “amicable” was YouTube’s settlement over songwriting royalties with the National Music Publishers Association, reported to be valued at over $40 million.

Copyright – Defense Victories

There was a pointed, if brief, ruling from the Second Circuit affirming summary judgment in favor of My Other Bag in the lawsuit brought by Louis Vuitton. The case, as you'll recall, involved the sale of tote bags carrying images of high-end purses with the legend “My other bag is a...,” echoing the old “My other car is a...” bumper stickers. The Second Circuit agreed that the totes were protected as parody, noting that the fact that the parody was potentially complimentary to Louis Vuitton did not change the analysis.

The New York Appeals Court held that the state’s common law copyright protection does not include a public performance right, scuttling a lawsuit against Sirius XM for performance of
pre-1972 sound recordings and throwing other lawsuits around the country involving pre-’72 music into doubt.

In the Northern District of California, Arista Networks defeated a software copyright claim brought by Cisco Systems over aspects of Cisco’s Command Line Interface (“CLI”). Arista made the innovative argument that that the CLI had become an industry standard by Cisco’s own efforts, and therefore constituted scènes à faire under copyright law.

Granting a motion for reconsideration, the Southern District of New York held that photographers who claimed that they had been coerced into unfair contracts with the NFL had later ratified those contracts, and dismissed the plaintiffs’ complaint. (The connection to copyright there is a bit tangential, true – but if the photogs’ contracts with the NFL were unenforceable, copyright issues could surface.)

A copyright troll in D. Or. was whacked with $17K in sanctions to a defendant that it wrongly sued. And in what can only be described as a victory for copyright defendants everywhere, John Steele and Paul Hansmeier, the two lawyers behind notorious copyright troll Prenda Law, were indicted and arrested this month on a range of federal charges related to their trolling scheme.

Copyright – Pending Cases

There were a couple of notable developments in music copyright cases before the Ninth Circuit in December. First, the Court heard oral argument in the state-law copyright dispute between Pandora and Flo & Eddie of The Turtles, considering whether the district court had properly denied Pandora’s anti-SLAPP motion. Pandora argued that California state law protection for pre-’72 recordings evaporates when the recording is “published” by sale to the public.

Next, Marvin Gaye’s family filed its appellee’s brief in the “Blurred Lines” case, defending the verdict but also arguing that, if a new trial does occur, it was error to preclude the plaintiff from introducing the complete recording of Gaye’s original song. Composers and musicologists supported the Gaye family in an amicus brief, claiming that the verdict would not discourage creativity because fair use is still available.

Copyright – Miscellaneous

The House Judiciary Committee wants to see some changes at the Copyright Office, stating that the post of Register of Copyrights should come with term limits and appointments subject to Senate approval.
Patent

It’s a bad month for Apple on patent issues. First the Supreme Court rules in favor of Samsung on design patents, then Nokia files a pair of lawsuits in E.D. Tex. and Germany alleging that Apple infringed 32 of its cell phone patents.

Patent plaintiffs are also on edge, after a district court judge in S.D.N.Y. ordered the attorneys for a patent troll claiming patents in online crowdfunding procedures to pay the defendants $500K in attorneys’ fees out of their own pockets.

Microsoft, Electronic Arts, and other defendants were more fortunate, walking away from a patent suit over 3-D motion tracking technology after the Federal Circuit affirmed a ruling in their favor from the District of Delaware.

Trade Secret & Misappropriation

If you breach an alleged contract to pay a screenwriter for use of his ideas in your movie, does the claim arise out of your release of the film, your non-payment, or both? That’s the issue on which the Ninth Circuit heard argument in an idea theft case over horror film The Purge, with the functional question being whether California’s anti-SLAPP law applies to the claim.

Commercial Speech

Trademark

They may look soft and warm, but Snuggies can turn on you darned quick if they think you’re stepping on their trademarks. The manufacturer of the blanket-with-arm-holes, which I’ve always thought of as the bastard child of a bathrobe and a hospital gown, has set its sights on Amazon in S.D.N.Y. for the e-retail giant’s alleged sale of “astronomical” numbers of infringing products. Conveniently, the Second Circuit has this case called Tiffany v. eBay...

A trademark suit in S.D. Fla. is the result of a falling out between two partners in the production of a Harley Davidson fan magazine. After the joint venture broke up, the defendant began publishing the magazine under the name the parties had agreed to use, with concepts that were allegedly jointly developed. Naturally, the plaintiff is alleging that the
defendant stole everything. You can just see the defendant’s response: “I thought he’d abandoned the idea, I did all of the work anyway, he’s just bitter because I actually followed through,” et cetera, et cetera. Sigh.

A trademark suit in C.D. Cal. over Rick Ross’s 2014 album “Mastermind” was dismissed, after the plaintiff’s registration for the “Mastermind” mark was ordered to be cancelled by the judge as descriptive and lacking secondary meaning. Meanwhile, rapper Logic defeated a trademark claim by disc jockey DJ Logic; the Sixth Circuit held that there was no likelihood of confusion because the plaintiff’s mark had little commercial strength and because the parties’ work did not directly compete.

False Advertising/Deception

Some quick hits:

- The Fifth Circuit reversed a $340 million verdict in an antitrust case, holding that evidence that supported a verdict on a false advertising claim was “a slim, and here nonexistent” basis for a finding of antitrust liability.
- Citing parallels in bankruptcy proceedings, the Seventh Circuit held that lawyers for an organization controlled by convicted TV huckster Kevin Trudeau should not be paid ahead of the victims of his fraud.
- False advertising claims do not create a right to a jury trial where the plaintiff only seeks an accounting of profits, according to the District of Massachusetts.
- Allegations of misappropriation of intellectual property do not constitute false advertising, according to the Western District of Washington.
- Mere exposure to false advertising without financial injury does not create Article III standing, according to the Middle District of Florida.

Professional Speech

Remember that speech code that the ABA was floating back in August? The one that prohibits lawyers from engaging in:

harmful verbal ... conduct that manifests bias or prejudice towards others ... [when] representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

Well, the Texas Attorney General has issued an opinion that the proposed rule would violate the First Amendment, and no wonder.
Miscellaneous

We’re nearly at the bottom of the 2016 barrel. Just a couple of cases still rolling around down there. Both from Virginia, as it turns out.

A Virginia appellate court [upheld the constitutionality of the state’s ban on the display of nooses], as applied to a man’s display of an all-black figure hung in effigy in his yard in open view of the two African-American families living on his street. The court held that the display in context constituted a true threat.

And for the last item of the year, we have the Fourth Circuit holding that the Petersburg Police Department’s social media policy, which banned negative comments about the department, was [unconstitutionally overbroad].

Conclusion

It’s been an interesting ride writing the Monthly Daily this year, and I hope you enjoyed these columns. Now, turn the page for the Awards.
The 2016 YEARLY Monthly Daily Awards

Welcome to the inaugural edition of the Yearly Monthly Daily Awards, in which we will celebrate some of the most notable media law developments of 2016 (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.

Awards are granted in three general categories: Decisions, Disputes, and Individuals. There are also two special awards: Law of the Year, and the Extremely Dubious Top Honors. Winners will be selected in the sole discretion of the author, until George and Dave manage to break through the barricade at my office door. 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.

DECISIONS

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The A-WHAT NOW? Award
(given to a judicial decision or other ruling that has left readers in more confusion then when they started)

RUNNER-UP: The U.S. Court of Appeals for the Ninth Circuit, for Sarver v. Chartier (the “Hurt Locker” decision)

The Ninth Circuit’s attempt to harmonize its precedents on the intersection of First Amendment law and the right of publicity was clearly banging together some jigsaw pieces that didn’t quite fit together. Noble effort, though.

WINNER: The U.S. Supreme Court, for Spokeo Inc. v. Robins

Is Congress granted deference on questions of injury and standing when it creates federal causes of action? Who knows? Spokeo considered whether Congress’ creation of a cause of action in the Fair Credit Reporting Act satisfied the plaintiff’s burden to establish Article III standing in a case regarding apparently harmless errors in an electronic database. The Court held that while Congress can’t declare the existence of standing, it’s really good at identifying potential harm. Both sides in the case declared victory and lower courts are still scratching their heads.

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The DON'T TOUCH THIS Award
(given to a U.S. Court of Appeals or state supreme court decision on which we hope the U.S. Supreme Court doesn't grant cert, but quite possibly might)

WINNER: The U.S. Court of Appeals for the First Circuit, for Doe No. 1 v. Backpage.com

The First Circuit held the line on Section 230 in the most challenging circumstances possible, with a ruling that 230's federal criminal law exception doesn't extend to civil causes of action created by federal statutes that are primarily criminal in nature. It's the right decision, but there's a pending petition for certiorari, and amici are crawling out of the woodwork asking the Supreme Court not only to flip the decision but to limit the power of Section 230 across the board. Remember the “distributor liability” theory? The amici do.

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The LAW OF UNINTENDED CONSEQUENCES Award
(given to a judicial decision or other ruling with disturbing or surprising implications of which the tribunal might have been unaware)

HONORABLE MENTION: The U.S. Court of Appeals for the Sixth Circuit, for Detroit Free Press v. U.S. Department of Justice

In holding that federal mug shot photos are exempt from disclosure under FOIA Exemption 7(C), the en banc Sixth Circuit not only shut down a long quest for access by the Detroit Free Press, but imported some European-style analysis of privacy interests. When the court stated that “[i]n 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades,” one could hear echoes of the right to be forgotten.

HONORABLE MENTION: The U.S. District Court for the Southern District of New York, for Enigma Software Group USA v. Bleeping Computer

This Section 230 decision raised eyebrows for attributing the actions of a non-employee discussion board moderator to the defendant website operator, invoking principles of New York's law of implied agency. Could this be the state law inroad into Section 230 that state legislators and law enforcement agencies have long sought?

RUNNER-UP: The U.S. Court of Appeals for the Ninth Circuit, for Facebook v. Power Ventures

According to the Ninth Circuit, accessing a website after being specifically told not to do so constitutes unauthorized access under the federal Computer Fraud and Abuse Act, with all of the draconian penalties that entails. The decision arose out of a case involving data scraping from
Facebook, but it didn't take long for commentators to wonder about how the ruling could be used to build ramparts on the internet backed up by the force of criminal law.

**WINNER:** The U.S. Court of Appeals for the District of Columbia Circuit, for *Pursuing America's Greatness v. FEC*

A Federal Election Commission rule bans political committees from using a candidate's name in website titles and on social media pages without authorization, in order to prevent voter confusion. The D.C. Circuit held that this was a content-based regulation that failed strict scrutiny: even assuming that prevention of voter confusion was a compelling interest, compelled disclosures to dispel confusion would be a less restrictive alternative. But, as Prof. Tushnet asks, what does this mean for the entirety of trademark law?

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**The HIDDEN DEPTHS Award**

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

**HONORABLE MENTION:** The U.S. District Court for the District of South Carolina, for *Billups v. City of Charleston*

This ruling arises out of a dispute over Charleston's efforts to regulate tour guides within the city limits, raising the question of whether a licensing requirement for the offering of tours regulates speech or behavior. Denying both the plaintiffs' motion for a preliminary injunction and the city's motion to dismiss, the district court conducted a close and fascinating examination of the line between content and conduct. Particularly interesting was the court's discussion of whether a category of speech like “what one might say on a tour” might be so broad or poorly defined to be inseparable from conduct that is legitimately regulated.

**RUNNER-UP:** The U.S. Supreme Court, for *Heffernan v. City of Paterson*

When a public employee is subject to retaliation on the mistaken belief that he was expressing particular viewpoints, does he have a claim under the First Amendment when he never actually expressed or held those views? Yes, according to the Supreme Court, which held that it is the government’s intent to engage in viewpoint discrimination that triggers the constitutional violation and not the particular speech interest of the plaintiff. In an opinion that echoed the principles behind the overbreadth doctrine, the Court held that allowing such claims would protect against First Amendment violations in other cases.
**WINNER:** The U.S. Court of Appeals for the First Circuit, for *United States v. Alvarez-Núñez*

The District of Puerto Rico sentenced a criminal defendant to more than three times the top of the guideline sentencing range on federal firearms charges, based on violent lyrics performed by the defendant's musical group. Reversing the sentencing decision and drawing a distinction that is rarely explored in First Amendment jurisprudence, Judge Selya of the First Circuit wrote an opinion discussing the difference between a performer's state of mind and the meaning of the message they might convey in a performance. Enhancing a sentence based solely on the latter, held the court, would violate the First Amendment.

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**The IT'S ABOUT TIME Award**
(given to a judicial decision or other ruling that is arguably more notable for a long delay than for its holding)

**RUNNER-UP:** The U.S. Court of Appeals for the Seventh Circuit, for *Carlson v. United States*

Only one media outlet (that we know of) has ever been the target of a grand jury investigation under the Espionage Act, but records of the WWII-era investigation of the *Chicago Tribune* have languished under seal since 1942 – until now. This isn't a case of judicial delay, which is why it didn't win the category, but the result of an effort by a modern-day journalist and historian who succeeded in lifting the seal. Still, this one definitely feels like we're opening a time capsule.

**WINNER:** The D.C. Court of Appeals for *Competitive Enterprise Institute v. Mann*

Fittingly for the category, this ruling came in at the tail-end of December. While the Court’s ruling – which holds that denials of anti-SLAPP motions are immediately appealable in the courts of the District, and clarifies the standard of review for such motions – is without question important, the decision is overshadowed by the delay of more than two years between argument and the release of the opinion.

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**The YOU WIN THE INTERNET Award**
(given to a judicial decision or other ruling that protects key aspects of internet infrastructure)

**HONORABLE MENTION:** The U.S. Court of Appeals for the Second Circuit, for *Microsoft v. United States*

The extraterritorial exercise of government authority is one of the greatest threats to the delicate balance of rights and interests that allows international digital communications networks to exist.
By holding that the United States could not access data held in a Microsoft server in Ireland with a domestic warrant, the Second Circuit limited the United States’ unilateral extension of its power overseas and avoided setting a dangerous precedent for less principled governments to do the same.

**RUNNER-UP:** The U.S. District Court for the Southern District of Texas, for *State of Arizona v. National Telecommunications and Information Administration*

The Internet Assigned Numbers Authority (IANA) oversees the IP addressing system that allows computers on the internet to find one another, as well as other core internet protocols. Four states misperceived the United States’ decision to give control of IANA to a non-profit group of stakeholders as ceding some central U.S. authority over the internet, and filed an emergency lawsuit. Fortunately, the Southern District of Texas denied the requested injunction and the transition proceeded without a hitch.

**WINNER:** The U.S. Court of Appeals for the District of Columbia Circuit, for *Weinstein v. Islamic Republic of Iran*

The Domain Name System allows users to access websites using a domain name like “washingtonpost.com” rather than an IP address like “192.33.31.56”; online chaos would erupt if governments could seize aspects of the system for their own ends. The D.C. Circuit avoided this situation by rejecting an attempt to seize top-level domain names assigned to Iran, North Korea, and Syria as assets to satisfy a U.S. court judgment.

**DISPUTES***

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**The SPLIT INFINITIVE Award**
(given to a notable dispute involving science fiction or fantasy fiction)

**RUNNER-UP:** *Dr. Seuss Enterprises v. ComicMix*

What do you get when you combine (1) Dr. Seuss classic and favorite graduation gift *Oh, The Places You’ll Go!* and (2) the universe of *Star Trek?* The unauthorized parody title, *Oh, The Places You’ll Boldly Go!,* of course. The company that holds the IP rights to Theodor S. Geisel’s work was not amused, but who couldn’t love a little Seuss-style Kirk fighting a Seuss-style Gorn? (That said, a Seuss-style tribble looks pretty much like an ordinary tribble.)
WINNER: *Paramount Pictures Corp. v. Axanar Productions*

What happens when hardcore *Star Trek* fans show a little too much love for their favorite show – as in, producing an unauthorized high-quality film with a seven-figure budget starring former *Star Trek* actors? Answer: A lawsuit that marked *Star Trek*’s 50th anniversary year and dove deep into the history of the show in an effort to establish CBS and Paramount’s rights to Vulcans, the *Enterprise*, and much, much, more. Special highlight: the Language Creation Society’s filings on copyright and the Klingon language, which switches back and forth between English and Klingon.

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The GAWKER BLOCKER Award

(given to a dispute that we couldn’t help but watch as it played out)

HONORABLE MENTION: *The World v. Team Prenda*

Prenda Law’s copyright trolling scheme has been a perennial subject of commentary, but it reached its ultimate nadir this year. Paul Hansmeier lost his law license; Hansmeier and John Steele were hit with more than $650,000 in sanctions over a meritless defamation lawsuit; and both were indicted and arrested on federal charges including mail and wire fraud, money laundering, and conspiracy to suborn perjury. This is the kind of wreck where you expect to see a single wheel rolling away, on fire.

RUNNER-UP: *Eramo et al. v. Rolling Stone*

Definitely a close second, as the media law community watched Rolling Stone’s *A Rape on Campus* story apparently fall apart and the inevitable lawsuits begin. Unlike Gawker, though, this saga isn’t over – we’ve got a pending JNOV motion in Eramo’s case, another trial yet to come (in a case brought by the Phi Kappa Psi fraternity), and of course the appeals process. And Rolling Stone did already score one win, in a case brought in S.D.N.Y. by three frat brothers who failed to persuade the court they were identifiable in the article as the alleged assailants.

WINNER: *Bollea v. Gawker*

Of course. We all agonized over this one, from the trial court judge’s difficulty in grasping the limits of privacy law, to the mystery of the two Hulks Hogan, to that ridiculously large verdict. The one bright spot was the Florida Second District Court of Appeals, which flipped an injunction against the republication of the Gawker article; it held that the article, including the sex tape excerpts, *was a publication on a matter of public concern*. The trial judge never took the hint, though, and it was a real shame that the jury verdict never went up on appeal.
***

**The TROUBLED CLEF Award**
(given to a notable judicial dispute involving music)

**CO-RUNNERS-UP:** *Good Morning To You Productions v. Warner Chappell Music*, *Saint-Amour v. The Richmond Organization*, and *We Shall Overcome Foundation v. The Richmond Organization*

A determination that “Happy Birthday to You” has passed into the public domain has blazed a trail for the same attorneys to file additional lawsuits over “This Land is Your Land” and “We Shall Overcome.” Just in time for those protests after the inauguration.

**WINNER:** *Skidmore v. Led Zeppelin*

There’s a lawyer who was sure that all that glittered was gold, and he sued over *Stairway to Heaven*. But in a court by the book there’s a songster who sings, and sometimes all of our claims are misgiven. When the tune came to us at last, it turned out that all was not one and one was not all; the plaintiff threw a rock, but it didn’t roll.

***

**The GONE TOO SOON Award**
(given to a judicial dispute that was resolved long before we stopped enjoying it)

**RUNNER-UP:** *Brown v. Whole Foods Market*

When a local pastor ordered a cake from the Whole Foods flagship store in Austin with the slogan “Love Wins” to celebrate recognition of gay marriage, he claimed that he instead received a cake that carried a gay slur. The pastor sued Whole Foods for infliction of emotional distress. But a comparison of store surveillance video to a later photo of the cake suggested tampering, and Whole Foods countersued for defamation alleging that the slur was in fact a forgery. One can only imagine a trial involving icing handwriting experts, but it was not meant to be – the pastor fessed up to altering the cake and the case settled.

**WINNER:** *Faulkner v. Hasbro*

Did a plastic hamster violate a Fox News Channel journalist’s right of publicity? That was the question in this lawsuit brought against Hasbro by Harris Faulkner over the toymaker’s somewhat bewildering decision to release a doll of the same name in the *Littlest Pet Shop* toy line. Sadly, the case settled before we found out the answer to the eternal question, the lady or the hamster?
INDIVIDUALS

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The FIFTEEN MINUTES Award
(given to an individual who sought to defend their fleeting fame in court)

CO-RUNNERS-UP: Lindsey Lohan and Karen Gravano

Did Grand Theft Auto V copy aspects of the personae of a troubled actress and the daughter of a mafia hitman? Perhaps, but the notoriously satirical game didn’t copy their names or likenesses, and that’s what matters under N.Y. law. Still, the case brought these two back to public awareness for a bit, even though each would have probably preferred that it wasn’t in the company of the other.

WINNER: Johannes “Ted” Martin

Almost 20 years ago, Ted Martin set a world record for consecutive footbag (e.g., Hacky Sack) kicks, with 63,326 kicks over the course of almost nine hours. In 2016, he filed a pair of right-of-publicity lawsuits against companies mentioning a footbag world record in their advertising and promotional material, claiming that his persona was inextricably bound to the concept. Both cases were kicked out, but Ted reminded us all that once upon a time people cared about such things.

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The DÉJÀ VU Award
(given to an individual who seems remarkably familiar...)

RUNNER-UP: David Despot

Ah, yes, the “Recursive Streisand.” Serial litigant Despot was worried about the fact that internet search engines were returning information about up to 40 lawsuits that he had filed. So, naturally he sued the search engines over their listings, resulting in news coverage of that lawsuit, which now turns up in search results...are we seeing a pattern here yet?

WINNER: Richard Prince

The notorious “appropriation artist” was hit with three separate copyright infringement lawsuits in 2016 alone (and a fourth filed on December 30, 2015 which we’ll count for good measure). Quoth Prince, “Copyright has never interested me.” But, dear Richard, copyright is interested in you.
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The SISYPHUS Award
(given to an individual who just keeps trying even as the ball rolls back downhill)

RUNNER-UP: Sen. Kamala Harris (D-CA)

Former California AG Kamala Harris has been hurling herself for years against the stone wall of Section 230, most recently in her prosecution of executives of Backpage.com for allegedly facilitating sex trafficking by users of the site. That case was dismissed, but in late December she filed new charges for money laundering while on her way out the door to become the junior U.S. Senator from California. One can only assume that she’ll carry on her fight to undermine Section 230 in her new role.

WINNER: FCC Chair Tom Wheeler

Oh, Tom. Your efforts to open up the set-top box market kept falling apart, but you kept pivoting with the speed of a Silicon Valley startup. You finally got the court ruling you needed from the D.C. Circuit to push through net neutrality via Title II reclassification, only to have the next administration vow to undo your work. You tried to bargain your own position away in exchange for an extension of Jessica Rosenworcel’s appointment, and the offer was thrown in your face. But no one can say you didn’t give it your all.

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The MASTERMIND Award
(given for special achievement in plotting to undermine the media)

RUNNER-UP: Donald Trump

Two problems with giving Trump the win in this category: first, calling what he does “plotting” gives his actions more credit than they seem to warrant; and second...well, more on that below. But you’ve got to admit he’s got the “undermining the media” bit down pat.

WINNER: Peter Thiel

It’s not his funding of the Hulk Hogan litigation that earns Peter Thiel this award, though it certainly didn’t earn him any friends among the press. It’s the bundling of other (and by all reasonable accounts meritless) defamation claims into the settlement of Bollea v. Gawker, and leveraging the verdict to force the removal of other articles. That’s not promoting good journalism, whatever stories Thiel needs to tell himself to sleep at night; it’s just vengeance.
SPECIAL AWARDS

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The LAW OF THE YEAR Award
(given the statute or regulation passed in the past year that best encapsulates the spirit of freedom of expression)

RUNNER-UP: The FOIA Improvement Act of 2016

The FOIA Improvement Act codifies a presumption in favor of disclosure of a record unless “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” There is also a 25-year limit on the deliberative process privilege, and a collection of procedural enhancements. A lot of it is aspirational, and by no stretch of the imagination will it save us from litigating access cases, but its heart is in the right place.

WINNER: The Consumer Review Fairness Act

No longer can businesses demand that their customers agree to give up their right to post a review of their experiences online, thanks to this piece of federal legislation. This is a welcome correction to an imbalance of market power that was eroding the speech rights of consumers and the information needs of the public.

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: The California Court of Appeal, First Appellate District, for Hassell v. Bird

I hate, hate, hate this decision, which holds that Yelp can be ordered to remove allegedly defamatory user reviews after a default judgment in a defamation case to which it was not a party. The court not only made a hash of Section 230 jurisprudence, but also threw the First Amendment under the bus in holding that Yelp has a de minimis speech interest in the reviews that it curates and publishes. Simply atrocious. Still, the case was depublished and the California Supreme Court has granted review, tempering the sting a bit.

AND THE WINNER IS...
An Inanimate Carbon Rod

Well, there was going to be no other choice, was there? One figure showed up in more sections of the *MediaLawDaily* than any other figure this year, between the defamation threats, the lack of transparency, the promise to open up libel laws, the blacklisting of reporters, the incitement of distrust and hatred of the press, the launch of a fact-free society, and so much more.

For all of these reasons, the Inanimate Carbon Rod takes home the Extremely Dubious Top Honors for 2016. Because there’s no way I’m giving top anything to Donald Trump.

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Thanks, everyone, and have a fantastic 2017!