The Monthly Daily:
A Roundup of Media Law Developments

By Jeff Hermes

As those of you who receive the MediaLawDaily might have noticed, we’ve been trying out some new ideas with respect to our daily newsletter. Knowing that not all of our very busy members have time to review all of the articles we hunt down every day, we’ve launched a new Saturday roundup edition with some of the key stories you might have missed.

Another thing we’ve discovered is that preparing the Daily is not only a great way to know what’s going on day to day — it also places the MLRC in a unique position to think about changes and trends in the practice of media law. This article is the first in a new series that will step back from the torrent of stories that we cover to get a broader perspective, summarizing activity over the past month and starting to note some month-to-month observations that we hope will be of interest to our members.

Some caveats: This isn’t a scientific report by any means — we’re as subject to selection bias as anyone, if not more so because you’re getting our sources’ editorial choices filtered through our own judgment. Also, not all of the cases we’ll mention below were actually decided in January; sometimes it takes a little while for matters to come to light. We’re not dealing with general news about the business of media, labor issues, or international news, which are all big enough topics for their own articles. (The short-form update on International: Europe says it’s concerned about privacy; China also says it’s concerned about privacy while meaning the exact opposite thing; Facebook is still having problems convincing India it comes in peace; proceed at your own risk elsewhere.)

Still, we hope you’ll find this interesting. And if you have any feedback, ideas for different ways we can slice this information, or other approaches that might be of use, please contact me at jhermes@medialaw.org.

Supreme Court

Intellectual property was the favorite topic of the petitions for cert we covered in January, with copyright battles over the Batmobile and Google Books knocking for admission, the Samsung/Apple design patent fight making its way up the steps, and rights of publicity at the line in Electronic Arts v. Davis. (I know, we here at the MLRC categorize rights of publicity as (Continued on page 37)
being privacy rights, but the modern doctrine has come a long way from the privacy-grounded right, and that’s the real problem, isn’t it?) The only traditional First Amendment petition we spotted was *Hodge v. Talkin*, dealing with federal laws prohibiting parades, processions, and assemblages in the Supreme Court building or on its grounds.

Copyright was the subject of the most notable grant of cert this month, with the Court welcoming *Supap Kirtsaeng* back for round two as he battles for his attorneys fees after winning a first sale doctrine case on his prior visit. The only other even vaguely media-related grant we flagged was the decision to take *Microsoft v. Baker*, in which an alleged problem with Xbox 360 discs spinning out of control has boiled down to the question of whether the Ninth Circuit had jurisdiction over the appeal of the case after the name plaintiffs dismissed their claims with prejudice. I know, exciting, right?

Meanwhile, the Supreme Court denied cert in a case that I was personally following, *Sam Francis Foundation v. Christies*. I know you were all chomping at the bit on this one, in which the Ninth Circuit knocked back California’s attempt to regulate out-of-state art sales on a dormant commerce clause argument. But seriously, if you’re at all interested in digital media, you’ll want to watch what happens with the commerce clause in sunny Cali, where we’ve seen a seemingly endless stream of attempts to regulate the Internet with potentially national repercussions. Just me? Fine, be that way.

The court heard two First Amendment cases at the periphery of our usual concern, but did anyone expect *Reed v. Town of Gilbert* to turn out to be that important? (Certainly not me—I thought that the whole “content-based” thing was pretty clear way back in Police Dept. of Chicago v. Mosley—but there you go.) So, we had *Friedrichs v. California Teachers Association*, asking whether employees can be required to opt out of subsidizing union messages with which they disagree, and *Heffernan v. City of Patterson*, asking whether a public employee can be fired for a reason that is blatantly viewpoint-discriminatory when the employee doesn’t actually hold the viewpoint ascribed (whoops).

Seriously, though, keep an eye on *Heffernan* because it’s actually an interesting question: does the First Amendment protect only the affirmative exercise of rights, or does it restrain pernicious government motives in the abstract? It’s almost as fundamental a question as that considered in my all-time favorite Supreme Court case, *U.S. v. Alvarez* (which saw a follow up case in the Ninth Circuit this month). If you want to get me talking, ask me about that one sometime, but be sure to bring a whiteboard.

We only flagged one actual opinion this month, *Campbell-Ewald v. Gomez*, in which the Court narrowly ruled that unaccepted settlement offer or offer of judgment to an individual plaintiff before class certification does not moot a potential class action. It’s arguably media-related because the underlying claim involved alleged violations of the Telephone Consumer
Protection Act, but more because the case dealt with a potential end-run around the privacy class actions that can plague digital media platforms.

Reporters’ Privilege

It was a slow month for reporters’ privilege issues. Subpoenas were quashed in Tennessee state and Florida federal court. There was a bit of a sticky issue for Bloomberg News in bankruptcy court in Delaware, involving an order that more than 100 people disclose information that they might have provided to Bloomberg about a bankrupt mining company. But the judge has realized the order was too broad, and hopefully this issue will resolve itself.

So, bullets (mostly) dodged. Onward.

Defamation

We’ve reported six new (well, new-ish, at least) defamation complaints this month. Four of the suits were against media defendants, with Al Jazeera America facing suit in D.D.C., Gawker and BuzzFeed in S.D.N.Y., and WBRZ-TV of Baton Rouge in the state courts of Louisiana. Maxim magazine raised some eyebrows by jumping to the other side of the v. and suing a couple of its own former employees in New York state court, claiming that they defamed the magazine in comments made to the New York Post. We’re also counting a bar grievance filed by an irritated doctor against a Michigan attorney over a blog post, which seems to be an attempted end run around the relevant statute of limitations for libel claims and the opinion doctrine. (A bar complaint as an end-run around defamation law... wonder if my media policy covers that as a claim.)

Luckily, we’re moving them out at the trial level just about as quickly as they’re coming in, with six defamation suits (and one defamation-like claim) dismissed. Two New York state cases were kicked, with an Israeli journalist and an Australian newspaper slipping out the door on jurisdictional grounds. Three social media spats (in E.D.N.Y., W.D.N.C., and New Jersey state court) went nowhere, two for the usual reasons that social media spats don’t belong in court, and one – the Jersey case – because it depended on interpretation of religious issues. E.D. Mo. dismissed an internet troll’s lawsuit against Gawker for lack of personal jurisdiction, although a duplicate suit lives on in California. And a judge in W.D. Pa. gave Bill Cosby the first good news he’s heard in a long time by dismissing a defamation claim by one of his accusers on the basis of opinion.

Although the dismissal happened earlier, this month also saw a Texas district court judge whack a defamation plaintiff with a $1 million sanction, plus $300K in legal fees, under the state’s anti-SLAPP law. My enthusiasm is only tempered by the judge’s willingness to blow
past the First Amendment in the other direction, with an order compelling the plaintiff to post admissions of fault and apologies with respect to statements made about defendant. And they were doing so well...

Alas, The Morning Sun didn’t succeed in its motion to dismiss a libel claim by a Michigan attorney, which sued the paper over its coverage of another libel suit the attorney filed over a parody Twitter account. It’s turtles all the way down, folks. The paper is taking the case up to the Michigan Court of Appeals. Other new appeals include a defendant’s appeal to the First Circuit of a $14.5 million verdict over accusations of serial pedophilia, and an appeal in New York’s state courts by a cryogenics facility over statements in a 2009 tell-all book (yes, the Ted Williams case).

And as far as appellate rulings go, January was, much like the weather, a bit bleak. The state appellate courts of South Carolina, Florida, and California all upheld plaintiff’s verdicts, while a Texas appellate court reinstated a case that had been dismissed. We spotted only one appellate decision in favor of the defendant – a Wisconsin opinion affirming that the trial court lacked jurisdiction over an Australian newspaper...hmm.

Good month to be from Australia, I guess.

Privacy

Besides the looming cert petition of EA v. Davis discussed above, our old friend right of publicity was back in January with a bunch of new cases and rulings. We flagged five new complaints: one from N.D. Cal, where Darlene Love sued over the use of her voice in a Google smartphone ad; one from N.D. Ill., where a former college football player has sued fantasy gaming sites FanDuel and DraftKings; one from New York state court where a Queens woman sued the Associated Press over its sale of a photo of her in a hijab to the Washington Post; a class action from Cook County, Illinois (which might already have been dismissed) asserting that the mugshot racket is still alive and kicking; and a lawsuit in California state court by a former “Bachelor” against a dating site for using his image without permission.

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As far as ROP rulings go, we noticed an odd coincidence as two different federal courts down south were both called upon to apply Michigan state law. The Southern District of Florida allowed an appropriation claim to proceed against Shaquille O’Neal over a Twitter/Instagram post, finding that Michigan required little in the way of commercial value of the plaintiff’s likeness or commercial purpose on the part of Shaq. Meanwhile, the 11th Circuit held – without considering the First Amendment – that Michigan’s free speech guarantee overrode ROP claims regarding the use of Rosa Parks’ name and likeness by Target in commemorative plaques and other media.

There were a smattering of other privacy-related cases worthy of note. A Texas appellate court carved down the damages in a revenge porn case from $500K to $345K, finding that the jury was wrongly allowed to award defamation-related damages when there was nothing “false” about the online posts at issue. The top court in Massachusetts held that cops with a warrant aren’t limited as to where they can search on a smartphone.

Finally, Planned Parenthood filed an intrusion lawsuit against The Center for Medical Progress over its sting operation regarding the sale of fetal tissue donations. And another shoe was soon to drop for the would-be gotcha journalists, with the undercover videographers indicted for tampering with government records and trafficking in human organs in the course of their efforts.

Access/FOIA

There was quite a bit of activity around access to public records and proceedings this month. I’m going to stick to judicial and legislative developments, rather than talking about all of the delayed or incomplete responses to FOIA requests that we’ve reported. We’re painfully aware that even a court win doesn’t mean you’ll actually get records in anything like a timely fashion, but other than noting that state and federal agencies are still playing fast and loose with their responsibilities, there’s not much more to say on that point.

We reported nine new access lawsuits (including media interventions in existing suits) filed around the country. In New York, we had a New Yorker reporter suing over a 40-second delay and edits in the audio that the media were permitted to hear at Guantánamo Bay military tribunals, and news network NY1 fighting over a $36,000 charge from the NYPD to produce body cam footage. In Washington DC, Vice News reporter Jason Leopold filed two lawsuits, one over e-mails between the Solicitor General and Supreme Court justices and one about e-mails related to a controversial memo on drone strikes; a third D.C. case was filed by Citizens United over correspondence between Chelsea Clinton and the State Department. Meanwhile, media outlets sought access to a hearing in North Carolina, names of unindicted co-conspirators in New Jersey, an arrest affidavit in the case of a Planned Parenthood shooting suspect in

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Colorado (last-minute update: the Colorado Supreme Court ordered the trial court judge to justify his sealing of records in the case), and court records in the Orange Park terror plot case in the Middle District of Florida. One additional lawsuit worth mentioning: a putative class action lawsuit was filed in the Western District of Washington alleging that PACER systematically overcharges its users.

We saw nearly as many wins as we saw lawsuits. In the federal courts, the Orange Park case resulted in the release of most of a psychologist’s report on the defendant; the Eastern District of New York granted access to a DEA surveillance tape; the District Court for the District of Columbia held that the FBI improperly withheld records regarding how it responds to FOIA requests; the Ninth Circuit held that Chrysler had to show a compelling interest (and not just good cause) to seal corporate records attached to filings in a products liability case; and the D.C. Circuit held that a one-man nonprofit run by an attorney could recover fees for winning access to CIA records. State courts ordered the release of stingray records in Illinois, mugshot photos in Montana, and teacher sick leave records in Colorado. The Attorney General of New Mexico opined that the state could not withhold the names of medical marijuana producers, and the Wisconsin Public Records Board revoked an earlier decision expanding the definition of “transitory” records that did not need to be preserved by officials.

It wasn’t all positive. The Second Circuit held that the National Security Council is not an agency subject to FOIA. Lawyers for a death-row inmate sought last-minute en banc review of an Eleventh Circuit ruling denying access to information about Georgia’s lethal drug protocols. The outgoing Attorney General of Kentucky issued a determination that private cell phones can be used by public officials for their official communications. A South Carolina judge ruled that a city solicitor’s disciplinary records would remain public.

And it was much more of a mixed bag when it came to legislative developments in January.

The big story on the legislative side was the House's approval by voice vote of a federal bill to improve public access under the 50-year-old Freedom of Information Act. The bill would require agencies to make information available online, and to adopt presumptions in favor of openness over secrecy. The Electronic Frontier Foundation is also pushing Congress to insert what it believes to be a missing comma into FOIA exemption 7(E), which would have a dramatic effect on law enforcement records. Meanwhile, Massachusetts is struggling with public records issues, as transparency advocates in my home state try to keep reform measures from being eroded in the legislative process. Over the objection of local and national press, a Florida bill was unanimously passed that trades mandatory awards of attorneys' fees to successful plaintiffs for discretionary awards. But a spot of hope in Colorado, where an upcoming bill looks like it would expand access to judicial records.

When it comes to topical amendments to public records laws, law enforcement is the big issue, and body cams in particular. Indiana is advancing a measure to make campus police

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records public, while a bill relating to body cams is a step backwards for access. Illinois, on the other hand, is trying to speed up access to body cam footage, and Iowa's state public records board has appointed an outside prosecutor to handle a body cam case against state law enforcement. Elsewhere, bills in New Jersey and Hawaii are favoring secrecy over transparency with respect to body cams and, in Jersey, 911 calls.

Other topics of legislative activity included a measure to remove public employee names from a salary database in Virginia after someone tried to file bogus tax returns for about 1,500 state employees, another bill in Virginia to block access to information about fracking chemicals, a bill in Michigan to create an exemption for records dealing with energy infrastructure, and an effort in Florida to carve hunting and fishing license information out of the public record. Because you don't want the fish to know where you live.

Finally, journalists in Missouri and Virginia are decrying restrictions on access to the floor of their state senates — because it’s always better for politicians that journalists report what they hear second-hand, right?

Newsgathering

Drones, drones, what to do about the drones? The FAA's registration program racked up 300K drone owners in its first month, and California in particular is looking at other measures, including requiring drone owners to have insurance. Meanwhile, the tech sector is sharing its own views on how to manage the skies as the lobbying process ramps up. On top of that, we reported not one but two lawsuits filed by drone hobbyists -- one in the D.C. Circuit challenging the FAA registration requirement, and one in W.D. Ky, arguing that drones can't trespass on private property if they're in airspace regulated by the federal government. Apples, meet oranges.

Border crossings were a bit tricky this month, with questions raised about a BBC journalist prevented from flying into the U.S, based on her dual UK-Iranian nationality, Sean Penn's jaunt to Mexico to interview El Chapo, and high stakes diplomacy resulting -- at long last -- in the return of Washington Post reporter Jason Rezaian and others held in Iran. Welcome home.

In other newsgathering news (this job is so meta sometimes), we spotted two new federal lawsuits over ag-gag laws. This time, Wyoming and North Carolina are in the spotlight. We also reported two situations where sources are under fire for speaking to the press, one an Air Force officer currently in the brig who might face discipline for speaking to the Air Force Times via telephone about his case, and the other a former DOJ lawyer facing ethics charges for leaking information about G.W. Bush-era domestic surveillance.

Arizona was the latest state to flirt with restrictions on recording the police; the proposed bill was quickly withdrawn. Meanwhile, in a District of Massachusetts case, a man charged with
wiretapping for using his iPhone to film a police officer settled his civil rights lawsuit for $72,500.

I should read Glik again. Great decision.

Prior Restraint

Yes, they keep trying to issue them.

The Florida courts of appeal knocked down two: a gag order against Alki David arising out of some nasty texts and social media posts about business rival John Textor, and an order prohibiting the Palm Beach Post from publishing transcripts of recorded jailhouse phone calls. Meanwhile, a judge in E.D.N.Y. threatened the Brooklyn office of the U.S. Attorney with "severe remedies" if it continues to add language to its subpoenas purportedly prohibiting recipients from disclosing the existence of the subpoena.

We're still waiting to find out what's going to happen with a Louisiana state judge's plan to hold the press in contempt if they publish photos of an accused child killer in prison regalia, but we're fairly optimistic that the issue will resolve itself.

And we saw some quick backtracking in state legislatures. A Kentucky measure to ban social media posts after injury-causing events was introduced and then pulled three days later, with the state senator who proposed the measure seeking some cover with a claim that he just "wanted to start a conversation." A South Carolina bill to license journalists was also introduced and withdrawn in short order, with that bill's proponent claiming it was just a stunt to illustrate how differently First and Second Amendment rights are treated in our society. Oranges, meet apples.

Broadcast/Cable/Satellite

A busy start to the year at the FCC. We've got:

- the Charter-TWC merger triggering concerns from various parties;
- the upcoming spectrum auction in which small TV broadcasters (and Michael Dell) seem poised to make a killing while low-power TV stations lost an interim court battle to be allowed to participate;
- a $540K settlement with the former owner of a New Hampshire radio station for failing to identify the sponsor of 178 commercial announcements;
- a planned FCC vote on ad disclosure rules before the Iowa caucuses;
• a metaphorical brawl between broadcast and pay TV lobbyists over retransmission consent rules;

• and Tom Wheeler's declaration that it's time to open up the market for set-top boxes.

Oh, and there's that whole net neutrality thing. But that's an issue we'll save for...

**Internet/New Media**

Throttling, data caps, and zero-rating were the net neutrality buzzwords this month, with T-Mobile particularly in the spotlight for its "Binge On" plan combining all of these issues (and what can only be described as an unwise decision to throw down with EFF over the service). The FCC had a productive chat with T-Mobile and Comcast about what has been going on. New bills introduced in the House would strip the FCC of authority to inquire into these issues; meanwhile, Senate republicans criticized the FCC's redefinition of broadband download speed to 25 Mbps as a power grab, and Republican FCC Commissioner Ajit Pai urged Silicon Valley to rethink support for net neutrality. In less controversial news, the FCC gave small ISPs another extension until December to comply with the transparency requirements of its Open Internet Order.

Hate, threats, and terrorism-related content online remains an urgent topic, with the challenges of dealing with terrorist recruitment revealing some deep fractures in how to approach these issues. Silicon Valley and the White House met for a high-level discussion of tactics, while tech companies also worked on their individual approaches. Complicating matters, Twitter was hit with a lawsuit by the widow of a man killed in Jordan, alleging that the site knowingly aided ISIS to spread its message.

Not much this month from some of our classic Internet issues, Section 230 and anonymity. We had a Section 230 loss in Connecticut Superior Court in a case involving forwarding screenshots of tweets by e-mail. Facebook is fighting a subpoena from the Republic of Kazakhstan in a CFAA case filed in the Eastern District of California, which threatens to expose the operators of a newspaper banned in the country. There was also an attempt in California state court to unmask a YouTube user who republished a critical TV news story about a dentist. Speaking of negative consumer attention, the federal Consumer Review Freedom Act, a bill to protect contributors on Yelp, TripAdvisor, and the like, received some positive press.

The controversy over the legality of fantasy sports sites continued to make headlines, with pending litigation in New York, regulations in Massachusetts, and legislation to regulate fantasy sports in California and to legalize some form of the game in Washington.
Finally, there were a handful of social-media related cases of interest. A California appeals court struggled with the definition of a “social media site” in interpreting the conditions of a prisoner’s parole. Another California appeals court affirmed the dismissal of contract claims against YouTube over the removal of content that the service determined to violate its anti-spam rules. A woman under a New York restraining order was found to have violated the order by tagging her sister-in-law on Facebook. And attorneys who obtained a non-monetary settlement with Facebook over purchases by minors on the site are seeking $1.25 million in fees. Well, I suppose they've got a better shot than I did with those PowerBall tickets.

**Internet Privacy**

Terrorism and law enforcement concerns continue to drive the encryption debate. We learned that ISIS has its own encrypted chat app, before learning that no, it really doesn’t. Politicians have circled the issue without saying very much and still seem to expect magic from Silicon Valley, and both New York and California both saw bills designed to prevent strong encryption on smartphones. (See, this is why I keep an eye on the dormant commerce clause; by banning strong encryption on cell phones in New York, you automatically weaken the security of calls to or from other states. Does a single state have that power?) AT&T has washed its hands of the whole affair, letting Apple carry the standard.

Since we're talking about making communications available to the government, it's worth noting that we've passed the Jan. 31 deadline for a new US-EU safe harbor agreement. But it looks like the negotiators have at least pulled together a framework that will stave off immediate action in Europe.

Meanwhile, we're still sorting out the meaning of the Cybersecurity Act of 2015, slipped through Congress at the end of the year; there's already a push to repeal the law.

At the state level, we saw a late-January legislative campaign by the ACLU in 16 states and the District of Columbia to rein in government surveillance promises increases in employee and e-mail privacy, and curbs on the use of stingray equipment. More on that as it develops.

Court battles over control of personal information on social media and other online services rattled on. The Ninth Circuit upheld a class action settlement with Facebook of the use of user photos in ads, while in the Northern District of California, Yahoo settled a class action over targeting advertisements based on e-mail and Twitter escaped claims that it eavesdropped on direct messages. Two lawsuits in the Northern District of Illinois alleging violations of Illinois' biometric privacy law through use of facial recognition software reached different results on motions to dismiss; Shutterfly failed to escape a suit on substantive grounds, while Facebook escaped claims on jurisdictional grounds (although still facing a similar suit back home in California). Finally, the Third Circuit allowed a narrow invasion of privacy claim to continue.
against Google and others under California law, based on the companies' alleged circumvention of browser cookie-blocking settings.

**Intellectual Property**

*Copyright*

Good news for copyright lawyers in New York and California! We tracked six new complaints in each of the Southern District of New York and the Central District of California, and one each in D.D.C. and the Eastern District of Pennsylvania. The media involved run the gamut, including television (twice), feature films, digital video, news, music (twice), magazines, books, photographs, HD technology, and social media. Notably, there’s a new suit against appropriation artist Richard Prince, who is at it again, and a celebration of 50 years of Star Trek intellectual property rights with a claim against a professional-quality fan film production. Alas, we might never know exactly what happened at the Battle of Axanar.

Courts were definitely favoring the alleged infringers this month. The Southern District of Florida allowed PissedConsumer to pursue a separate Section 512(f) action against Roca Labs for bogus DMCA takedown notices. The Southern District of New York put an end to an artist’s claim against Starbucks, while the Second Circuit affirmed the dismissal of a claim against 50 Cent because the plaintiff filed suit too late. (This isn’t the only limitations period case the 2nd Circuit considered in January — the appellate court also heard argument that a suit against Jay Z over “Big Pimpin” and other songs had missed the deadline.) The Southern District of California dismissed a lawsuit over 24 Village People songs. The Central District of California kicked out a lawsuit over Fox’s “New Girl,” and saw accused filesharing pirates win a class-action settlement from Warner Bros. and Rightscorp. And in the Northern District of California, Google and Waze fought off a claim over traffic hazard and speed trap data, while Judge William Orrick held that a crested macaque of some notoriety lacked standing to sue over his selfie picture. Too bad, Naruto.

Plaintiffs managed to eke out interlocutory victories in C.D. Cal. and D. Utah, with lawsuits being allowed to proceed over Katy Perry’s dress in the former and customized hot rods in the latter. The Utah case was interesting for the district court’s rejection of the Zippo test for jurisdiction based on the interactivity of a website, finding that the online world has become much more complicated since 1997 but that the classic jurisdictional tests still made sense. And in a case being watched closely by attorneys in Rivendell, the Ninth Circuit declined to rehear a decision from last October allowing Warner Bros. to assert contractual counterclaims in a long-running copyright battle over The Hobbit and Lord of the Rings with the Tolkien estate.
There are also a couple of new copyright appeals to watch. Streaming service FilmOn X’s multi-state battle against the networks is headed to the D.C. Circuit, after a district court judge allowed an immediate appeal of her ruling that FilmOn X is not eligible for a compulsory license. The appeal will give the D.C. Circuit an opportunity to weigh in on the issue, on which federal courts in California and New York are currently split. On the other side of the country, a screenwriter’s copyright case against Elizabeth Banks over the movie “Walk of Shame” is headed to the Ninth Circuit after he walked out of the district court with his head hanging low.

In other copyright news:

The International Trade Commission is seeking en banc review of a Federal Circuit ruling that barred it from blocking the import of intangible data — an issue with major implications for enforcement of copyright by the agency.

Fox News was headed to trial this month in S.D.N.Y. over its use of an iconic 9/11 photo, after a fair use ruling that left a lot of us puzzled. (Where does it say that a fair use needs to be an original use? And can the district court’s reliance on commercial use survive after Judge Leval’s recent Google Books decision?) Late update: We’ve heard that the trial has now been continued to February 16, so we’ll revisit this next month.

The U.S. Commerce Department has urged Congress to reform the Copyright Act to make damages awards more proportionate to the nature of the alleged infringement.

Legal scholars and others are weighing in on a case in D.D.C. over the copyrightability of proprietary building and safety codes incorporated by reference into binding laws and regulations.

Five years after the fact, U.S. Immigrations & Customs Enforcement quietly returned control of a hip-hop website to its owners after determining that ICE had no basis to believe there was infringement occurring.

Concerned about copyright trolling, an Oregon federal judge has drafted a standing order to help infringement defendants to find counsel.

With election campaigns in full swing, IP silly season is upon us. Mike Huckabee has argued that his rally with Kim Davis was a religious gathering, insulating him against infringement claims over his unauthorized use of Eye of the Tiger. Reminds me of the “In-A-Gadda-Da-Vida” gag from The Simpsons.

Patent

Turning to the other half of Article I, section 8, clause 8, patent plaintiffs didn’t do all that well with media tech lawsuits this month. After a claim over comparison systems used in online search stumbled, the Federal Circuit upheld an award of attorneys’ fees to the plaintiff in the first case to apply the Supreme Court’s 2014 Octane Fitness ruling. The Federal Circuit also
handed Google, Facebook, and AOL a win by affirming the invalidation of a patent for the gamification of online discount programs. And a patent troll who sued well-known troll slayer Newegg and then immediately dropped its case found that it couldn’t escape so easily — Newegg hauled the troll back into court in the Central District of California in a declaratory judgment action.

Apple in particular is fighting patent battles on both sides of the v., with mixed results. In the Northern District of California, Apple won dismissal of an infringement lawsuit over video streaming. Meanwhile, in its role as plaintiff in its long-running fight with Samsung, Apple obtained a largely symbolic injunction prohibiting Samsung from selling certain cell phones that are no longer on the market. Lastly, patent troll VirnetX is taking a shot at Apple in a trial that just started in the Eastern District of Texas, alleging Apple’s use of virtual private network and video-messaging tech is infringing.

Trade Secrets

Just a quick note that the Senate Judiciary Committee has passed an amended version of the federal Defend Trade Secrets Act. This section is long enough, so I’ll deal with trademark issues in…

Commercial Speech

A few trademark decisions of note this month. The repercussions of December’s ruling in In re Tam continue to be seen, with the USPTO acknowledging before the Federal Circuit that its opinion on “disparaging” marks would apply to “scandalous and immoral” marks too. The 6th Circuit upheld a permanent injunction granted to Larry Flynt, ordering his brother Jimmy not to use the “Flynt” name for his adult retail store in Ohio without including his first name. The 9th Circuit affirmed dismissal of a claim by Adobe against an unauthorized software reseller, finding that the defendant’s use of Adobe trademarks was nominative and that the software giant couldn’t use trademark claims to assert bait-and-switch false advertising.

In the district courts, experienced trademark plaintiff Louis Vuitton was stymied by parodic use of its designs in a case in the Southern District of New York, with the judge finding humor in the shoulder-carried version of the old “My other car is a…” joke; LV now faces a motion for attorneys’ fees. A religious dispute in the Chabad Lubavitch community transformed into a trademark fight in the Eastern District of New York, when two sects’ disagreement over the identity of the Messiah was reflected in distinct but similar marks used in various publications; the court kicked out the case finding that confusion was unlikely, and that a delay of seventeen years before raising trademark claims was more than enough time for a laches defense to apply.
A trademark plaintiff did have some luck in the Western District of Wisconsin, which allowed a trademark claim to proceed against General Electric after finding that GE’s use of the Internet Archive’s [Wayback Machine to establish prior online use](https://web.archive.org/) did not suffice at the motion to dismiss stage.

Recent false advertising cases were more successful. The FTC obtained a **$2 million settlement from Lumos Labs**, in an N.D. Cal. case over Lumos’ promise that playing its video games could stave off cognitive decline. In a suit brought by holders of taxicab permits, the Southern District of Texas held that while many of Uber’s statements about safety were puffery, some of them contained specific measurable assertions that could be falsified and that these statements constituted commercial speech targeting consumers. A New York judge held that the state had **jurisdiction over a seller of magazine subscriptions** that allegedly deceived consumers with offers that looked like renewal notices. The Southern District of California did **dismiss a claim against Sea World** alleging that its statements regarding its care for orcas were deceptive, because the complaint lacked any allegation that such statements were considered by visitors when buying tickets — but leave to amend was granted.

Three interesting rulings in professional speech issues, relating to attorneys and judges. The New York City Bar issued an opinion resolving a long-standing question regarding lawyers’ LinkedIn profiles, finding that most do not count as attorney advertising. In Indiana, however, a bankruptcy lawyer was suspended for thirty days for **claiming that he had been “screwing banks since 1992,”** which was found to be misleading. Finally, the 9th Circuit has **upheld Arizona’s limits on judges’ soliciting donations and campaigning for colleagues.** (That last one isn’t really a commercial speech issue, I know, but it fits better here than anywhere else.)

Compelled speech was the subject of **an order from the Northern District of California** in a dispute over cell phone radiation warnings. The court has allowed the City of Berkeley to require retailers to display the warnings, subject to the deletion of one sentence regarding harm to children.

We’ll close out this section with a judge trial in the Central District of Illinois against Dish Network over illegal robocalling. Four states and the U.S. Department of Justice are seeking **more than $24 billion in penalties**; the judge already determined that Dish made more than 55 million illegal calls.

### Miscellaneous

Just about anything can show up in the MediaLawDaily’s Miscellaneous section, but there are two topics we see fairly regularly.

Government licensing and funding of speech generated a number of recent court matters. The Second Circuit heard argument regarding the **running of an anti-Hamas ad on New York**
City buses, with questions as to why the issue was not moot after the city withdrew its objection. The Fifth Circuit held that the Texas Film Commission did not violate the First Amendment in denying an incentive grant to the producers of the film Machete Kills based on its controversial content. The Eleventh Circuit overturned a ruling preventing the opening of a tattoo shop in Key West. Finally, the State of Idaho found itself in federal court after it tried to revoke Meridian Cinemas’ liquor license for the chain’s showing of Fifty Shades of Grey.

In the world of academia, University of Missouri professor Melissa Click, who called for “muscle” to help her drive a journalist away from a protest on the Mizzou campus, has been suspended and charged with third-degree assault. A state bill filed in reaction to the Mizzou protests would require free speech classes at Missouri colleges. In the latest of a long series of educational and judicial resources wasted by schools getting upset over student T-shirts, the Middle District of Tennessee held that the First Amendment protected a high schooler’s right to inform others that “Some People Are Gay, Get Over It.” But if you’re a professional student, the Ninth Circuit has held that in some cases you can be kicked out of your program for expressing views that do not square with standards set by government authorities — a bad case perhaps making bad law, given that the issue involved a student in a secondary school teacher certification program arguing that online child predation should be legalized.

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So, that’s it for January. If you didn’t see mention of a case you thought was important, or want to call our attention to trends that you’re seeing, let us know and we’ll keep an eye out next month!

Jeff Hermes is a Deputy Director of MLRC.

UPCOMING MLRC EVENTS

Legal Issues Concerning Hispanic and Latin American Media
March 7, 2016, Miami, FL

Legal Frontiers in Digital Media
May 19-20, 2016, Mountain View, CA

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