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

Nothing better captures my feelings about January better than this factlet: Amazon.com sold out of George Orwell’s 1984.

Plenty of folks have commented that with the inauguration we’ve passed the signpost for the Twilight Zone, or followed Alice through the looking glass. But if we now find ourselves standing on the Chessboard Fields, so be it. There are still laws and rules, even if they might sometimes look nothing like those with which we’re familiar. So let’s figure it out, get to the eighth square, and get out of here. (Actually, I really hope we can do it in four – or less.)

Supreme Court

This month’s big news was the nomination of Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to fill the late Justice Scalia’s seat on the Supreme Court. There has been plenty of commentary on whether Gorsuch, a former clerk of Justice Kennedy, fits into the mold of Justice Scalia. I personally find those kinds of comparisons unavailing, particularly given that the adjective that possibly best described Scalia, after “conservative,” was “idiosyncratic,” and reduction of a judge’s career to a single point on a one-dimensional liberal/conservative scale loses too much information to be useful.

In any event, there is perhaps reason to believe that Gorsuch might be better on civil liberties issues than other names on the short list would have been, and from my reading of his
opinions to date, he tends to be an excellent and thoughtful writer. (And in full disclosure, I also have a close friend who clerked for Judge Gorsuch, whose report on the judge’s temperament and adherence to principle over politics has been encouraging.) The few defamation decisions he has written while on the 10th Circuit – two majority rulings and one concurrence that I know of – have broken our way, albeit with some degree of caution as to the breadth of those rulings. And I do like this statement at the beginning of a Lanham Act false advertising opinion that he wrote:

Most everyone expects a little audacity — maybe even a little mendacity — in their advertising. Sometimes it can even prove amusing. Like the local greasy spoon's boast that it pours the "world's best cup of coffee." Or the weight loss company's promise that its miracle pill will "literally melt the pounds away." But sometimes advertising crosses the line from harmless hyperbole into underhanded deception with material commercial consequences.

I’m just looking at speech-related cases here, and perhaps I’m just looking for a silver lining wherever I can find it, but this has a ring of common sense to it. And as I said, it could be a lot worse. The hearings won’t be until March though, and it looks like we'll be in for a fight no matter what happens (even if Trump successfully persuades the Senate to change its rules to block a filibuster), so now we just watch and wait.

We had two significant hearings on First Amendment matters this month, in Expressions Hair Design v. Schneiderman (on New York’s ban on businesses applying surcharges for credit card use) and Lee v. Tam (on the federal ban on registering disparaging trademarks). Both cases tested the Court’s ability to discern the communicative impact of laws that, on their face, do not restrict permissible speech, with the Justices expressing more skepticism of First Amendment arguments in the former than the latter.

No new grants of cert this month in media-related cases, but plenty of denials. Most importantly, Section 230 dodged a bullet as the Supreme Court declined to take up the First Circuit’s ruling on intermediary liability for third-party sex trafficking advertisements in Doe No. 1 v. Backpage.com; another Section 230 case, O’Kroley v. Fastcase, was left untouched as well. Also rejected were: Jesse Ventura’s attempt to reinstate his $1.8 million defamation verdict in the “American Sniper” case; an attempt to revive Video Privacy Protection Act claims against Google and Viacom over tracking of children’s online behavior; and review of a First Circuit ruling holding that website Jerk.com engaged in misrepresentations about its user base.
Finally, a Michigan lawyer has filed a new petition for cert, asking for review of a Sixth Circuit decision upholding a ban on cellphones in the courtrooms of Saginaw County.

**Reporters’ Privilege**

A couple of new fights this month, with journalists invoking California’s shield law to avoid testifying in the Colonies corruption case, and a political blogger refusing a South Carolina judge’s order to disclose his sources in a libel suit filed by a former state representative. Meanwhile, an investigative reporter for WTVF in Nashville was ordered by a state judge to turn over records from his investigation of District Attorney General Glenn Funk in the course of Funk’s defamation suit against the reporter.

The bigger question at the moment, though, is whether the next Attorney General will continue to support the DOJ Media Guidelines. The Committee to Protect Journalists is on the case, pressuring Sen. Jeff Sessions to stand by the Guidelines. As of January 10, though, Sessions said he hadn’t yet reviewed the applicable rules.

**Defamation**

This won’t be the only time we talk about Donald Trump and CNN in this issue, I’m afraid, but let’s start with the abortive defamation threat leveled at CNN over its report about Sen. Tom Price’s questionable purchase of shares in a medical device company just before new legislation dropped affecting the company. The shoot-from-the-hip demand for a retraction wound up shooting itself in the foot in more ways than one, and was quickly withdrawn.

**New Cases**

In other Trump news, a season five contestant on The Apprentice sued after Trump denied charges that he assaulted the contestant in a hotel room. We know this pattern from the Bill Cosby case, and as little personal regard as I have for the defendants in these cases, you should have a First Amendment right to defend yourself against public accusations.
Troubling developments in D. Mass., as Shiva Ayyadurai – fresh off his windfall from the Bollea v. Gawker settlement – continues his libel bullying campaign against those who question his self-declared status as the inventor of email. This time, it’s tech & policy blog Techdirt whose existence is threatened by the Thiel-fueled machine. Ayyadurai points to a copyright registration of a program called “email” as if it were a government declaration that he thought of the idea first, which brings this clip to mind. And it looks like Ayyadurai might be gearing up to go the Full Rakofsky, as his lawyer has started serving demand letters in an attempt to force the removal of social media posts in response to the latest suit.

Other new cases: CBS was sued in the Southern District of West Virginia by a pharmacy owner who claims he was falsely painted as responsible for painkiller abuse in the state; the Press-Democrat was sued in California state court by a Santa Rosa businessman who claims he was defamed in reports on campaign spending for the city’s Council elections; a blogger for the Yonkers Tribune was sued in New York state court by Yonkers’ former fire chief over allegations that he misappropriated public funds; in the same court, the New York Post was sued for a story calling an NYC Department of Education official the “Grinch of Jewish Holidays”; and, in Pennsylvania state court, two police investigators sued the author and publisher of a book about the 1991 murder of Laurie Show over allegations that they raped and framed the defendant who was convicted in the case.

Finally, courtroom fight between singer Kesha and producer Dr. Luke in New York state court is beginning to snowball, as each party seeks to expand their claims; Dr. Luke has asked to add a defamation claim over a text message in which the singer allegedly accused him of rape.

Defense Wins

The new President fought off another defamation claim in New York this month, this one from political consultant and pundit Cheryl Jacobus over allegedly libelous tweets fired off by Trump. The court’s ruling that no one could take Trump’s trademark hyperbole seriously, while a defense win, is disturbing to me – not only because we’re learning quickly that Trump might actually have meant all of those outrageous things he’s been saying, but also because it continues the longer trend of devaluing speech on social media as a category. That kind of thing will inevitably come back to bite us.

Alt-weekly the Denver Westword defeated a claim in Colorado that it defamed a doctor who lost his medical license, with the court finding the paper’s articles to be substantially true. Glenn Beck and his TV network won an anti-SLAPP motion in Texas in the lawsuit filed by the
father of “clock boy” Ahmed Mohammed; Irving, Texas, Mayor Beth Van Duyne was also dismissed from the case. The New York Daily News won a case brought by a pro se plaintiff in S.D.N.Y., with the fair report privilege, substantial truth, and opinion supporting the paper’s report on the defendant’s rape and stalking convictions. In the same court, the owner of a chain of strip clubs defeated a libel claim by models who alleged that the clubs’ websites falsely indicated the models’ endorsement; the court held such a statement was not defamatory, absent other implications that could not be gleaned from the website. And in Pennsylvania, two former prosecutors dismissed their claims against the Philadelphia Daily News over reports on their involvement in the porn on government servers scandal.

In appellate matters, the Pennsylvania Supreme Court declined to hear a former county commissioner’s appeal of a ruling in favor of Ogden Newspapers, regarding reports on accusations of theft for which the commissioner was later acquitted. Meanwhile, the Texas Supreme Court upheld the remand of a jury verdict against an East Texas newspaper for a new trial on libel claims brought by the son of a Fort Bend County Sheriff's Deputy, because the jury instructions in the first trial did not require the plaintiff to prove either falsity or actual malice.

And it was a big month for anti-SLAPP laws in the appellate courts out west. The California Supreme Court held that a lack of subject matter jurisdiction does not preclude dismissing a suit under the state’s anti-SLAPP law, while the state’s Court of Appeal affirmed another anti-SLAPP ruling that statements by lawyers in the media about a pending matter were protected by the fair report privilege. And in the Ninth Circuit, a panel held that Oregon’s anti-SLAPP law allowed an immediate appeal of the denial of a special motion; the panel also had a brief but interesting discussion of the plaintiff’s burden to prove the defendant’s publication of the statements at issue.

Defense Losses

Melania Trump’s case against the blogger who claimed that she formerly worked as a “high-end escort” will proceed in Maryland state court despite a motion to dismiss, after Trump persuaded the judge that ordinary readers would have understood the statement to have implied she was a prostitute. The Daily Mail might well escape for now, however – the paper's argument that the case against it really belongs in New York seemed to gain traction with the judge. [LATE UPDATE: Yep, the Daily Mail is out.]

In E.D. Va., WAVY Broadcasting won a partial victory on a motion to dismiss a plaintiff’s claim that he was falsely accused of, and arrested for, rape. The court held that the
statement that he was accused was substantially true, while the statement that he was arrested was neither true nor a fair report.

**Miscellaneous**

Perhaps in the wake of recent investigations into libel suits with bogus defendants used as a pretext for demanding the delisting of search results, Google has become somewhat more circumspect about when it will accede to such demands (though it will still do so, contrary to initial reports).

And finally, media law analysts were thrown into a furor over Buzzfeed’s decision to publish the unverified Trump Dossier in January. As is often the case, I personally like Prof. Volokh’s discussion of the issues.

**Privacy**

**Rights of Publicity**

Comedian Steve Harvey won a jury trial in N.D. Tex. against a videographer who shot over 120 hours of footage of his act; Harvey not only scored a verdict that he had no contract with the videographer, but also obtained a ruling that the videographer misappropriated Harvey’s identity in attempting to release highlights from the tapes.

That defamation case about models and strip clubs in S.D.N.Y. mentioned up above also had a New York right of publicity claim tucked into it; the ROP claim survived a jurisdictional challenge. Across the river in Brooklyn, another strip club defaulted in E.D.N.Y., leading to a $360K verdict in favor of three models suing the club for similar ROP violations.

In E.D. Pa., we’ve got another video game case, with Microsoft and Epic Games sued over their alleged use of the name and likeness of pro wrestler Lenwood Hamilton in Gears of War. And in California state court, Apple was sued over its use of a song by Jamie xx in an iPhone advertisement; the complaint was filed by The Persuasions’ lead singer Jerome Lawson, whose voice was sampled in the recording and who claims Apple needed his permission as well.


**Intrusion**

Intrigue at the Safari Club International this month, with the Ninth Circuit ruling that the First Amendment did not protect a board member’s [secret recording of another member](#) against claims of illegal recording and violation of common law rights of privacy. The panel affirmed the denial of the plaintiff’s anti-SLAPP motion.

If you’re going to protest against government snooping, make sure to do it in a timely fashion. The Eleventh Circuit held that a couple from Indian River County, Florida, blew the statute of limitations for filing suit over the local sheriff’s office [misuse of a law enforcement database to spy on them](#), because the claim accrued when the misuse occurred and not when it was discovered through a public records request.

**False Light**

A new claim against Chipotle in D. Colo. from the tail end of December: A woman whose photo was taken in the restaurant, and who declined to sign releases, has sued over the chain’s display of a [version of the photo that was allegedly modified to add bottles](#) in the foreground. She claims that this association with alcoholic beverages cast her in a false light.

**Access/FOIA**

**New Cases**

Another month, another round of new FOIA and access cases involving the federal government in D.D.C. as press and advocacy organizations ramp up the pressure on the Trump administration. We’ve got: ProPublica and the *Virginian-Pilot* suing for [Veterans Affairs documents](#) relating to Agent Orange and Trump’s pick for VA secretary; EPIC suing the FBI for information about [Russia’s influence on the election](#); Politico suing the FBI and CIA for the [2-page synopsis supplied to Trump](#) regarding the “Trump Dossier”; Jason Leopold suing eight federal agencies and departments for records concerning Sen. Jeff Sessions; Newsweek suing another group of departments and agencies for [records on the President’s classified briefings and Stephen Bannon’s security clearance](#); and the Reporters Committee for Freedom of the Press seeking to unseal records related to [the prosecution of former government employees](#) alleged to have leaked information to the press.
Meanwhile, Courthouse News continues to fight for timely access to newly filed complaints, this time with a case in California against the court clerk of Orange County. The New York Times sued N.Y. Gov. Cuomo's office in state court for blocking access to records about former top Cuomo aide Joseph Pecoco. And in Ohio, the NAACP is seeking access to transcripts from the grand jury in the Tamir Rice case.

Access Granted

MuckRock’s multi-year quest for access to CIA records finally bore fruit this month, with the online release of approximately 13 million pages of documents from the Agency’s CREST database of declassified information. The FBI, meanwhile, has released documents related to two failed Trump endeavors, the Trump Shuttle and the Trump Taj Mahal. Meanwhile, judges in D.D.C. have issued preservation orders for the private-account emails of outgoing officials at the Justice Department and the Department of Homeland Security (the DOJ has sought reconsideration of that order).

Tennessee’s Attorney General fired a shot across the bow of state agencies trying to hide their activities from the public by outsourcing functions to private contractors, ruling that the state’s open records and meetings laws follow the function, not just the office.

Pyrrhic Victories

Although the Indiana Court of Appeals rejected former Governor Pence’s argument that his responses on public records requests were immune from judicial review, it nevertheless ruled that the governor appropriately withheld records related to efforts to undermine President Obama’s executive order on immigration.

And the FBI did release almost 100 pages of documents on the hacking of the San Bernardino iPhone, but redacted the vast majority of its production apart from boilerplate and the fact that three other companies expressed interest in trying. Meanwhile, the FBI has decided that all FOIA requests that will return more than 50 pages are “complex”; given that “simple” requests take six months to process, goodness knows how much time bigger ones will take now. (Not to be outdone, the NSA then invented a new “security concerns” exemption to deny FOIA requests about its contractors.)
Access Denied

A judge in Kentucky state court ruled against student newspaper the Kentucky Kernel’s widely-reported effort to gain access to U. of Ky. documents on the investigation of sexual harassment charges against a former professor. (On the other hand, Kentucky’s AG has issued an opinion that Western Kentucky University violated the law in denying student papers access to records into similar sexual misconduct investigations, so the news out of the Bluegrass State isn’t all bad.)

In W.D. Wash., the court granted the FBI’s demand for an order enjoining the City of Seattle from disclosing information about the location of cameras mounted by the FBI on utility poles. The 9th Circuit held that the CIA was not required to disclose records on the John and Robert Kennedy assassinations.

Finally, a judge in New York who was not clear on the concept of an “open court” ejected a lawyer for Gizmodo Media Group when she sought leave to argue why Bill O’Reilly’s lawsuit against his ex-wife should not be sealed. The judge refused to issue an order or findings on the record, and Gizmodo has now sought relief from the appellate courts.

Christine Walz of Holland & Knight (and the MLRC’s own Next Generation Committee) gets the “grace under fire” award for this one.

Pending Cases

That case in D.D.C. alleging that the federal court system overcharges for PACER fees is moving forward, with the court certifying a class for the litigation. Meanwhile, the appellate courts of New York are considering two separate cases involving police disciplinary records, brought by civil liberties groups and joined by the media.

Legislation

Guess what, there’s another bill in Congress seeking to compel the Supreme Court to televise its proceedings. I’ll not be holding my breath. In South Carolina, there’s an effort afoot to treat mug shots as public records.

But in New York, a new proposed rule of court would allow judges to seal records to protect proprietary or sensitive business information; the proposed rule has run into stiff opposition from the Committee on Media Law of the New York State Bar Association. In Arkansas, a new bill would exempt body and dash cam records from public records requests while an investigation is pending.
Newsgathering

I’m sitting here looking at my notes about everything that happened this month, and I just...don’t...even.

Okay. Let’s do this.

Trump Administration

Don’t think about it as giving Trump his own section. Think of it as a quarantine.

It started pretty calmly. Trump’s communications team met with the White House Correspondents’ Association at the beginning of January. Trump himself had a civil meeting with Graydon Carter of Vanity Fair (of “short-fingered vulgarian” fame). But there was some disquiet when the President-elect called for a probe into how NBC obtained an intelligence report on Russian hacking of Democratic officials.

And then came the Trump Dossier. Trump & Co. straight-up lost it after CNN reported on a two-pager about the Dossier used by intelligence agencies to brief the President-elect, with BuzzFeed then releasing the Dossier itself. Republicans on Capitol Hill demand an investigation into the source of the leaks. Trump unloads on CNN at a press conference, but CNN’s Jim Acosta’s not taking it and demands to ask a question; Trump then rounds on Acosta with the f-word (that’s “fake,” folks). Sean Spicer demands an apology. CNN not a chance, and Trump freezes out CNN from interviews with administration officials for a period lasting twenty days.

Not that the rest of the Fourth Estate was doing much better, as the press were labeled the “opposition party” and there were rumblings of kicking the press out of the White House entirely. The press was barred from entering Trump’s hotel in D.C. during the week of the inauguration. Mind you, this was all before he took office.

Reporters covering protests on Inauguration Day encountered a violent response by police, with six journalists facing felony riot charges after sweeping arrests. (Charges against four of the reporters have since been dropped.) Then Trump lost it again when photos surfaced comparing his sparse inauguration crowd to past attendance.
This marked the official advent of the Age of Alternative Facts: Spicer and Kellyanne Conway took to the airwaves to explain that the President hadn’t attended his inauguration in this universe, but a parallel one where the sun was shining and everyone loves him. Journalists were branded by Trump himself as “among the most dishonest people on earth” for not recognizing this simple fact, and for inconveniently remembering his comment comparing intelligence agencies to Nazis.

Yes, Donald, they are in fact among the most dishonest people on earth. Because to do their jobs properly they unfortunately have to mingle with the likes of you. Go ahead and clamp down on federal agencies speaking to the public; the sources will be there, and we’ll be waiting.

Finally, we have to mention Trump's slapdash and disastrous immigration order here as well. It wasn't specifically targeted at the press, but it had an impact on press correspondents as well.

Folks, I’m sure there was more, but that’s all I can stand to report for now.

Punishment of Sources

Okay, deep breath. In other source-related matters:

- Federal prosecutors want ex-general James Cartwright sentenced to two years for his role in leaking information about Iran’s nuclear program to the press and then lying about it to the FBI.
- Federal prosecutors identified the FBI agent who admitted to leaking information about an insider trading probe into golfer Phil Mickelson.
- State and federal authorities are trying to determine how TMZ.com obtained video of the shooting at Fort Lauderdale-Hollywood International Airport.
- The D.C. Court of Appeals held that a former in-house attorney at General Electric and her lawyer violated professional conduct rules when they leaked information about overseas fraud to the press, even though the same disclosures in whistleblower complaints were acceptable.
- And some good news: Chelsea Manning’s sentence for leaking information to WikiLeaks was commuted by President Obama. She will be released on May 17; the delay is intended to allow her time to make arrangements for her life after release. I also won’t be holding my breath for Julian Assange to live up to his promise to accept extradition to the U.S. after Manning’s release.
Drones

The FAA has smacked a drone company with a $200K fine for conducting 65 illegal flights over Chicago and NYC, the largest such fine to date.

At the state level, a doctor in Newton, Massachusetts has filed a pro se suit in D. Mass. arguing that a municipal drone ban steps on the FAA’s toes and violates his First Amendment rights.

Prior Restraint

A hearing took place in a New Jersey case that we’ve reported on previously, in which The Trentonian was ordered not to report on a sealed child-abuse complaint that it had obtained. The state accused the Trentonian’s reporter of stealing the complaint, but no charges have been filed and the reporter denies the accusation.

A hearing was also scheduled in W.D. Wash. in January on the Department of Justice’s motion to dismiss a complaint filed by Microsoft, in which the company seeks an order allowing it to tell at least some of its customers about government requests for their information. However, that hearing was continued at the last minute.

We also saw a few more National Security Letters released this month, one directed to Cloudflare in 2013 and two directed to Twitter from 2015 and 2016. There are most certainly others about which we know nothing.

Information Infrastructure

Federal Communications Commission

We have a new chair of the FCC, as Republican Ajit Pai takes the reins from Tom Wheeler. The early moves are not unexpected, as Pai declared his opposition to the Title II reclassification of broadband, proposed scaling back transparency under the net neutrality rules, and pulled the set-top box proposal from discussion. Industry players and groups immediately sought other rollbacks as well on issues such as internet privacy, media ownership and the UHF discount.
It's worth noting, as Wheeler did on his way out the door, that overturning the FCC's net neutrality ruling is not as simple as issuing, say, a poorly conceived executive order; you're either looking at another drawn-out rulemaking process or (perhaps more likely) direct congressional action. Of course, whether the Commission enforces net neutrality in the interim is another question [LATE UPDATE: Turns out the answer is no].

Speaking of congressional action on net neutrality, you might remember Rep. Marcia Blackburn (R-Tenn.) as the author of the “Internet Freedom Act,” a bill designed to gut net neutrality. Blackburn has now been tapped to head up a new telecommunications subcommittee. One of her first moves was to introduce a bill that would reverse an FCC decision requiring board members of noncommercial broadcasters to provide media ownership information to the agency.

The FCC's general counsel also departed the agency after three years; Howard Symons had been heavily involved in the broadcast spectrum incentive auction, which has been stumbling a bit in the face of unexpectedly low demand. The Third Circuit will hear a legal challenge to the FCC's Quadrennial Review by Prometheus Radio, after the D.C. Circuit transferred the case. And the FCC issued its 18th Video Competition Report, which is great if you care about the state of broadband competition in 2015.

Finally, the FCC approved the merger of Nexstar and Media General, but the AT&T/Time Warner deal is still pending. Time Warner has at least been considering dumping licenses to avoid the need for FCC review of the merger.

Antitrust & Media Consolidation

On that last issue, will the President oppose the AT&T/Time Warner deal? Who can say? Last month it looked good for the deal at the White House, but now the rumors are swinging back the other direction. This might well depend on which of the White House Rasputins is whispering to fill the void in Trump's head at any given time.
Digital Content

Section 230

I've discussed California's new Actor Age law before, under Digital Privacy; but as IMDb moves this month for a preliminary injunction against enforcement of the law, it's important to note that there's a major Section 230 issue as well. Specifically, the new law would require subscription-based professional networking websites to remove user-submitted content containing subscribers' ages upon a request by the subscriber, or face liability. That provision should easily get mowed down by the CDA.

Backpage.com finally gave into years of soft and not-so-soft government pressure in January, taking down its adult advertising section. The California prosecution continues, as the company's execs returned to court to face arraignment on the state's second attempt to plead around Section 230.

Let's see, we've also got a new lawsuit in Ohio where a lawyer has sued Google over negative reviews (h/t to Jack Greiner for calling that one to my attention), which will probably wind up as a Doe lawsuit for the “Anonymity” section eventually.

And in Georgia state court, Snapchat escaped liability for a road accident allegedly caused by its “Speed Filter” under Section 230 in a decision with a bit of a twist. See, the user involved in the accident never published the video at issue, but the court found that didn't matter: Snapchat was still entitled to Section 230 immunity because the claim sought to hold it liable for deciding to allow third-party Speed Filter content to be published.

There's a somewhat similar complaint that was just filed against Apple in California Superior Court, alleging that the company was negligent for not preventing people from using iPhones to text or use Facetime while driving; it will be interesting to see if the Section 230 argument shows up there as well.

Hate, Terror, and Other Internet Nastiness

Victims of violence and their families looking for someone to blame continue to focus on social media. This month, we've got a suit in N.D. Cal. against Twitter, Google and Facebook, and another in S.D.N.Y. against Twitter alone, for allegedly facilitating terrorist acts. It's actually kind of sad that these families' anger and grief is playing out in this fashion. Maybe for now it seems like they're doing something constructive, but drawing out the grieving process through
litigation can't be healthy and their pain will only be compounded when these suits run smack into Section 230 as they always do. Plaintiffs' lawyers taking these cases are doing their clients no favors.

While cases like those are probably non-starters, Facebook, Twitter and Google are still trying to stem the tide of nastiness (with “fake news” the boogeyman du jour). Google's banning publishers, Twitter is improving its tools, and Facebook, as always, is tinkering with its algorithms. The ACLU, meanwhile, expressed concern over racial bias in the censorship decisions made by third-party agencies to which Facebook outsources the processing of hate speech complaints.

Terms of Service

The 9th Circuit refused to enforce an arbitration clause on a warranty brochure inside the box for a Samsung Galaxy S4 smartphone, with the purchaser's silence on those terms not constituting consent to be bound. On the other hand, a judge in N.D. Cal. held that Facebook's choice of law and venue provisions were enforceable, noting that California's consumer protection laws were at least as strong as those in the plaintiff's home state of New Jersey.

Digital Privacy

Hacking/Control of Personal Information

I'm combining these sections this month, because we saw quite a few cases that raised both issues.

Former CBS3 anchor Larry Mendte apologized to his former co-anchor Alycia Lane for hacking her email and leaking personal information and photos to the press, as part of a settlement of a civil case pending in Pennsylvania (Mendte had earlier pleaded guilty to criminal charges). Mendte also agreed to an order prohibiting him from releasing more information about Lane or commenting about Lane anywhere in any context.

In N.D. Ill., the Chicago man behind the “Celebgate” hacking and leak of celebrity nude photos was sentenced to nine months in prison, adding another data point to the wildly varying consequences of hacking prosecutions. A New York woman sued Google for refusing to delist revenge porn, which will face the obvious obstacle.
The Republic of Kazakhstan showed up in N.D. Cal. to file CFAA claims against a Polish man who allegedly published material obtained from hacks of Gmail and Hotmail accounts used by the country's government. It tells you something about how screwed up things are when a touchy Eastern European country forum-shops into the United States to take advantage of its incredibly punitive hacking laws.

On another note, a putative class action in S.D.N.Y against video game company Take-Two Interactive over biometric scanning was dismissed. The plaintiffs alleged that players who created personalized avatars in “NBA 2K15” and “NBA 2K16” via a facial scanning feature had their biometric data stored on Take-Two's servers without their consent; the court held there was no allegation of concrete injury.

**Intrusion**

The Telephone Consumer Protection Act survived a constitutional challenge from Facebook this month in N.D. Cal., with the court allowing a class action to proceed on allegedly unauthorized text messages reminding people about friends' birthdays.

**Encryption & Data Security**

James Comey must be pretty pleased with himself right now for any number of reasons that make me hope a great big truck full of karma is headed in his direction. For one, Attorney General nominee Jeff Sessions came out strongly in favor of encryption backdoors this month, mouthing the usual nonsense about the simultaneous importance of strong encryption and easy government access. Someone should have asked Sessions if he believes in the Tooth Fairy, Bigfoot, and the Loch Ness Monster too. Good news, though – hypersecure email service Lavabit is returning, now with “Paranoid” mode.

The Third Circuit and the Seventh Circuit split on the application of Spokeo to data breach claims this month, with the 3rd allowing a class action on intangible harm to proceed and the 7th affirming the dismissal of a class action for lack of concrete harm. The FTC started looking at hardware manufacturers for their responsibility for hacking and data breaches, suing manufacturer D-Link for alleged misrepresentations as to the security of their routers and video cameras. And the SEC is investigating Yahoo for its delays in reporting recent massive data breaches.
Finally, a Minnesota appeals court has held that there's no Fifth Amendment issue with compelling a user to **unlock a phone with a fingerprint**, comparing the act with other compelled physical activity such as drawing blood and appearing in police lineups.

*Internet Surveillance*

One can assume that the Trump administration will be highly in favor of tracking online activity, with the likes of Mike Pompeo indicating little hesitation at the idea of **mining social media** for data useful to the government. The Obama administration gave them a little boost in that regard on its way out the door, by **authorizing the NSA to share intercepted personal communications** with 16 other intelligence agencies without a review for privacy considerations.

But the Email Privacy Act, which was reintroduced this month, was **welcomed back with enthusiasm** in Congress; the Act, as you'll recall, updates the Stored Communications Act to require law enforcement to get a warrant before obtaining communications such as emails and texts from an ISP. The Second Circuit, meanwhile, **decided against rehearing** on its decision in favor of Microsoft in the Ireland server case.

Finally, don't store anything you don't want the government to know about on your **PlayStation 3 or PSN account**: a judge in D. Kan. has held that there's no reasonable expectation of privacy in such information.

*Transatlantic Privacy*

There was briefly some concern that a Trump executive order **restricting protections under the federal Privacy Act** to U.S. citizens and lawful permanent residents could jeopardize the EU-U.S. Privacy Shield agreement. However, **EU regulators later stated their opinion** that the Privacy Shield did not depend on the protections of the U.S. statute – though they're now watching the White House closely. As are we all.

*Intellectual Property*

The *Axanar* case is officially over, folks. **Paramount and CBS settled with Axanar Productions** over the high-quality, high-budget fan production this month after a judge in C.D. Cal. nixed Axanar's fair use defense. The **case was headed for a jury trial** on subjective similarity when it settled, the day after the studios' attorney discussed the case in Los Angeles at the MLRC Entertainment conference.
The terms of the deal have not been fully disclosed, but we know that (1) *Axanar* can now be released online in the form of two 15-minute segments (as opposed to the 90-minute film that was originally planned); (2) the prequel *Prelude to Axanar* can remain online; (3) it appears that *Axanar* will not be held to all of the restrictions of the widely-criticized “*Star Trek Fan Films Guidelines,*” in that professional cast and crew will be allowed to appear, and possibly in other respects; and (4) any future releases by *Axanar* Productions will comply with the Guidelines. It's murky as to whether any money changed hands (*Axanar* raised far, far more than the $50,000 permitted by the Guidelines), and it's not clear how *Axanar's* backers will respond to the shorter product given that they were promised a feature-length film. Personally, I still want to see what they come up with, if the suit has not derailed production permanently.

*Copyright – New Cases*

This fight could go the distance: Paul McCartney has sued in S.D.N.Y. for a declaratory judgment that he will soon recover his rights in iconic *Beatles* tunes from *Sony,* invoking termination rights under the Copyright Act. Everyone, head to your shelters and do not panic.

Fredrik Colting, the Swedish author responsible for an unauthorized *Catcher in the Rye* sequel that resulted in a copyright injunction upheld by the Second Circuit, is back in court in the Southern District of New York. Major publishers and trustees of authors' estates have sued over his publication of “elementary school versions” of famous novels such as *Breakfast at Tiffany's* and *2001: A Space Odyssey.* Also in S.D.N.Y., Disney, DreamWorks, and others have been sued by a writer who alleges that 2016's *The Light Between Oceans* infringed his screenplay.

Out in the District of Colorado, Pharrell Williams is looking at another copyright suit as he and Gwen Stefani face claims that they lifted the chorus of “*Who's Got My Lightah*” by former Korn singer Richard Morrill for their “Spark the Fire.”

In S.D. Tex., Texas A&M's athletic department has been sued for posting the “heart” of an unpublished book about alumnus E. King Gill on its website. The story gets into the weeds of college football history pretty quickly due to Gill's legacy as “the 12th Man,” a concept around which the school has built a formidable trademark portfolio.
Copyright – Plaintiffs’ Victories

Facebook and Oculus VR were whacked with $500 million in damages for infringement after an extended jury trial in the Northern District of Texas this month; a jury found that they unlawfully copied source code owned by ZeniMax Media for their virtual reality devices. In E.D. Va., Viacom and other media outlets won a $26.65 million judgment against two individuals who were rebroadcasting content from India without permission. In C.D. Cal., a jury awarded a horror film maker $460K for infringement by a distributor that marketed a recut version of the plaintiff's footage under another title.

In C.D. Cal., Ed Sheeran’s motion to dismiss a claim over his song “Photograph” was denied. In M.D. Fla., the owner of an Arabic pay-TV company must personally face allegations that his company stole signals from Dish Network, based on allegations that he supervised that activity. In S.D.N.Y., David Bowie's former manager failed to convince the court to declare that it could not enforce an earlier $9.35 judgment against him for distributing Bowie's work without permission. (It was a weird little motion.) In the same court, the heirs of a 1952 play about the life of Anastasia fought off a motion to dismiss their claims against a planned musical about the same subject, with the judge holding it was premature to rule that the plaintiffs were suing over historical facts rather than protected expression. And in D.D.C., a judge denied a motion to dismiss a composer's claim over the unauthorized use of his song in a political ad, though the court dismissed a Lanham Act claim because the ad was political rather than commercial speech.

ESPN settled a suit with Broadcast Music, Inc., in S.D.N.Y. over the broadcast of music inadvertently captured from speakers in stadiums and arenas. The specific terms are confidential.

Film-sanitizing service VidAngel was smacked with $10,000 in contempt fines for failing to comply with a preliminary injunction from C.D. Cal. in the case brought by Disney, Fox and Warner Bros.; the defendant has appealed. And in the Eleventh Circuit, Yellow Pages Photos had its fee award restored after the district court slashed its request by over 90 percent.

Copyright – Defense Victories

The DMCA's protections might have been narrowed a bit in the Second Circuit, but you still need to prove the underlying infringement – and that's now harder to do under a new ruling from the Ninth Circuit. Thanks to Perfect 10, the porn company and repeat copyright plaintiff ironically responsible for broadening copyright protections for digital platforms due to its overaggressive tactics, the Ninth Circuit has declared that (1) plaintiffs must prove volitional conduct by platforms before they can be held liable for direct infringement and (2) passively
storing or automatically copying or transmitting material at the direction of users does not meet that standard. Content host Giganews escaped liability as a result.

UMG ducked a blues singer's lawsuit against it in N.D. Ill. for lack of personal jurisdiction, but the suit, which accused the publisher of unlawfully sampling the plaintiff's work for “Know the Ledge,” can be refiled elsewhere.

In the bankruptcy courts of Delaware, the publisher of the Yellow Pages won a ruling that a suit over use of stock photos owned by Dex Media was precluded by earlier litigation in the matter.

Copyright – Miscellaneous

FilmOn X continues its quest to find an appeals court that will support its Aereo-clone service’s right to a statutory broadcast license; this month, it argued its case before the Seventh Circuit.

The “six strikes” copyright warning system is officially dead. It doesn't seem to have done much good, particularly among the repeat offenders that it was intended to deter.

Patent

Michelle Lee will remain the head of the U.S. Patent & Trademark Office under the Trump administration.

The Federal Circuit addressed three cases of interest in January. First, it held that a Taiwanese company's patent for encoding digital information onto the surface of an object was not indefinite in a suit against Encyclopedia Brittanica and two other publishers. Second, it affirmed the invalidation of patent claims for television auctions in a fight between America's Collectibles Network and the Jewelry Channel. Finally, it ruled that a photo processing patent was invalid as indefinite in suits against Pinterest and Yahoo.

Commercial Speech

Trademark

Scholastic and Houghton Mifflin were sued in N.D. Tex. by an educational product company who claimed that the publishers infringed its trademarks in various products. There's a lot of recitation of legal principles in the complaint, but it must be said there is precious little specificity on how the marks in question were allegedly infringed.
A bit further south, a judge in S.D. Tex. granted Viacom's motion for summary judgment on its claims that its trademark rights in the fictional “The Krusty Krab” restaurant from *SpongeBob SquarePants* were infringed by the defendants' real-life “Krusty Krab” restaurant. The court held that an element of a fictional show can be protected as a trademark, and should be in this case given Viacom's substantial and successful investment in promoting the “Krusty Krab” name in connection with its content and merchandise.

Viacom also scored a win on the defense side in W.D. Mich., with a court holding that merchandise associated with Nickelodeon's *Bubble Guppies* cartoon did not infringe the plaintiff clothing company's “Guppie” line.

Amazon avoided liability for trademark infringement in W.D. Wash. for its purchase of the plaintiff's marks as search keywords, which allegedly led purchasers by one route or another to counterfeit products. The court held that Section 230 blocked the plaintiff's state TM and federal false advertising claims, because third parties had posted the allegedly infringing items for sale; the court further held that the plaintiff had not established direct liability under federal law, citing *Tiffany v. eBay*.

The 9th Circuit rejected an argument that shifting musical works from physical to digital media created a new infringing product carrying the plaintiff’s trademarks, finding that the claim looked more than a little like a copyright case in disguise (and was noted to be such by the Seventh Circuit in a virtually identical case last year). The panel held that the plaintiff had confused the creative work embodied in a song with the tangible product in the marketplace that is the “good” relevant to a trademark analysis.

**False Advertising/Deception**

Actress Shoshana Roberts appeared in a video intended to call attention to the prevalence of catcalling and other forms of sexual harassment in public. The video went viral, and its creator licensed its use by TGI Friday's for a ridiculously tasteless ad (Eric Goldman has embedded the video in his article) in which various foodstuffs were superimposed over Roberts' image and appeared to receive the catcalls originally directed at Roberts. She sued under the Lanham Act for false endorsement, among other theories, but a judge in S.D.N.Y. dismissed that particular claim because her image no longer appeared in the video and no viewers would be confused into thinking she had endorsed the ad.
Miscellaneous

Academia

The Eastern District of Pennsylvania upheld a school district's decision to suspend and possibly expel a 15-year-old student for posting to Instagram a mashup of a video about overlooking homicidal students with the tune “Pumped Up Kicks.”

Government Licensing & Public Fora

Protesters challenging exclusion zones around abortion clinics in New Hampshire will have to revisit the issue later, after the First Circuit held that their case was unripe because no clinic had yet implemented the 25-foot zone permitted by state law.

Protesters at Donald Trump's inauguration lost their challenge to a decision by the National Park Service to line sections of the parade route with bleachers reserved for officials. The bleachers, held the D.C. Circuit, left ample space for peaceful demonstrations.

Political Speech

The Sixth Circuit cited Reed v. Town of Gilbert in holding that an ordinance that allowed large signs except when carrying political content violated the First Amendment. And no wonder. But the Seventh Circuit held that Indiana's neutral ban on robocalling was not unconstitutional just because it had exceptions for certain categories of call but not for political speech.

Threats & Intimidation

The Pennsylvania Supreme Court has agreed to review the conviction of a Pittsburgh resident for threatening police in an online rap song. Meanwhile, Madonna gave us a reason to re-read U.S. v. Watts while she was speaking at the Women’s March.

Conclusion

My sources tell me that the Patriots just won the Super Bowl or something. I don’t know, I was working on my taxes at the time. Still, as a loyal Bostonian born and bred, let me extend all of the folks back home my congratulations, and I wish you the best of luck in recovering from the experience.

Thanks, everyone – I’ll see you next time, and hang in there.