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

You know, when I started writing this month’s column, I was in the midst of an existential crisis. There’s an old saying, “Reality is what you can get away with.” With the president-elect apparently attempting to gaslight the country, truth can too easily seem like a matter of perspective and hazy memory.

But whether Trump is dressing down the press, cozying up to them, or bypassing them entirely to spread conspiracy theories, it doesn’t really matter what he says and it’s a mistake to get drawn into debates over reality. Yes, I know, it matters when the President lies, but I think we can consider that particular fact established. Perhaps instead of repeating tweets, we could just have a “Trump canary” on the front of the Times homepage that goes away if he ever tells a verifiable truth?

In that spirit, let’s talk about some things that actually occurred this past month.

Supreme Court

Though prophecy and analysis about the future of the Court is rampant following the election, there’s not much of substance on media law issues to report from November. The justices heard argument on whether a laches defense can be asserted in a patent case before the statutory limitations period elapses. Exciting, I know.

We continue to wend our way toward argument in the Slants case on scandalous and disparaging trademarks, with the USPTO’s brief filed and a bunch of amicus briefs pouring in thereafter. We’ve got the expected Washington Redskins brief supporting the Federal Circuit’s ruling that the ban on federal registration of disparaging trademarks violates the First Amendment, a group of law professors arguing that it doesn’t,
and the American Bar Association chiming in to argue that, whatever happens, such marks should still be enforceable even if not registrable.

Reporters’ Privilege

We saw couple of wins in New York, with a state court ruling that a Daily News reporter did not have to produce non-confidential notes in a sex abuse case, and the Southern District of New York applying the state’s shield law to shut down a demand for a reporter’s notes in a defamation case linked to the Jeffrey Epstein scandal. The latter ruling was notable for protection given to informal communications with sources outside the context of “gathering information for a specific article.”

But the Los Angeles Times lost a bid to protect one of its former reporters from having to testify in C.D. Cal. in the upcoming corruption trial of former L.A. County Sheriff Lee Baca; the prosecution wants the reporter to talk about an interview with the defendant. And reporters for an Erie, Pa., newspaper still face discovery of their notes in a lawsuit brought against them by a state judge, after the Pennsylvania Supreme Court declined to hear an appeal of an order forcing the defendants to turn over the notes.

Defamation

New cases

There’s a lot of speculation about exactly what’s going on under judges’ robes, but is it really defamatory to suggest that a judge removes his pants in chambers? A new case in Rhode Island state court against a local NBC reporter turns on that question.

In state court in Florida, a self-described scientist sued a blogger for criticizing his results and methodology. Sure, I remember that from school as part of the scientific method: observation, hypothesis, experiment, analysis, theory, lawsuit.

A West Virginia woman is suing Thomas Broadcasting in state court over a news report in which the father of her deceased grandchild accused her of taking drugs. And you thought talking about the election at Thanksgiving would be rough.
In California, Relativity Media has sued Netflix for allegedly disparaging Relativity in the press and with production companies and talent agencies over an inability to get films into theaters. Netflix’s anti-SLAPP motion is already on file. Also in California, Rep. Darrell Issa is suing a former opponent over allegedly defamatory campaign ads.

In New York, a consulting firm with ties to the Clintons has sued a Republican strategist who chairs a Trump super PAC for statements made on Fox Business’ “Lou Dobbs Tonight” and in a New York Times article. This should get ugly fast.

In Georgia, a trade group of olive oil importers sued Dr. Oz for statements on his show about the prevalence of fake extra virgin olive oil in U.S. supermarkets. First, this whole food libel thing is wacky, and second, isn’t there a serious of & concerning problem here? Are we going to recognize “food group libel”?

In the Northern District of Texas, a man is suing Fox News over an Associated Press article that it published under the heading “Sex Crimes.” Problem is, he was accused of child neglect but was not charged with any crimes or accused of any sex crimes.

Finally, Google is facing a defamation case in D.D.C. over a third-party blog about the plaintiff’s sportswear company. Look for this one in the Section 230 section in a couple of months.

Defense Losses

The first Rolling Stone trial is over, with Nicole Eramo picking up an award of $3 million in a jury verdict from the Western District of Virginia. Next up is the suit in Virginia state court by the fraternity allegedly defamed in the same article; jury selection should be interesting as the magazine seeks to avoid a panel familiar with the first judgment.

Last month’s $7.3 million verdict for Penn State whistleblower Mike McQueary became $12.3 million after the trial judge awarded $4 million in damages under Pennsylvania's whistleblower law and $1 million in additional non-economic defamation damages.

Gawker settled a defamation claim brought by the Mail Online over Gawker's accusations that DailyMail.com was engaged in the routine theft of copyrighted material; Gawker agreed to alter the story. There’s also some upsetting news in a pair of defamation cases that got caught up in the Hulk Hogan mess, but we’ll deal with that below.
Defense Wins

The fair report privilege was working hard this month, driving defense wins in state court in: New York, involving a *New York Post* article about a sex scandal at a law firm; Washington, involving an attorney’s comments about a pending wrongful death case on a law firm blog; South Carolina, involving a report by the *Charleston City Paper* on a school district investigation of allegedly racist post-game ritual performed by a high-school football team; and Minnesota, where a jury returned a verdict in favor of a local station and the *St. Cloud Times* on reports about a suspect in a cop killing.

An attempt to revive a suit in New York between a billionaire and a fashion mogul fell flat, with the judge refusing to reconsider her decision that the case should have been brought in the Bahamas. In Texas state court, a law firm's suit against a student and former client over a bad Yelp review was whacked with attorneys' fees under the state's anti-SLAPP law.

The Third Circuit affirmed a verdict in favor of Houghton Mifflin brought by the son of an alleged Nazi war criminal, holding that statements in a 2014 book regarding the plaintiff were substantially true. A California appellate panel reversed the denial of *Radar Online*’s anti-SLAPP motion in a case brought by former American Idol contestant Corey Clark, holding that Clark had failed to make a showing that the statements at issue were materially false. Meanwhile, the Georgia Court of Appeals rejected record producer Memphitz’s claims that he was defamed by accusations of abuse and embezzlement in VH1’s “Love and Hip Hop Atlanta.”

Miscellaneous

The Consumer Review Fairness Act is now on President Obama's desk, after the Senate passed it at the end of November. Almost there...

We also have a couple of updates on that pattern of sham lawsuits we reported last month. Courts where these cases have been filed, including the First Judicial District of Pennsylvania and the U.S. District Court for the District of Rhode Island, have announced that they are looking out for new lawsuits fitting the pattern. Seriously, if you’re going to try to pull the wool over the eyes of a court, don’t pick D.R.I.; those of us who remember Buddy Cianci know those guys do not screw around.

And that’s it for defamation. If you’re thinking by now that there’s a lot less than usual going on in this month’s article, I agree with you.
Privacy

Rights of Publicity

A new ROP claim from Texas this month, where four adult models sued a pair of strip clubs for using their images in promotional material; the models had never performed there. Though phrased as a privacy claim, this one’s purely about damage to the commercial value of the plaintiffs’ personae. If it gets that far, the discussion of reputation in the context of the adult entertainment industry should be fascinating.

False Light

We actually had a stand-alone false light ruling this month, with a decision from M.D. Tenn. that adding a demeaning caption to a photo meme can support a claim for false light invasion of privacy. The case involved the photo of an eight-year-old with Down Syndrome, to which the defendant added the phrase, “Letting your kid become obese should be considered child abuse.” The court denied a motion to dismiss, holding that while the statement plausibly addressed an issue of public concern and thus required a showing of actual malice to support the claim, the complaint satisfied that standard.

Disclosure of Private Information

In non-Hulk Hogan news, a federal judge in S.D.N.Y. held that Condé Nast couldn’t invoke recent changes in Michigan privacy law to defeat a lawsuit over the sale of consumer data, ruling that the changes did not apply retroactively.

But the main event, as it were, was the settlement of Hogan’s lawsuit against Nick Denton and Gawker for $31 million. It’s a distressing result, especially when the changes of flipping the verdict looked good on appeal, but at least we have the interlocutory appellate ruling stating that the tape and story were matters of public concern.

More troubling was the fact that the case was used to leverage six-figure settlements in two unrelated defamation lawsuits that could never have survived on their own. The bundling of meritless claims into this kind of resolution sets a terrible precedent.
**Miscellaneous**

Wyoming is considering an amendment to its state constitution that would guarantee its citizens a right to privacy. Though the wording is vague, it appears targeted at government rather than private intrusion, and contains language intended to protect rights of access to public records and government proceedings. This isn’t the first time Wyoming has toyed with this concept, but past attempts have not succeeded.

**Access/FOIA**

**New Cases**

One would expect that we’d see new Clinton FOIA cases drop off, but it seems there was still one in the hopper: In D.D.C., a pair of organizations filed a complaint on November 10 seeking access to IRS records related to the Clinton Foundation’s tax exemption.

Also in D.D.C., FOIA gadfly Jason Leopold filed a new claim against the NSA over a long series of allegedly inadequate responses to his requests. In S.D.N.Y., Courthouse News Service filed a claim against the clerk of New York County over a pattern of delays in access to newly filed cases. And in North Carolina state court, The Daily Tar Heel is fighting for access to records on sexual assaults held by UNC.

**Access Granted**

The California Supreme Court continues to support access to police arrest videos, refusing to depublish a recent Court of Appeals ruling that the videos are not exempt from disclosure as officer personnel records. (Officer personnel records? To whom did that argument sound plausible?) Meanwhile, the Washington Court of Appeals joined the long list of jurisdictions recognizing that personal e-mail can’t be used to avoid public records laws.

At the trial court level, a Florida judge ruled in favor of a coalition of media outlets and ordered the release of 911 recordings from the Pulse nightclub shooting. The city of Trenton, N.J., released a memo regarding censorship of its police department’s Facebook page after a state judge found that it was wrongly withheld. A New York state judge ordered the state's AG to explain its withholding of documents relating to climate change, holding that a bare repetition of the statutory language wouldn't cut it.

A judge in D.S.D. held that a South Dakota newspaper was entitled to records from the U.S. Department of Agriculture on the redemption of food stamps. And a judge in D.D.C. held that
the State Department had to do a more thorough search for records of visitors to Hillary Clinton’s office in response to a request from the Republican National Committee.

**Access Denied**

The Sixth Circuit denied three death row inmates’ First Amendment challenge to a new Ohio law that protects the identities of suppliers of lethal injection drugs, holding that there was no injury to support standing and no constitutional right to general records related to executions.

Demonstrating the key difference between seeking records from a state school and a private university, the Indiana Supreme Court held that the Notre Dame police department is not a public agency with regard to a request for reports of crimes committed by student athletes. It’s not the first time a state supreme court has reached this result, and I’ve never agreed with it – private school PDs are invested with significant power by the state, and both the PDs and the state should be publicly accountable for how that power is used.

In D.D.C., the State Department defeated a suit by the Associated Press seeking access to records related to a settlement paid by a UK defense manufacturer, with the court ruling after an in camera inspection that State had produced all reasonably segregable information and that the balance were subject to a variety of FOIA exemptions. In the same court, the Federal Election Commission obtained a ruling that it did not have to disclose a study of security vulnerabilities in its IT systems. And in D.S.C., a federal judge refused to reconsider his ruling closing Charleston shooter Dylann Roof’s competency hearing.

**Pending Cases**

In the Second Circuit, the Reporters Committee and Time Inc. have appealed a federal court decision in August denying a motion to unseal settlement-related records in a class action against Donald Trump. The case relates to the alleged use of undocumented workers to build Trump Tower. Moving down a rung to Mike Pence, there’s also a pending case in the appellate courts of Indiana regarding an e-mail sent to Pence in his role as Governor.

The existing Clinton e-mail cases are still rumbling along as well, with the D.C. Circuit hearing argument on whether the State Department can be forced to notify the National Archives that Clinton’s emails were removed
from government custody, and a judge in D.D.C. weighing the possibility of conducting an in-camera review of over 1,000 emails withheld by the department.

**Legislation**

California has overwhelmingly passed a new law requiring that (1) legislative bills be publicly available on the internet for at least 72 hours before a vote may be taken, (2) legislative proceedings be recorded and posted on the internet, and (3) any person be allowed to record public meetings of the Legislature. All in all, a positive step.

Pennsylvania Governor Tom Wolf vetoed a bill that would have blocked access to the identities of police officers involved in shooting incidents. Also a good thing.

But Mississippi is taking a step backward, rushing through a bill that would deny public access to government contracts; the measure seems to have been triggered by a media request for a particular contract relating to school funding.

**Newsgathering**

**Lawsuits by Journalists**

Cop recording continues to be a major theme in this section, with a TV news reporter in Louisiana settling his claim against the Baton Rouge PD after his arrest.

The Fourth Circuit also reinstated a woman’s § 1983 claim against the Baltimore PD over her arrest for filming the arrest of a minor. The jury reached a defense verdict, but the Court of Appeals reversed and remanded, holding that evidence of the woman’s prior arrests should not have been admitted.

Meanwhile, the Eighth Circuit will hear an appeal of a decision from W.D. Mo. holding that an activist had no right to record activity in a police station lobby.

**Prosecution of Journalists**

At least another seven journalists are facing criminal prosecution in connection with their coverage of the Dakota Access Pipeline protests in North Dakota. The situation has become even more chaotic; in addition to more arrests for trespassing of the sort we saw last month, journos are getting caught up in mass arrests for rioting, and – in one freelancer’s case – being charged with felony conspiracy to set fire to roadblocks and vehicles. There are also reports of journalists’ equipment being seized and held; one Canadian reporter was blocked at the border.
and had his phones seized. Even with the pipeline issue resolved for now, there’s quite a lot of fallout to clean up.

**Drones**

Oh, and drones were particularly unwelcome at the Pipeline protests. The FAA designated the area a no-drone zone.

**Punishment of Sources**

The Wisconsin Supreme Court has decided not to appoint a special master to investigate who leaked over 1,300 pages of information to the press from a law enforcement probe of Governor Scott Walker’s campaign. If the state AG wants to chase that one, he's on his own.

**Credentialing & Access to Places/Events**

So does it really come as a surprise that the President-elect is playing games with press access and jettisoning long-established traditions of cooperation? He’s like a spoiled heiress in a bodyguard flick, sending a misleading tweet about her intention to visit a friend before sneaking out the bathroom window to see her boyfriend. Maybe Mike Pence will be more reasonable, or at least so the Committee to Protect Journalists hopes.

And if you’re trying to get reporters into a Mavericks game, best be sure they’re not in league with our new robot overlords. Mark Cuban revoked the credentials of two ESPN journos to protest the network’s use of “automated game reports” for some events. Um, what?

**Prior Restraint**

So...apparently Alabama passed a law that nobody noticed back in May that bans the publication of mugshots for people arrested for prostitution. It went into effect in August, but was only reported in November. First, not cool, and second, it’s appalling that state house coverage is so bad in Alabama that this slipped past the press.

Over in Louisiana, a state appeals court vacated a prior restraint in the case of a pair of trial court judges looking out for one another. One judge granted the other’s request for an injunction barring her political opponents from criticizing her. Pretty soon I’m going to need a new desk from banging my head against it.

In the Western District of Virginia, a federal judge told the Charlottesville City Council that they couldn’t ban “group defamation” from the public comment portion of their council meetings
– a result that’s plainly correct regardless of the surprisingly murky status of *Beauharnais v. Illinois*.

Finally, in N.D. Cal., Twitter continues its battle with the DOJ over its right to release a government surveillance report. The DOJ moved for summary judgment, arguing that the courts have no right to second-guess classification decisions. Because checks and balances couldn’t wind up being important someday.

**Information Infrastructure**

*Federal Communications Commission*

Everything’s off the table for the FCC following the election; Tom Wheeler cleared the Commission’s monthly meeting agenda at the request of Republicans, leaving a clean slate for the next administration. And in fact Trump’s transition team isn’t even sure that we need the FCC as it currently exists. The House isn’t leaving anything to chance, though, having quickly passed a bill to block any last-minute regulations.

Meanwhile, the National Association of Broadcasters is pursuing legal challenges to the FCC’s Quadrennial Media Ownership review and its nixing of the UHF discount, filing suit with respect to the first and seeking to join an existing case brought by Twenty-First Century Fox with respect to the second. Both cases are pending in the D.C. Circuit.

All of this being the case, it seems like the FCC’s new opt-in requirements for ISP user might not survive until the one-year deadline for compliance. AT&T is also likely breathing a sigh of relief, given that Wheeler’s Commission is no longer in a position to ponder the implications of AT&T’s acquisition of Time Warner for net neutrality.

**Antitrust**

Meanwhile, the Trump DOJ, despite earlier threats, looks like it might be less concerned about the antitrust implications of the AT&T/Time Warner deal. But that hasn’t stopped the Obama DOJ from dropping a new complaint against AT&T and DirecTV in connection with negotiations over broadcasts of L.A. Dodgers games.

In N.D. Ill., a federal judge denied Comcast’s motion to dismiss a case accusing it of impairing third parties’ ability to compete with Spotlight, its own spot cable ad sales service. And the FCC’s chief ALJ held that Cablevision’s shifting of the Game Show Network onto a paid tier constituted illegal program carriage discrimination.
Customer Complaints

Finally, we have a new lawsuit in California state court against Charter, alleging that the company is engaged in a bait and switch, offering low prices and then hitting consumers with extra fees that it falsely claims are mandated by the government.

Digital Content

Section 230

Yet another busy month for Section 230 up and down the state and federal courts.

The Tenth Circuit, ever a challenging place for the CDA, issued two decisions this month. The first held that CDA provides immunity only from liability rather than from suit, and thus ruled that the denial of a § 230 defense is not an immediately appealable collateral order. The decision tied itself in knots avoiding 47 U.S.C. § 230(e)(3), which states directly that “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” On the other hand, in a separate case the Tenth Circuit had no problem affirming the 12(b)(6) dismissal of an intermediary liability complaint based on conclusory allegations that a website wrote comments purporting to be from users and invoking the long-discredited “distributor liability” theory.

The Seventh Circuit was more generous to the plaintiff in a defamation case against Nick Denton and Gawker that had been languishing during the latter’s bankruptcy. The Court revived the case and held that the plaintiff’s allegations that Gawker staff authored defamatory comments under pseudonyms would survive even the Iqbal/Twombly standard due to their length and detail. But as Eric Goldman correctly notes, the Court didn’t identify any allegations connecting the claim that Gawker staff wrote comments generally to the single comment that the Court found was potentially actionable.

Twitter successfully re-defeated that case in N.D. Cal. seeking to hold it responsible for ISIS activity on the platform, with § 230 knocking out the plaintiffs’ amended complaint as easily as the original. But it wasn’t all smiles for platforms in the Northern District. Airbnb lost its § 230 challenge to a San Francisco ordinance making it a misdemeanor to provide booking services for unregistered rental units, with the court holding that the restriction doesn’t depend on what Airbnb users post (though the court did raise questions about how Airbnb could be expected to verify whether its users were registered). Google also had motions to dismiss under § 230(c)(2)
denied in a pair of cases, with that pesky “good faith” requirement proving the fatal flaw to early disposition.

But Google scored a win in S.D.N.Y. in a more traditional § 230(c)(1) case over indexing of allegedly defamatory content on Ripoff Report. Down in D.D.C., that wacky suit against the U.S. Attorney General for enforcing § 230 was dismissed on standing grounds, with a judge quite reasonably noting that the AG doesn’t enforce § 230, and therefore didn’t cause any harm that would give the plaintiffs standing to sue.

Finally, there was a tentative ruling in favor of Backpage.com CEO Carl Ferrer and his colleagues in the California state “pimping” prosecution. The ruling was a fairly straight-up application of § 230, but the court gave the prosecution time for further briefing. An updated ruling is expected soon.

Hate, Terror, and Other Internet Nastiness

A notable case from October came in too late to report last month: A jury in Virginia state court awarded a plaintiff $1.3 million in a lawsuit over an extended pattern of online and real life harassment, including swatting, falsified admissions of crime posted on a community website over the plaintiff’s name, and false complaints to law enforcement. Folks, you know I’m always skeptical of plaintiffs’ verdicts, but barring an undisclosed evidentiary error this one seems pretty cut and dried.

Twitter is continuing its war on trolls, with a tool allowing users to block particular words (we’ve seen that before) and a vast purge of accounts associated with the alt-right. Take it from an old school D&D player, Twitter – the problem is that you need to kill them with fire. Otherwise they just regenerate at 3 h.p./round. Yes, that’s 1st edition rules, I said old school. Advertising tech firm AppNexus knows what I’m talking about, cutting off Breitbart News for carrying hate speech.

Miscellaneous

I’ll take Potpourri for $100:

- In a lawsuit which seems oddly familiar, Facebook was sued in N.D. Cal. for allowing housing ads that exclude a specific “Ethnic Affinity.” Someone needs to go back and read Roommates.com more closely, methinks (and remember that the plaintiff lost that case on First Amendment grounds).
• Also in N.D. Cal., we’ve got IMDb suing to block enforcement of California’s new law prohibiting the disclosure of certain actors’ ages online. Blatant plug time, we’ve lined up the attorney representing IMDb to speak at this year’s MLRC Entertainment Conference on January 19th in Los Angeles, so come join us!

We should really also discuss the fake news controversy, what with the President (the current one) calling the spread of disinformation a threat to democracy and all. It’s certainly kicked concerns about platforms’ content decisions up a few notches, and shifted the dynamic of the debate from whether platforms shouldn’t be acting as censors of user content to whether they should be acting as editors of news content.

Demonstrating concern over the accuracy and newsworthiness of information for the benefit of the public... Hmm, almost sounds like a media company, no?

Digital Privacy

Control of Personal Information

The Eleventh Circuit stayed an injunction obtained by the FTC against a lab company that was hacked. The Court rejected the FTC’s argument that a “low likelihood” of exposure of patient data is still a “likelihood” that would warrant imposition of expensive additional safety measures on a defunct company.

The Michigan AG jumped into a case in the Southern District of New York in which a Consumer Reports reader sued the magazine’s publisher for selling subscriber information in violation of Michigan privacy law. The state AG showed up to counter the publisher’s argument that the Michigan law is unconstitutional.

And then there’s this: An ex-Playboy Playmate surreptitiously snaps a nude photo of a 70-year-old woman in the shower at the gym, then posts the photo with a nasty caption. She’s now facing misdemeanor criminal charges in California. Of this I will simply say, I hope I’m going to the gym when I’m 70. The Playmate has pleaded not guilty.

Internet Surveillance

We’ve got a new Fed. R. Crim. P. 41, now that last-ditch efforts have failed. Federal judges can now issue warrants to search computers beyond their jurisdiction and to search multiple computers even if the identity of the owners are unknown. Meanwhile, President Obama has declined to pardon Edward Snowden, and it only gets worse for our dinner speaker in the next administration.
Intellectual Property

Copyright – New Cases

Perhaps the election can be summed up best in two new suits on opposite sides of the country. In S.D. Cal., a pair of bobblehead doll companies are fighting over the copyright in a “Hillary for Prison” doll kitted out for a stay in the penitentiary of your choice. Meanwhile, in S.D.N.Y., composer Wendy Carlos has sued the creator of a Trump-based parody of A Clockwork Orange that uses elements of her score for the film. I’m not exactly sure what that says about us as a society, but it says it all, really.

Speaking of film scores, legendary film composer Ennio Morricone has filed suit in S.D.N.Y. for a declaration that he has successfully terminated copyright grants in three different scores. In other music news, in what could shape up to be the music battle of the century, the estate of legendary copyright enforcer (and decade-transcendent music icon) Prince is squaring off against legendary defeater of copyright cases Jay Z in D. Minn. over streaming of the Purple One’s albums on Tidal. And a music publisher has sued Porsche in M.D. Tenn. for allegedly recording a rip-off of the X Ambassadors' hit “Jungle” for use in an ad.

In the first of several sci-fi/fantasy-related IP cases we’ll discuss this month, Dr. Seuss Enterprises has sued the would-be publisher of Star Trek-themed mashup book Oh, The Places You’ll Boldly Go! Now, who isn’t a fan of the works of Theodor Geisel, but come on – everything’s better with Spock.

That said, while Spock’s a whiz at nuclear physics and has had his brain removed, Buckaroo Banzai can give him a run for his money on the science, put someone's brain back into their head, and then rock the night away with the Hong Kong Cavaliers. Well, that's presuming that a new lawsuit in C.D. Cal. over who has the rights to make a new Buckaroo Banzai TV series gets resolved.

The Newseum drew a lawsuit in D.D.C. from a photographer, who claims that the museum exceeded its license to display his work by featuring it in a livestreamed event. Finally, it wouldn’t be the “Copyright – New Cases” section without a visit from Richard Prince. The
appropriation artist notched up another lawsuit in S.D.N.Y. over the unauthorized use of an Instagram photo of Sonic Youth’s Kim Gordon.

*Copyright – Plaintiffs’ Victories*

Some high-profile wins for copyright plaintiffs this month. The Second Circuit dropped a blockbuster ruling on the DMCA Safe Harbor in a music filesharing case, suggesting that the duty to identify repeat infringers might extend not only to those who repeatedly post links to infringing material but to those who click on the links, and that receipt of a takedown notice might require investigation of other related material not specifically identified. The internet (or at least that portion of it that can afford Bay Area real estate) quickly went to red alert.

The Eighth Circuit affirmed a $2.57 million judgment and permanent injunction against a company that restored old movie posters for *Gone With the Wind*, *The Wizard of Oz*, and *Tom and Jerry*, and used the restored images on merchandise.

The creators of “Jersey Boys” were held liable for copyright infringement by a jury in the District of Nevada. Fortunately for the defendants, the judge ruled out damages for willful infringement earlier in the month – but with a finding that 10% of the show’s success was attributable to the infringement they’re still looking at a potentially big number.

The Flo & Eddie case against Sirius XM in C.D. Cal. over pre-1972 sound recording copyrights has settled; the plaintiffs will walk away with at least $25 million and possibly as much as $99 million. Now all eyes turn to the Florida Supreme Court, where the same parties are battling over whether common-law copyrights in the Sunshine State evaporate after sale of a recording. Meanwhile, Warner, Universal and Fox settled another music suit in the same court brought by a musician’s union, accusing the studios of repurposing soundtracks for other works. (Oh, and the weirdest reuse of a movie theme? *Robocop 2* and *Star Trek IV*, by the same composer. No, seriously.)

Fantasy author Sherrilyn Kenyon defeated a motion to dismiss in a case in M.D. Tenn. in which she claims that Cassandra Clare’s Shadowhunter books infringe her own Dark-Hunter series. Oh, and remember that fellow who copied a Disney coloring book, backdated the copies, and then sued Dreamworks for infringement over *Kung Fu Panda*? Courtesy of a D. Mass. jury, he’s been convicted of wire fraud and perjury. No goose feather for you.
Copyright – Defense Victories

This might seem obvious, but in a software copyright case, you really do need to introduce the source code into evidence if you want to prove similarity. At least that’s what the Ninth Circuit held when it rejected an appeal by the author of the original Apple II version of “Madden NFL” on his claim that the later Sega version produced by Electronic Arts was infringing.

The Fourth Circuit held that an expert witness couldn't invoke copyright law to punish a client that backed out of using him, holding that the client hadn't copied his proposal for services and that any use of the expert’s CV was fair use.

Univision defeated a suit in D. Utah over a broadcast of Danny Trejo vehicle Machete, brought by an indie filmmaker who directed a similar movie starring the same actor. Look, if you had to be able to tell Danny Trejo roles apart in order to be able to use him in your movie, the poor guy would never work again.

A sick burn for the plaintiff in a suit against Viacom in C.D. Cal., with a ruling that the plaintiffs’ proposal that Viacom allegedly ripped off contained no original copyrightable work. Ouch. In the same court, street artist (and possible elaborate Banksy prank) Mr. Brainwash lost a variety of IP claims against a music festival, with the plaintiff’s own inequitable conduct dooming his case.

A victory for the DMCA safe harbor in W.D. Wash., in a fairly straightforward case where the plaintiff sued despite the defendant, a stock music library, removing the offending material within a day despite a non-compliant takedown notice. And in E.D. Va., that Bieber kid and Usher picked up a (probable) win, with a magistrate recommending summary judgment in their favor on a claim that their hit “Somebody to Love” was infringing.

And we’ll call this a defense win, though it’s a plaintiff seeking a DJ: A judge in S.D.N.Y. denied a motion to dismiss a case seeking a declaration that “We Shall Overcome” is in the public domain. Between that, “Happy Birthday,” and “This Land is Your Land,” the rule seems to be that if I was required to sing the song in elementary school music class in the 1970s, it now belongs to the ages.

Copyright – Miscellaneous

In the Second Circuit, the DOJ has appealed its recent loss on its attempt to require ASCAP and BMI to offer “100% licensing” on music in their catalogs. The tech world has come out to support ISP Cox Communications in its DMCA case in the 4th Circuit, which we’re watching closely.
And in case you were wondering (and I know you were), the Axanar case hasn't been resolved yet, but cross-motions for summary judgment are pending. Come hear more about it at our Entertainment conference in January, where the attorney representing CBS and Paramount in the case will join a discussion on fan-produced works!

Patent

The big online companies continue their run of good luck in patent infringement cases this month, with more patents for basic online functions being held invalid. In N.D. Tex., Twitter knocked out two recording and transcoding patents that its Vine service was alleged to infringe, while the Federal Circuit handed wins to Google, Microsoft and Facebook, invalidating a patent for targeted advertising tech, and to Netflix, upholding a ruling that two patents held by TiVo were invalid.

But it's not all bad news for TiVo, which won reconsideration of an S.D.N.Y. ruling invalidating three of its patents in another case. The Federal Circuit, however, denied Samsung's request for reconsideration of its decision that it infringed Apple's patents for two iPhone functions (a separate case from the design patent dispute recently argued before the Supreme Court).

Trade Secret & Misappropriation

In California Superior Court, a producer has filed suit against Animal Logic Entertainment, alleging that they tricked him into turning over intellectual property rights in various films, including the upcoming The Lego Batman Movie. The Walk of Shame saga continues in the same court, with a judge tentatively holding that the plaintiff sufficiently alleged access to his screenplay to survive a motion to dismiss.

And there was a surprise appearance of the hot news doctrine in S.D.N.Y., where the holder of commercial rights in the World Chess Championship tried and failed to obtain an injunction against others reporting players' moves from the championship match. I've had plenty of arguments with George and others about why I think the hot news doctrine is a questionable idea at the best of times, but this one didn't even pass the smell test – especially not in the same court that decided Theflyonthewall.com.
Commercial Speech

Trademark

It's sad when band members fall out. It's even sadder when they later show up in court fighting over who gets to use the name. In M.D. Fla., a judge held that a former member of The Commodores had to place his name before the group's in his marketing materials in order to be able to invoke the fair use doctrine. Meanwhile, a D. Mass. jury declared a mutual pox on the founder of the band Boston and its former guitarist, rejecting the former's trademark claim against the latter and the latter's contract claim against the former.

The Georgia Supreme Court held that a law firm didn't dilute a nursing home's trademarks when it ran an ad looking for clients in a local newspaper. Good to know blatant end runs around the limitations of defamation law still get shut down. In D.N.J., a judge denied summary judgment in favor of the creator of The Walking Dead against a group planning to open a Walking Dead theme restaurant. And in N.D. Cal., Dropbox defeated a claim of trademark infringement brought by a company called Thru, with the court holding that sitting on your rights since 2008 gives rise to a pretty good laches defense.

Finally, the Federal Circuit reversed the cancellation of a church's registration for “ADD A ZERO,” holding that even de minimis out of state sales of hats and t-shirts bearing the mark constituted use in interstate commerce. The cancellation by the TTAB had occurred at the instigation of Adidas, which was trying to clear a path for its “ADIZERO” mark.

False Advertising/Deception

Sure, you might be in trouble if you lie to a court in order to obtain a preliminary injunction against a competitor. But it's not misleading to tell the public truthfully that an injunction issued, according to the Western District of Pennsylvania.

DirecTV is still facing an FTC false advertising case over a promotional package in N.D. Cal., after a judge rejected the company's defense of waiver. It just sounds so unlike the FTC to waive any enforcement authority, doesn't it?
Restricted Subject Matter

Bad luck for tobacco companies in the D.C. Circuit, which rejected the industry's bid to lift a requirement that they televise “corrective” ads detailing the harm caused by smoking. But if drinking's your vice of choice, there's some hope in the Ninth Circuit, which will rehear en banc a case about whether California's ban on paying retailers to advertise alcohol products is legal.

Professional Speech

Members of the D.C. Bar have been warned to watch their behavior online, with two opinions detailing the ways in which ethical rules can reach a wide range of activity on social media.

Miscellaneous

Political Speech

Just to round up from last month: Federal courts in California and New York rejected last-minute challenges to those states’ bans on ballot photography before the election; the District of Colorado blocked enforcement of that state's ban on displaying ballot photos while noting that the state might constitutionally ban taking such photos; and while a federal judge in Michigan enjoined enforcement of that state's ballot selfie law, the Sixth Circuit stayed the injunction. Pretty bleak results for a pretty bleak election.

Oh, and speaking of bleak, we've had our first arrest (in N.D. Ohio) for someone threatening to kill the President-elect – on Twitter, appropriately enough.

And no, I'm not going to talk about the flag burning thing.

Government Licensing & Public Fora

A New York appellate court rejected a First Amendment challenge brought by the Hustler Club to special taxes imposed on adult entertainment establishments. The court held that nothing prevented constitutionally protected activity at those clubs; by imposing the tax generally while giving breaks to certain other kinds of performances, the court said, the State Legislature simply wanted to encourage certain kinds of speech while remaining “neutral” as to other forms of expression.
Hollywood Hijinx

A while back we reported on an eye-roller of a case in which the big Hollywood Studios were sued over presenting characters smoking in movies rated PG and PG-13. The theory was that describing films featuring smoking as appropriate for those under 18 was deceptive. The case has now been dismissed, for all of the reasons you'd expect.

The True Miscellany

So, you've got a right to flip someone off, says the Pennsylvania Superior Court (following a long line of digitus impudicus jurisprudence). But the Fourth Circuit says it’s okay to ban profane language near a church, so long as the language prohibited by the law is limited to “fighting words.” Surprisingly, the Court didn't so much as mention R.A.V. v. St. Paul in that opinion.

Conclusion

Folks, while we still have part of a month left in 2016, this is my last column of the year. I'll be back in January with a round-up of the media law follies in December, as well as my selections for the 2016 Media Law Stories of the Year. Who will take the extremely questionable top honors: Peter Thiel? Donald Trump? Rolling Stone? Captain Garth of Izar?

There's only one way to find out, and that's to come back next year! Happy holidays, everyone!