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

Apologies to my readers for the late issue this month. There’s been a lot going on here at the MLRC with the Annual Dinner, the MLRC Forum, and planning for our upcoming conferences...hopefully you’ll think all the effort was worth it!

For various reasons, I’ve recently needed to review the writings of some of the great free speech scholars and philosophers, going back to Milton and Mill and working my way forwards. It had been a while since I’d read Areopagitica and On Liberty, and their respective discussions of speech and truth. As you might recall, Milton argued that we need not censor printing to protect the truth, because truth will win out over falsehood: “[W]ho ever knew Truth put to the worse, in a free and open encounter?” This argument has been criticized as romantic rather than rational, due to the many reasons why falsehood does win out in one-on-one battles – including personal bias, asymmetric advocacy, lack or suppression of information, psychological vulnerabilities, and many other factors.

These practical limitations on the marketplace of ideas have led some to reject Holmes’s theory of the First Amendment as articulated in his famous dissent in Abrams. Certainly, one might be tempted to look around and declare the marketplace of ideas broken, what with Trump using “Big Lie” tactics and crowing about polls showing distrust of the media; filter bubbles, tribalism and political fatigue keeping people with differing viewpoints from engaging; emotional rhetoric supplanting logic; speech on campus devolving to the heckler’s veto; and politicians choosing power over inconvenient reality. It’s enough to make one wonder why we bother.
But then there’s Mill, who argues that yes, indeed, the search for truth is a primary reason to protect freedom of expression – but not because truth will always beat falsity in some endless elimination tournament. To the contrary, Mill acknowledges that truth is often suppressed repeatedly, or fragmented and blended with error. But because of its very nature, truth will continue to spring up until it is finally recognized as such (even if that process takes a long, long time):

[T]he dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. ... Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.

From this perspective, the fact that falsity is persistent and often triumphant in the short term is no reason to despair regarding the utility of speech, because the theory of freedom of expression is focused on the long game.

That’s what keeps me going when I have a moment of doubt. Those who obfuscate the truth can’t actually rewrite reality. If we keep protecting freedoms of speech and press, sooner or later people will catch on.

Moving on...

**Supreme Court**

**Pending Cases**

The Supreme Court is back for the October Term, and we’re looking at some interesting times ahead. Plenty of folks have written previews of the term for your reading enjoyment. In specific cases, the Court heard argument in *Gill v. Whitford*, the partisan gerrymandering case (which has a First Amendment connection through rights of association). The Chief Justice worried about the implications of getting involved in political matters and criticized reliance on
“sociological gobbledygook,” because heavens forfend we apply a little rigorous math to the operation of our democracy. Science can’t possibly have anything to do with real life, right? I mean, what would judges do if they couldn’t make decisions based on vague presumptions and vacillating value judgments? Next you’ll ask them to decide based on facts. [Image: Steven Nass, CC BY-SA 4.0]

Amicus briefs have been filed in support of the government in Carpenter v. United States, the historic cell-site information case. The briefs, including one from Prof. Orin Kerr (a name familiar to regular readers of the MediaLawDaily), defend the application of the third-party doctrine to the information at issue.

The respondents’ briefs have been filed in Masterpiece Cakeshop v. Colorado Civil Rights Commission, arguing that the First Amendment protection sought by the petitioners would eviscerate civil rights law. We also have an amicus brief in support of neither party from cake artists asking that the Court recognize First Amendment protection for their activity regardless of the eventual consumption of their work. As I mentioned last month, I find myself sympathetic to this argument if not to the attitude of the particular baker in this case. Neither slippery slope arguments about other businesses that might claim what they do is “expressive” nor the commercialization of expressive works seems to me to be a reason not to apply scrutiny in this case appropriate to compelled speech regulations.

Petitions

With the new term comes a raft of cert denials for petitions lingering since last term and filed over the summer. Let us bid farewell to the following cases: Russell v. Journal News (2nd Cir.; dismissal of sec. 1983 and malicious prosecution claims); Dodson v. JRL Music (2nd Cir.; dismissal of copyright claim); Louis Vuitton Malletier v. My Other Bag (2nd Cir.; dismissal of trademark and copyright claims); Elonis v. United States (3rd Cir.; threats conviction following earlier remand from Supreme Court); Batato v. United States (4th Cir., seizure of assets of alleged copyright infringer subject to foreign extradition proceedings); BWP Media USA v. T&S Software (5th Cir.; dismissal of photo copyright claims); Hart v. Amazon.com (7th Cir.; dismissal of claim against Amazon for third-party sale of counterfeit books); Power Ventures v. Facebook and Nosal v. United States (9th Cir., interpretation of Computer Fraud and Abuse Act); Shame on You Productions v. Banks (9th Cir., copyright infringement); Elliott v. Google (9th Cir., "Google" trademark not void as generic); Von Kahl v. Bureau of National Affairs (D.C. Cir., summary judgment in favor of BNA on defamation claim); Selden v. Airbnb (D.C. Cir.;
enforcing website arbitration clause); and *Milo & Gabby v. Amazon.com* (Fed. Cir., patent, trademark, & copyright infringement).

I’m particularly sorry that the Supreme Court didn’t take up the task of reconciling circuit court interpretations of the Computer Fraud & Abuse Act in *Power Ventures or Nosal*, and didn’t follow up on whether the First Amendment requires proof of intent in threats cases in *Elonis v. United States*. And with all of those copyright and other IP cases rejected, it seems like the Court might be moving on from issues that appeared to occupy its attention in recent years.

All that aside, we do have one grant to report: The justices will consider the application of *domestic search warrants to computer servers located in foreign countries* but controlled by domestic companies in *U.S. v. Microsoft*. The Court will likely resolve a split between the Second Circuit, which limited the extraterritorial reach of a warrant in this case, and most other courts that have considered the issue.

There are also a pair of new petitions worth mentioning: A journalism collective has asked for review of an Eleventh Circuit decision on when standing to sue for copyright infringement accrues, whether on filing or on approval of an application by the Copyright Office; and the State of Connecticut is asking the justices to flip a state supreme court ruling vacating the sentence of a woman arrested for upsetting public order with vulgar language that allegedly amounted to fighting words. Wouldn’t that be something, a modern fighting words decision from the Supreme Court?

**Reporters’ Privilege**

Defense attorneys for Chicago cop Jason Van Dyke have subpoenaed the journalist who exposed discrepancies between witness and police accounts of the killing of Laquan McDonald, leading to Van Dyke’s trial for murder in Illinois state court. The journalist, Jamie Kalven, has stated he will refuse to identify his sources.

MLB players suing Al Jazeera in D.D.C. over a documentary on sports doping have moved to compel the defendants to turn over emails from an undercover reporter.

In S.D. Fla., BuzzFeed has argued that it should not have to disclose its source for the “Trump Dossier” in a defamation suit filed by a Russian businessman, invoking the reporter’s privilege. In New York’s top court, the Reporters Committee for Freedom of the Press led a coalition of media amici arguing that a subpoena to New York Times journalist Frances Robles for
testimony and work product related to her work on the “Baby Hope” murder case was properly quashed. In Louisiana state court, former reporters for the Advocate are resisting prosecutors’ demands that they testify about the content of exchanges with a murder defendant.

Finally, a district court judge in N.D. Ill. adopted a magistrate judge’s recommended ruling that communications between an inmate and a writer recorded by the Illinois Department of Corrections are not protected by the state’s reporter’s privilege.

Defamation

The parallels between Harvey Weinstein and Donald Trump have been well documented, but for the purposes of the media bar this similarity is particularly noteworthy: Both threatened to sue the New York Times over its reporting on allegations of sexual misconduct, and both have apparently let the matter drop. Particularly notable is the fact that Charles Harder apparently found a defamation plaintiff that even he couldn’t stomach.

New Cases

Turning to complaints that have actually been filed:

- Fusion has been targeted with a new lawsuit in D.D.C. over the Trump Dossier by three Russian heavies who previously sued BuzzFeed in New York.
- The New York Times is facing an amended complaint in N.D. Fla. from a University of Florida horticulture professor who alleges that he was portrayed as a “covertly paid operative” of Monsanto.
- A scientist studying renewable energy filed suit in D.C. Super. against another scientist and the National Academy of Sciences for publishing a peer-reviewed article critical of his research.
- A candidate for the Pittsfield city council filed a handwritten complaint in Massachusetts against the Berkshire Eagle over a report of an incident in which strangers in a parking lot attempted to convince the candidate not to drive home because they smelled alcohol on his breath.
- The father of JonBenet Ramsey sued CBS in Michigan over a special marking the 20th anniversary of her death. You might recall that JonBenet’s brother Burke filed an earlier lawsuit over the same special, as to which a motion to dismiss is pending.
- Bill O’Reilly has filed a complaint against a former New Jersey pol, who wrote on Facebook about how O’Reilly allegedly treated his ex-girlfriend when she worked at Fox.
- The reporting is a bit vague on this one, but it seems that an ex-DA who declined to pursue sexual assault charges against Bill Cosby has launched a lawsuit in Pennsylvania
against one of Cosby’s accusers, claiming that the accuser’s previous suit against the ex-DA for defamation caused him to lose a race for reelection.

- In Virginia, a former candidate for mayor of Richmond has sued the local CBS affiliate over coverage of last year’s mayoral race.

**Plaintiff Wins**

A former columnist for the New York Times will be allowed to proceed with a defamation claim against the producer of a trailer for a film based on his ex-wife’s writing, with the court ruling that he could be understood to be the subject of accusations involving infidelity and promiscuity. In California, an appellate panel issued a tentative ruling to reinstate Janice Dickinson’s defamation suit against Bill Cosby and Marty Singer.

I’m putting this one under “Plaintiff Wins” because that’s where I tend to report settlements with undisclosed terms, but it’s far from clear that the plaintiff is walking away with anything in this case except regret: The Fifth Court of Appeals in Texas has dismissed an appeal of an anti-SLAPP win by Glenn Beck and his network on claims by “clock boy” Ahmed Mohamed and his father, after the parties settled their dispute.

**Defense Wins**

A judge in S.D.N.Y. rejected Bobby Brown’s motion for an injunction against the airing of a biographical film about his deceased daughter, finding the singer’s concerns over potential defamation “speculative” because he hadn’t actually seen the film or read the script. One would have thought that a necessary prerequisite to filing the suit in the first place, but oh well. The judge also found that even if Brown were depicted as a bad father and abusive husband, that would be an expression of opinion based on disclosed facts.

In N.D. Cal., a lawsuit against Greenpeace alleging that the organization conspired to defame a logging company was dismissed without prejudice. Frank Ocean fought off a lawsuit by his father in C.D. Cal., over Ocean’s report of his father’s use of homophobic terms in a Tumblr post. In D.D.C., the Associated Press defeated yet another defamation claim by a Russian oligarch, this time involving reporting about the plaintiff’s dealings with Paul Manafort. And in Texas state court, AIM Media Texas won an award of attorneys’ fees from a former lawyer who sued over a story about a ruling he lost at the state’s Supreme Court.

On appeal, the First Circuit rejected Kathrine McKee’s attempt to revive her defamation lawsuit against Bill Cosby for denying her allegations of rape, finding that she voluntarily became a public figure as a result of her efforts to call Cosby to account. The Third Circuit held
that media outlets’ reporting on a woman’s alleged connections to a drug and prostitution ring were protected as fair reports of a press conference by the New York Attorney General, despite her later exoneration.

The Georgia Court of Appeals affirmed the dismissal of a cop’s libel claim over reports that he lied about his military record, holding that the plaintiff was a limited purpose public figure and could not prove actual malice. A Michigan appeals court held that an opinion column in the Detroit News was just that, opinion, when it stated that the plaintiff was a “leader” of the KKK; the statement, the court found, did not necessarily imply that the plaintiff held a formal leadership position. In Pennsylvania, an appellate panel held that ABC27 could not be held liable for embellishing its report on a state health inspection of a restaurant with unflattering adjectives such as “slimy” and “caked.” And in Texas, another appeals court held that a law professor’s defamation claim against a Houston attorney was based on opinion and true facts, and that his attempt to file a cross-motion to dismiss the attorney’s anti-SLAPP motion was not acceptable in lieu of a standard opposition to the motion.

**New & Pending Appeals**

Shiva “I invented e-mail” Ayyadurai has appealed his loss against Techdirt to the First Circuit; Techdirt cross-appealed the district court’s decision not to apply California’s anti-SLAPP law to the claim. A former hedge fund exec asked the Second Circuit to reject a media coalition amicus brief, which argued that the fair report privilege should have doomed a claim against Bloomberg over a report containing statements by the exec’s former employer. The Seventh Circuit is considering the standards for proof of defamation damages on appeal of a $27 million verdict against Allstate. The Ninth Circuit heard argument on whether to revive a Hungarian Olympic swimmer’s defamation claim against an author who questioned how the athlete could have achieved her feats without performance-enhancing drugs.

**Miscellaneous**

Anti-SLAPP bills are making their way through the legislatures of Massachusetts, New York, and Ohio. The Bay State and the Empire State are considering upgrades to their early-model statutes, while a new bill based on Texas’ powerful statute landed in the Buckeye State’s senate.

Sarah Palin’s attempt to revive her suit against the New York Times in S.D.N.Y. continues apace, with further briefing from both sides on her motion for Judge Rakoff to reconsider his dismissal of the case and allow an amended complaint.
And AIG is fighting over coverage in some recent high-profile defamation cases, arguing in C.D. Cal. and seeking a declaratory judgment in N.Y. Sup. that it should not be on the hook for a chunk of the ABC “pink slime” settlement, and appealing to the First Circuit on a district court ruling that it is bound to defend Bill Cosby in defamation cases brought by women whose rape allegations he denied.

Privacy

Rights of Publicity

In the Northern District of Illinois, the holder of rights in Muhammad Ali’s persona sued Fox over its use of the boxing icon in a Super Bowl ad.

We have a pair of new strip club cases, with a group of models suing a Chicago club in Illinois state court for its unauthorized use of performers’ images to promote adult venues online, and another case in Texas state court involving basically the same allegations. (That’s quite a few of these now...I’m starting to think about the 2017 Yearly Monthly Daily Awards, and this fact pattern might well be up for some kind of recognition.)

The California Court of Appeal affirmed the anti-SLAPP dismissal of a right of publicity claim by actress Paz de la Huerta (in the news recently as one of Harvey Weinstein’s leading accusers) against Lionsgate over the use of a voice double to dub her lines in a film.

Finally, Ohio is considering a new bill to shut down the mugshot extortion racket (is that still a thing?). A few years ago there was a class-action ROP lawsuit against mugshot websites in Ohio, which I remember thinking was a stretch because the state’s right tended to focus on exploitation of the positive aspects of the plaintiff’s persona rather than merely attaching a dollar value to an image. This bill would seem to close the loop.

Disclosure of Private Information

In Touch Weekly escaped liability in W.D. Ark. on a claim by former reality TV star Josh Duggar over the magazine’s publication of reports about Duggar’s alleged abuse of four of his sisters.

In D. Neb., an NCAA men’s basketball referee and his wife sued Kentucky Sports Radio for allegedly airing their personal information in retaliation for a game lost by the University of Kentucky. In California, Blac Chyna dragged the Kardashian clan into court for allegedly “slut-shaming her on social media.” (And George Freeman just stopped reading this article, lest he see
the word “Kardashian” again. Whoops, I said it again.) In Georgia, former NFL’er Kordell Stewart has sued a blogger who allegedly posted a nude video of the footballer online.

And there were remarkable developments with respect to a publication of private facts claim filed in D.D.C. by a DNC staffer against the Trump campaign, which he alleged conspired with Russia to publish stolen emails via Wikileaks. The campaign has moved to dismiss, arguing that the publication of private facts tort violates the First Amendment even as traditionally construed, because it punishes the communication of true facts.

*Intrusion*

The federal government poked its nose into a Telephone Consumer Protection Act case against Time Warner Cable over unsolicited phone calls, opposing TWC’s attempt to certify a ruling in S.D.N.Y. against the company’s First Amendment challenge to the statute. Meanwhile, a judge in M.D.N.C. rejected Dish Network’s motion to vacate or reduce a $61 million TCPA judgment against the company.

Is it weird that I put TCPA cases under intrusion? They feel thematically related. Let me know if you disagree.

*Wiretapping/Eavesdropping*

If your spouse happens to be an FBI agent and decides to use the agency’s toys to keep tabs on you, you don’t have a claim against the United States. So held the First Circuit, ruling that the U.S. had not waived sovereign immunity on wiretap claims brought by a woman based on her ex-husband’s penchant for recording devices during their marriage.

*Access/FOIA*

*New Cases*

Our usual crop from D.D.C.: BuzzFeed’s Jason Leopold sued the CIA for documents related to U.S. payments to Syrian rebels after some loose tweeting by Trump apparently disclosed the existence of the program; judicial watchdog Fix the Court sued the DOJ for records about Supreme Court justices’ travel and protection; and the Government Accountability Project sued the Department of State for records related to the J-1 visa program for au pairs.

In N.D. Cal., a media coalition moved to intervene in the Waymo/Uber battle over self-driving car technology to keep the courtroom open during the trial.
In S.D.N.Y.: The New York Times has sued for access to the names of those who met with the Trump-Pence Transition Team before the January inauguration; the Knight First Amendment Institute sued for access to Department of Homeland Security documents on the “extreme vetting” and social media monitoring of immigrants and visitors to the United States; and BuzzFeed sued the Department of Justice for the names of an ex-U.S. Attorney and a subordinate who were having an affair.

Opening statements in the murder trial of a former Mesa, Arizona, police officer were postponed to allow the judge to consider whether to exclude the media from access to a police video showing the shooting of an unarmed man (which presumably would be key evidence in the case).

WBUR in Massachusetts is seeking the names and addresses of jurors after the federal murder trial of a former pharmacist whose laboratory was alleged to have caused a fungal meningitis outbreak. (In a late-breaking development, the judge said that he would release juror names and towns, but not addresses, and not until after sentencing unless the media proposed a protective order on how the information would be used; WBUR has argued that requiring a protective order on information that should be public would constitute an illegal prior restraint.)

In Minnesota, a media coalition is fighting to compel the return of investigative documents in the case of the 1989 abduction and murder of Jacob Wetterling to the FBI, where they will be subject to release to the public.

And in North Carolina, Sheriff Terry Buchanan of Ashe County was suspended and is facing felony charges for interfering with public records requests by WBTV relating to Buchanan’s appointment to his position. The alleged interference included ordering deputies to investigate county employees who attempted to respond to WBTV’s requests. I know there must be many decent, hard-working law enforcement officers out there in this country who would be appalled by this behavior, but I see so many issues like this at the county level that the title “Sheriff” now has nothing but unpleasant connotations for me.

Access Granted

A handful of state matters to report:

• WDEL in Delaware won a ruling from the state’s attorney general compelling the New Castle County Council to turn over emails on private accounts discussing public issues.

• Kentucky’s attorney general issued opinions that the University of Louisville violated state law by withholding records regarding the fate of the hard drive of the university’s
former president, and that the Cabinet for Health and Family Services did the same by withholding records of a murder-suicide in Frankfort.

- The University of Michigan settled a case with a reporter, agreeing to turn over emails sent by university President Mark Schlissel regarding Donald Trump.
- A Missouri judge ruled that a prosecutor in Cole County purposely violated the state’s public records law in denying a law student’s requests for records on the state’s war on drugs.

- A Montana judge ordered the release of Rep. Greg Gianforte’s mugshot. (The smug smile says it all.) In the same state, a judge ordered the Montana University System to release records on campus sexual assaults to author Jon Krakauer.
- New York’s open government committee ruled that details regarding the Cayuga Conservation District’s contract for a regional methane digester were subject to the state’s public records law. (What is a methane digester? Glad you asked.)
- Vermont’s Supreme Court ruled that state employees’ use of personal email for public business was subject to the state’s public records law. Is it just me, or is there an echo in here?

Access Denied

In D.D.C., the New York Times was denied access to a classified memo written by Ted Olsen relating to the activities of the NSA, with the court holding the memo is protected by attorney-client privilege. Judicial Watch also came up empty in an attempt to obtain emails from Hillary Clinton’s private account regarding Benghazi.

Also in D.D.C., a federal judge dismissed a case brought by the Knight First Amendment Institute, which sought to compel the Justice Department’s Office of Legal Counsel to produce opinions generated for Executive Branch officials under FOIA’s reading room provisions. However, the judge suggested that an amended complaint might identify a narrower set of OLC opinions subject to those provisions.

A judge in S.D.N.Y. expressed surprise at the trivial number of records produced by the Department of Homeland Security in response to her order to disclose records of presidential visitors at Mar-a-Lago, but declined either to impose sanctions or to issue an order to show cause.

The Oregon Supreme Court held that HIPAA prohibits the disclosure of the names of patients who submitted “tort claim notices” to Oregon Health and Science University. The
Oregonian had sought the information pursuant to an investigation into how much such claims were costing the public.

And in Arizona, a security guard at the state’s Department of Education pushed a reporter for the Arizona Center for Investigative Reporting out of the building during an attempt to review public records relating to school letter grades. That’s one way to deny access, I suppose.

Pending Cases & Appeals

Courthouse News Service has elevated its ongoing battle against Orange County Superior Court over same-day access to new complaints up to the Ninth Circuit, challenging a district court ruling that complaints could be withheld until reviewed and processed for privacy concerns. Also in the Ninth Circuit, a media coalition is appealing a decision from D. Ariz. denying access to records on execution drugs.

The Broward Bulldog has asked the Eleventh Circuit to reverse the dismissal of a complaint seeking access to FBI files on the existence of a U.S.-based support network for the 9/11 hijackers. A media coalition has chimed in with an amicus brief.

Legislation

In response to the Harvey Weinstein scandal, a California lawmaker has proposed legislation to ban the secret settlement of sexual assault and harassment claims.

The Michigan state house has voted to exempt certain information on cybersecurity practices from the state’s public records law, in order to prevent such records from being used to formulate cyberattacks.

In Wisconsin, there was a battle this month over Assembly Bill 351, which would exempt body cam footage from the public record unless it depicts death, injury, arrest, or search during temporary questioning.

Miscellaneous

The D.C. Circuit has taken the plunge into live streaming of oral arguments, while the Supreme Court is still getting nowhere near the water.

The National Archives and Records Administration has released thousands of documents on the JFK assassination that were required to be disclosed this year. Donald Trump has of course claimed credit for the mandatory effect of a 1992 law that required the records to be released 25 years later, although it is more accurate to say that he is responsible for holding back some of the documents for a final review for national security issues.
Finally, Immigration and Customs Enforcement is experimenting with toothpaste reinsertion technology after accidentally revealing the personal information of callers who used ICE’s Victims of Immigration Crime Engagement (“VOICE”) hotline to snitch on their acquaintances, friends, neighbors, and family. (You know, the one that resulted in this prank.) ICE took down its whole FOIA library in response to the gaffe, and demanded that reporters “return” the data that was exposed. Um, yeah, we’ll get right on that.

Newsgathering

Prosecution of Journalists

Deputy AG Rod Rosenstein met with representatives of the news industry in October regarding the DOJ’s review of its guidelines for investigative demands to journalists; further meetings are likely as the review is still in its initial stages. For now, the DOJ continues to take the position that all options remain on the table in light of Trump’s pursuit of leakers. Sen. Ron Wyden (D-OR), who we usually see defending speech interests down in Digital Media and Digital Privacy, has demanded more information about the Department’s investigation of reporters in connection with leak prosecutions.

The Committee to Protect Journalists had a less-than-helpful meeting with Rep. Greg Gianforte, who after promising half an hour to listen to CPJ’s ideas about protecting press freedom bailed out after five minutes. Well, if the congressman can’t make himself available, at least his mugshot is.

In local matters, two journalists were caught up in the arrest of protestors in St. Louis; the protestors had blocked Highway 40 in response to the not-guilty verdict in the case of police officer Jason Stockley. And in Virginia, a reporter attempting to speak with failed Republican gubernatorial candidate Ed Gillespie was violently thrown to the ground and arrested for—get this—public swearing.

Punishment of Sources

Reality Winner was denied bail again. No surprise there.

Trump Administration

Last month was blessedly quiet in this section, but we all knew it wouldn’t last. In October, we saw Trump: call on the Senate Intelligence Committee to investigate the American media for publishing “fake news”; demand that NBC’s “broadcast license” be revoked for its
coverage of his interest in multiplying the size of the U.S. nuclear arsenal; call for changes to the NFL’s “tax status” because of player protests; call NBC, CBS, ABC and CNN “fiction writers”; and demand “equal time” from late-night talk shows.

I don’t know what’s more depressing: the endless drum beat against the First Amendment, the fact that these blatherings reflect basic misunderstandings of the operation of government, or the fact that Trump made my comments in September’s Monthly Daily regarding soft pressure from the bully pulpit superfluous by actually threatening the press and the NFL with legal repercussions. Like most things Trump says and does, there’s no actual likelihood that any of these threats will be carried out, but it’s still a distraction and a disruption.

And no, Commissioner O’Rielly, Trump is not “rightfully venting” when he makes these threats—he’s violating the constitution. And that is perhaps the most depressing thing of all: that people who actually do know the law are attempting to normalize his behavior.

In other news, Defense Secretary Jim Mattis instructed U.S. admirals and generals to begin speaking to the press, which makes a nice change. (I guess Mattis is the designated sane one in the administration this month?) The White House has argued in response to the Knight Institute’s lawsuit in S.D.N.Y. that Trump’s blocking of Twitter followers is beyond the reach of the courts due to separation of powers. And lastly, Sean Spicer was interviewed by Robert Mueller’s team, although his role in the investigation has been overshadowed by more recent events.

Lawsuits

Fresh off of Wyoming’s ag-gag law getting smacked around by the Tenth Circuit, we have a new lawsuit in federal court challenging Iowa’s law criminalizing falsehoods on job applications to farm operations.

Drones

Exciting times for journalistic use of drones, as CNN scores the first waiver allowing it to routinely conduct drone flights above crowds. Meanwhile, New York has announced that it will open up an airspace corridor for drone testing. But an advisory group to the FAA on drone policy has run into significant problems, with participants complaining about drone industry dominance of the group and being shut out of discussions and excluded from review of draft reports.
**Prior Restraint**

The Ninth Circuit [vacated a gag order](#) issued by the district court in a trademark dispute between pop culture heavyweight San Diego Comic-Con and the unaffiliated Salt Lake Comic Con. The order had prohibited the latter from discussing the case online or sharing court documents.

At the Second Circuit, a media coalition is fighting an [order enjoining a film production company from proceeding with a biopic](#) about the crash that killed members of Lynyrd Skynyrd; the district court enjoined the production based on the involvement of former band member Artimus Pyle, who had entered into a consent decree decades prior not to do this type of thing. The film company, of course, was not a party to the earlier decree, and the new injunction explicitly does not prohibit them from proceeding with a production without Pyle—but the media amicus brief makes the compelling argument that the First Amendment does not permit prior restraints against third parties to cure a breach of legal duty by a source of information.

Microsoft may be dropping its case in W.D. Wash. against the DOJ over its practice of including [gag orders without a termination date in its demands for user data](#), after the DOJ amended its policy to limit such gag orders to a year or less absent exceptional circumstances.

The Georgia Supreme Court heard argument on a [gag order issued in the trial of the accused murderer](#) of Irwin County teacher and beauty queen Tara Grinstead, whose case remained open for 12 years after her disappearance in 2005. In Michigan, WXYZ (I love that there’s actually a “WXYZ”) appealed a prior restraint against the media that prohibits the press from displaying [pictures or video of two people involved in a story about the state’s probate guardianship system](#). Not to be outdone, a judge in Boone County, Missouri, issued a prior restraint prohibiting the press from publishing the [names, photos or video of victims in a criminal case](#).

**Information Infrastructure**

**Federal Communications Commission**

So, to no one’s real surprise, Ajit Pai was [confirmed for another term](#) as Chair of the FCC. He has also named a [new deputy general counsel](#), Ashley Boizelle (formerly of Gibson Dunn). Pai came under scrutiny this month for his [failure to repudiate Donald Trump’s threats to pull broadcast licenses](#) from media outlets; while he [affirmed that he would not let the FCC be used as a tool of political vengeance](#) against the media, he avoided comment on Trump’s tweets.
The deregulation agenda continues apace, with the elimination of the main studio rule (the requirement that broadcasters maintain a main studio close to where they are licensed) and an announcement that rules against newspaper and broadcast ownership in the same market are also on the chopping block. And with the spectrum incentive auction in the rear-view mirror, the FCC is offering $1 billion in reimbursements for eligible broadcasters and MVPDs building station facilities for reassigned channels.

However, the FCC’s decision to eliminate price caps on business broadband providers is facing a new court challenge, with advocacy groups appealing the decision to the Eighth Circuit and arguing that the FCC improperly evaluated the level of competition in the market.

Net Neutrality

There was briefly a rumor that the FCC would attempt to sneak a vote on the repeal of the Open Internet Order in around Thanksgiving, but that’s not happening. The agency has stated that there will be at least three weeks’ notice before the vote.

Meanwhile, Verizon is focusing on the next stage, namely, ensuring that states do not replace repealed federal net neutrality rules with local versions. They have asked the FCC to preempt state law in that respect.

Mergers & Antitrust

The Sinclair-Tribune merger remains the deal to watch, especially given that the FCC’s moves toward deregulation are likely to benefit Sinclair’s efforts. (Commissioner O’Rielly denies that the FCC is intentionally helping Sinclair out, and that the merger is simply taking place at a fortuitous time; Commissioner Rosenworcel isn’t convinced.) Tribune’s shareholders have voted in favor of the merger, and Sinclair is receiving bids for its TV stations, the sale of which would bring the combined company under the current FCC ownership cap. The merger is facing opposition from rival conservative media outlets and from news unions concerned about what the deal will do to jobs. The FCC’s comment period on the merger was extended to November 2.

In other merger news, AT&T and Time Warner gave themselves more time to obtain regulatory approval, while opposition to the merger from across liberal/conservative lines is amassing before the DOJ. The DOJ was also reportedly turning against a putative Sprint/T-Mobile merger, though that issue is now moot as talks have fallen through. Finally, the FCC dismissed a complaint by The Word Network against Comcast over alleged violations of its merger conditions with NBCU.
And to tie up an antitrust case we mentioned last month, alt-right social media platform Gab [dropped its case against Google](https://www.mediawirelawletter.com) for delisting its app from the Google Play store, after Google gave Gab a path to appeal the decision internally.

**Digital Content**

ПОЙСЯ ВПЕРЕД

The major issue in this section, and possibly the biggest issue in media law generally in October, was the wave of disclosures regarding [Russian manipulation of Facebook and other social media platforms](https://www.mediawirelawletter.com) to advance the candidacy of Donald Trump in last year’s election. The sheer numbers involved ([3,000 ads](https://www.mediawirelawletter.com) on Facebook, [126 million people served content](https://www.mediawirelawletter.com) from Russian-linked pages, etc.) as well as what looked like [reticence to disclose details](https://www.mediawirelawletter.com) – but could well have been concern about privacy laws – led to major platforms being called onto the [Congressional carpet](https://www.mediawirelawletter.com) in [multiple hearings](https://www.mediawirelawletter.com). Tech companies have been doing damage control and implementing new measures internally, which have been widely seen as a race to stay ahead of regulation of their behavior (although it’s not entirely clear to me how great a burden some of the [advertising rules](https://www.mediawirelawletter.com) that have been proposed would really be).

The issue, unfortunately, is more than political. These events may have [marked a turning point](https://www.mediawirelawletter.com) in the public’s perception of digital platforms, at which the exhilaration and tolerance of the startup era could transform to a [jaded cynicism](https://www.mediawirelawletter.com) about the power and self-interest of entrenched megacompanies. Some sectors of the media industry might feel a little schadenfreude at the thought of Internet giants feeling the heat, but public tolerance for greater regulation could easily have repercussions in other areas of the information economy. Needless to say, we’ll be watching this closely.

**Section 230**

Significant developments in the debate over the Stop Enabling Sex Traffickers Act (S. 1693) (“SESTA”) have taken place between the end of October and the publication of this article, so rather than spend time on that now, we’ll revisit this next month.

In the meantime, Section 230 continues to do its work. The First Circuit shut down a case that has been bugging a few of us for quite a while now, in which an [attorney purported to obtain a copyright assignment of a critical review on Ripoff Report](https://www.mediawirelawletter.com) by means of a default judgment against the poster. The court held that Ripoff Report was
protected by Section 230 against direct liability for unfair trade practices, notwithstanding Ripoff Report’s purported acquisition of the copyright in the post and its decision not to block Google from scraping its website for search results. The court also held that Ripoff Report had obtained at least a non-exclusive irrevocable license from the original poster to publish the post, making a subsequent attempt by the plaintiff to leverage his allegedly later-acquired copyright to force the post’s removal ineffective.

Speaking of lawyers and negative reviews, a law firm recently dropped a suit in E.D.N.Y. against Pissedconsumer.com over a review discussing an attorney’s “sexual dalliances.” A judge in N.D. Tex. kicked out a claim against a membership association based on member postings on the organization’s message board. Oh, and in that privacy case against the Trump campaign I mentioned up above, the campaign’s motion to dismiss also invokes Section 230 – specifically, it argues that because Wikileaks is protected by § 230(c)(1) for its publication of leaked information, there was no illegal act to support a conspiracy claim for the campaign’s alleged collusion with Wikileaks to publish the plaintiff’s private information.

Finally, conservative content generator Prager University (not an educational institution, but a reaction to perceived liberal bias in higher education) has sued Google in N.D. Cal. due to alleged censorship of its videos on YouTube. Expect § 230(c)(1) to save the day here, while the facially more applicable § 230(c)(2) languishes in a corner.

Hate, Terror, and Other Internet Nastiness

Terror-related lawsuits against platforms continue to roll in with two new suits in N.D. Cal., one relating to the Barcelona attack and one related to the Nice attack. As usual, these complaints assert that the platforms gave terrorists “material support,” and as usual they are likely to run aground on Section 230. Speaking of which, a recent lawsuit against YouTube over an attack in Paris has once more run smack into Section 230, with a second amended complaint tossed out but leave granted to file a third. [Late development: The third amended complaint was filed on November 6th; the new attempt to evade Section 230 depends on YouTube’s alleged monetization of ISIS videos, which revenue is claimed to be shared with ISIS.]

With SESTA looking more and more like reality, it’s worth remembering that the legislation had its origins in high-profile failures to hold websites like Backpage.com liable for sex trafficking. One could similarly see the terror-based lawsuits as an attempt to set up a record to support another carve-out from § 230, which could well move more swiftly with SESTA breaking the trail.
We also have updates from Alphabet, Twitter, Reddit, and Facebook on their efforts to curb abuse, violence, and fake news.

**Miscellaneous**

In N.D. Ohio, a man acquitted on charges of disrupting public services with a Facebook page parodying the Parma police department has sued the PD for civil rights violations. Meanwhile, the Miami Beach police have arrested the creator of a Twitter account parodying the department’s spokesperson for impersonating a cop.

In future, I’ll be reporting lawsuits against public officials for blocking people on Twitter and other social media in this section (with the exception of Donald Trump, whose antics in this regard we’ll still discuss up in Newsgathering). This month, we have a new suit in W.D. Wis., in which progressive group One Wisconsin Now sued three state representatives for blocking on Twitter.

**Digital Privacy**

**CFAA/Hacking**

The hiQ Labs v. LinkedIn case has reached the Ninth Circuit, with LinkedIn arguing that scraping of publicly available user information violates the CFAA.

The Senate voted in favor of a joint resolution that would strike a regulation from the Bureau of Consumer Financial Protection that overrides arbitration clauses in contracts for consumer finance services. The vote has drawn scrutiny due to its potential impact on consumers affected by the Equifax hack. In related news, Equifax and Yahoo are both being called to testify about their respective hacking problems by the Senate Commerce Committee.

**Control of Personal Information**

The Ninth Circuit heard argument on whether to revive a class action against ESPN for allegedly disclosing app users’ information to Adobe for advertising purposes. Smart TV maker Vizio, however, was denied certification in C.D. Cal. for an interlocutory appeal of a denial of its motion to dismiss claims that it tracked users through their TV sets.

SAG-AFTRA faced harsh inquiry from a judge in N.D. Cal. as it argued against summary judgment in IMDb.com’s case challenging the constitutionality of California’s actor age law. The deputy AG defending the law on behalf of the state decided that discretion was the better part of valor and submitted his arguments on paper rather than standing up to take his lumps.
The Massachusetts Supreme Judicial Court has held that federal law does not preclude Yahoo from granting a deceased user’s estate access to his email account, addressing a question that implicates complex issues of both law and public policy regarding the private lives of deceased individuals.

The era of voice interaction with computers has led to interesting issues regarding children’s use of voice-enabled devices, particularly regarding children’s privacy. Getting in front of the issue, the FTC has relaxed the verifiable parental consent rule under COPPA so that service providers will not run into liability if kids use voice interaction for simple tasks.

**Anonymity**

According to a magistrate judge in N.D. Cal., anonymous donors to journalist Barrett Brown’s legal defense fund have stated a claim against the FBI for abusing its subpoena power to identify them, in violation of the Stored Communications Act and their privacy and First Amendment rights. [Photo: Barrett Brown, CC BY-SA 4.0]

In D. Del., a judge shut down an attempt by the manager of an apartment complex to obtain the identities of anonymous reviewers on ApartmentRatings.com, holding that the manager had no Lanham Act claim for the reviewers’ non-commercial speech and that there was no other basis for federal jurisdiction.

**Encryption**

This issue had faded into the background a bit, but Deputy AG Rod Rosenstein seemed to be reviving the crypto debate in a recent speech criticizing “warrant-proof” encryption.

**Internet Surveillance**

The attempt by federal authorities to trace those who interacted with inauguration protest website disruptj20.org ran aground, with respect to user information from both the website and, in a separate case, its affiliated Facebook page. With respect to the website, the court held that web host DreamHost would not have to turn over any identifying information about users unless the government could connect a specific user to specific illegal activity. That probably defeated the point of the feds’ demand, which was likely to identify participants in the protest. After that, the DOJ dropped a demand for identifying information on the roughly 6,000 people who liked the disruptj20 Facebook page.
Never fear, there are always more ridiculous subpoenas from the DOJ – like one we just learned about which sought extensive information on five Twitter users because someone else tweeted a smiley face at them. The backstory is convoluted, and the justification non-existent, but you’re welcome to delve into it if you have a taste for the absurd.

Finally, there were three different Section 702 “reform” bills bandied about this month. As usual, we have the good, the bad, and the ugly – although I understand if my readers might want to rearrange those in their own minds.

Transatlantic Privacy

The U.S.-EU Privacy Shield program has passed its first annual review, although the EU took the occasion to call for reform of U.S. foreign surveillance. Don’t assume that everything is hunky-dory; the Irish Commercial High Court also held this month that “standard contractual clauses” used by digital companies to satisfy EU law should be reviewed by the Court of Justice of the European Union.

Intellectual Property

Copyright – New Cases

Let’s run through these quickly:

- C.D. Cal.: Major studios and streaming companies have joined forces to sue TickBox TV, which sells a device that allegedly simplifies access to illegal streams of copyrighted content.
- C.D. Cal.: Frankie Valli sued EMI for allegedly holding his music “hostage” despite his reclamation of his copyrights.
- D. Idaho: A Scholastic children’s book regarding the artwork of primitive artist James Castle allegedly infringed his works, according to the artist’s official archive. However, a preliminary injunction against the book’s publication was denied, with the court finding that a fair use defense would likely succeed.
- N.D.N.Y.: CBS sued a social media user for posting screenshots from the “Dooley Surrenders” episode of Gunsmoke, which aired in 1958.
• S.D.N.Y.: If you thought the “Dark Lord,” “Mauler,” “Princess,” and “Big Hairy Guy” who showed up at that kid’s birthday party (or yours for that matter, I don’t judge, much) looked kind of similar to some folks from a galaxy far, far away, you’re not alone...Disney filed suit against a company offering appearances by “Star Battles” characters.

• E.D.N.C.: Epic Games continues what seems to be an emerging trend in leveraging copyright to crack down on cheating in online multiplayer videogames, suing over alleged manipulation of the code for its game “Fortnite.” Sounds kind of silly, perhaps, but in a world where streaming of competitive videogames is becoming big business, software hacks pose as much of a problem as doping does in real world sports. Still, I’m not really sure that’s a copyright injury.

• M.D. Pa.: The author of a motivational book wasn’t thrilled that a coach at King’s College was motivated to share his wisdom online, suing the coach and the school over a tweet containing a photo of a single page of the text.

Copyright – Plaintiffs’ Victories

Only one victory for a plaintiff this month, and just an interlocutory one at that. ESPN lost a summary judgment motion in a case in N.D. Miss. alleging that it used the plaintiff’s footage for a documentary but failed to provide the agreed compensation, thus infringing the plaintiff’s copyright.

Copyright – Defense Victories

Quite a few defense wins, on the other hand.

In C.D. Cal., a judge issued a tentative ruling dismissing a claim against Disney over its film Zootopia, finding that the plaintiff screenwriter’s television pitch wasn’t particularly similar.

In S.D.N.Y.: The father who sued media outlets for using his inadvertently livestreamed video of his son’s birth was whacked with $120K in attorneys’ fees; legendary film composer Ennio Morricone lost his attempt to reclaim his rights in his scores, with the court holding they were works-for-hire under Italian law; and the author of bestseller “A Light Between Oceans” defeated a claim by the writer of an unproduced screenplay.

In M.D. Tenn., Steve Winwood and other members of the Spenser Davis Group fought off a copyright claim over “Gimme Some Lovin’” on motions to dismiss and for summary
judgment, because among other reasons the plaintiff failed to present evidence that the song was written at a time when the defendants would have had access to the allegedly infringed work.

In S.D. Tex., a judge roundly rejected a claim against Disney over three numbers from the “High School Musical” series, citing a lack of personal jurisdiction, a failure to register the works, and (most strikingly) a failure of existence – the plaintiff corporation having ceased to exist through forfeiture of its corporate charter.

Copyright – New & Pending Appeals

No one had an easy time at the Fourth Circuit when it heard argument in the appeal of BMG Rights Management’s victory against Cox Communications. The panel subjected both sides to tough questioning, in a case that raises serious questions about what ISPs have to do if they want to invoke the DMCA to avoid copyright liability for infringement on their networks.

The Ninth Circuit heard argument in the “Blurred Lines” case this month, with the attorney for Pharrell Williams and Robin Thicke urging the court to focus only on the protectible elements of Marvin Gaye’s “Got to Give It Up.” Meanwhile, Zillow’s opening brief on appeal of a $4 million award for infringement of real estate photographs also landed at the Ninth Circuit.

In the D.C. Circuit, the amicus briefs were the ones to watch. U.S. House Representatives Zoe Lofgren and Darrell Issa filed an amicus brief supporting Public.Resource.Org in its fight for the right to publish privately issued safety standards that have been incorporated into public law by reference. And in another suit involving extraterritorial transmission of content, the U.S. Government filed an amicus brief arguing that public performance rights are infringed by unauthorized online streams that originate overseas but are viewable in the United States, while Hollywood studios and recording industry groups argued against reading a volitional conduct requirement for direct infringement into the Copyright Act.

Finally, the Turtles continue to have a rough time with lawsuits based on state copyrights in pre-1972 sound recordings, with the Florida Supreme Court ruling that Florida does not recognize a right to collect royalties for such recordings.

Copyright – Miscellaneous

Family-friendly (but not copyright-friendly) streaming service VidAngel filed for bankruptcy this month but vowed that its legal battle to defend its business model would continue.

The Internet Archive is planning to publish a collection of complete copies of out-of-print books originally published between 1923 and 1941, invoking a provision of the 1998 Sonny
Bono Copyright Term Extension Act. Fittingly, if ironically, they’re naming the new collection after Bono.

Copyright trolls may be changing their tactics, lowering the dollar value of their threats and calling them “fines” in order to increase compliance with their demands.

And the Copyright Office has announced the seventh triennial rulemaking proceeding for exemptions to the circumvention provisions of the DMCA, as they warm up the rubber stamp.

**Patent**

There’s a new bill seeking to end sovereign immunity for Native American tribes with respect to patents. The bill is intended to stop the practice of handing off patents to Native American tribes in order to avoid Inter Partes Review at the USPTO. No surprise there.

**Commercial Speech**

**Trademark**

Audrey Hepburn’s name is at the center of a new trademark dispute in C.D. Cal., with her son suing the charity he founded in his mother’s honor about what he considers unlawful use of her name and related marks.

Kudos to The New York Times and BuzzFeed for amicably resolving the latter’s use of “All the news too lit for print” as a slogan. Debate the merits amongst yourselves; for my part, it’s just nice to see MLRC members finding a way not to sue one another.

It’s a battle of the festivals in C.D. Cal., with the folks behind Coachella obtaining a preliminary injunction against the use of “Filmchella” for a film festival. I was going to make a bad pun here about “chellas” being those folks to the conductor’s right, but instead I’ll leave you with this. No, seriously, just click the links.

Also in C.D. Cal., Lionsgate lost a motion to vacate a ruling that its claim against TD Ameritrade for riffing on the line “Nobody puts Baby in a corner” from Dirty Dancing was preempted by copyright law. The parties had previously settled the case, but Lionsgate wanted to clear the decks of unhelpful precedent.

At the Ninth Circuit, Fox asked the court to affirm its TM victory against a California record label over the title of hit series Empire. In a separate case, the Ninth Circuit held that the appearance of a European flooring company’s trademarks in Sony’s “Gran Turismo” racing
video games was a use in a creative work protected by the First Amendment under the Rogers test.

**Compelled Commercial Speech**

The Ninth Circuit denied rehearing en banc on its decision that Berkeley, California’s mandatory cell phone warning law is constitutional, over a bitter dissent.

California exempted booksellers from the state’s autograph authentication law, which otherwise requires sellers of memorabilia to issue certificates of authenticity for signed products. The exemption, which was sought by booksellers because of the potential impact on author events and selling signed books, resolved a First Amendment lawsuit filed earlier in the year.

**False Advertising**

Again in the Ninth Circuit, we’ve got a ruling that the inability to trust future representations by a defendant in a false advertising case can provide standing for injunctive relief, even if the plaintiff now knows that a particular past statement was false. Makes sense to me. On the other hand, the Ninth Circuit held that a plaintiff’s claim that consumers could not identify labeled ads in Google search results as such was not plausible.

The D.C. Circuit drew a fine line between deception and making false statements in stock offerings, holding that an investment banker who was directed to send false statements by his boss could be held guilty for the former but not the latter in an SEC disciplinary proceeding. The court found that it was the boss, not the messenger, who “made” the false statements.

T-Mobile agreed to stop claiming that its speeds exceed Verizon’s after a ruling from the National Advertising Division.

**Unfair Trade Practices**

A shareholder suit in C.D. Cal. against Facebook about allegedly inflated metrics for video consumption foundered on the court’s finding that the plaintiff had failed to establish an intentional effort to mislead.

**Miscellaneous**

**Academia**

Talk about biting the hand that feeds you...a bunch of students not clear on the concept of the First Amendment shouted down a speaker from the ACLU at the College of William & Mary. I don’t want to suggest that the ACLU is immune to criticism, but there’s a logical flaw in
exercising your right to protest in order to suppress the speech of people who are protecting your right to protest through the actions about which you are protesting.

The DOJ weighed in on a case in C.D. Cal., supporting a student who sued after he was limited to a 616 sq. ft. area on the Pierce College campus while distributing Spanish-language copies of the United States Constitution. I will admit that my inner (well, maybe not so inner) cynic was somewhat surprised at this move.

“Give us an F!...Give us a U!...” The Middle District of Pennsylvania held this month that a public high school cheerleader could not be kicked off her squad for off-campus vulgarity.

**Government Licensing & Public Fora**

A Baltimore Police Department protocol for leafletting at circuses came under scrutiny at the Fourth Circuit, with the court ruling that the protocol, which is usually applied to protesters against animal cruelty, might be found to be content-based rather than content-neutral.

In Indiana, a State Representative has – *yawn* – drafted a bill requiring the licensing of journalists in order to protest the licensing of firearm owners; the stunt is neither clever nor original.

**Political Speech**

The Ninth Circuit upheld Montana rules on political contribution limits, with a dissent arguing that the majority failed to apply sufficient scrutiny to the state’s justification for the cap.

The Eleventh Circuit held that a multi-step process that must be completed one week prior to a Walker County Board of Education meeting by those wishing to speak at the meeting could be used to suppress speech, where the Board controls the timing of one of the steps. If that last sentence looks familiar, it’s because I took it verbatim from the MediaLawDaily – but I wrote it in the first place, so I figured it was fair game.

**Hollywood Hijinks**

The Third Circuit held that movie theaters must supply patrons who are deaf and blind with interpreters who can communicate what’s happening in a film. The plaintiff in the case was named “Paul McGann,” which threw me for a moment as that’s also the name of the eighth actor to play the Doctor in the canonical run of Doctor Who. Sorry, that’s how my brain works.

And if there are any of you out there muttering the names “Adrian Gibbs,” “Richard Hurndall,” “Michael Jayston,” and/or “Geoffrey Hughes,” then please tell me who you are so I know I’m not alone here. If you can name someone else pre-McGann who belongs on that list,
you get all the points, but don’t bother mentioning Edmund Warwick or the Morbius faces. For the rest of you – look, when your abiding obsession is a TV show with more than 50 years of content, the debates get pretty esoteric.

Don’t worry, we’re nearly at the end.

Universal lost a fight in C.D. Cal. to force its insurer to cover the costs of moving production of a TV series out of Jerusalem, with the court ruling that the conflict between Israel and Hamas constituted a “war” triggering a policy exclusion.

Fox might have dodged a trademark bullet in October with respect to Empire, but a judge in N.D. Ill. partially denied Fox’s motion to dismiss claims brought by inmates at a juvenile detention center for whom services were disrupted during filming.

Publishing

A convicted murderer sued her former attorney in Arizona state court for violation of attorney-client privilege and unjust enrichment by his publication of a book about the trial. Meanwhile, Milo Yiannopolous fought off a motion to dismiss his claims against Simon & Schuster for breach of contract in New York state court.

Here’s a question though; given that Yiannopolous’ book is now in print, how do his profits on the book affect his claim? One presumes that Simon & Schuster will argue that if he earns less than the $10 million he demanded in the lawsuit, it will demonstrate that Milo wasn’t worth as much as he thought he was; on the other hand, he could argue that any difference is down to a lack of S&S’s resources to promote the book (if he can swallow enough of his ego to make that argument). If this actually gets to a verdict, figuring out mitigation will be a beast.

Adults Only

It seems disingenuous somehow to just keep dumping the sex-related cases into The True Miscellany, so I’m inaugurating a new section.

We have the Indiana Supreme Court shrugging at an inconsistency in state law that makes it legal to have sex with 16-year-olds but illegal to send nude selfies to people under 18 years of age, puntting the problem to the legislature. Meanwhile, the Maine Supreme Judicial Court held that the state’s indecent exposure statute couldn’t be applied to “virtual” flashing via sext, holding that such a reading of the statute would run afoul of the First Amendment. And finally, a Utah lawmaker wants to revive the position of “porn czar” in the state, apparently because he finds Cosmopolitan a bit too racy.
Conclusion

It was great to see so many of you at the MLRC Forum and Annual Dinner! I hope you those of you who traveled to New York enjoyed your trips. We ourselves will be traveling out to California for our Entertainment Law conference in January, where we’ll look forward to seeing you at the conference’s new venue – the Japanese American National Museum. It’s shaping up to be a great event, so please join us!