Ah, summer. Hot days, warm nights, movies, ice cream, hordes of Pokémon Go players blocking the sidewalks. Seriously, my wife and I left the theater after seeing *Ghostbusters* last week only to find dozens of people camped out on the sidewalk, scanning the questionably fragrant Queens evening for digital critters. All the wonderful things that augmented reality can do for humanity, and what catches our attention? Pokémon.

But it was always going to be something like that, I suppose. Let’s crack open a fire hydrant and cool off in a torrent of media law news.

**Supreme Court**

Term’s over and the Justices have retreated to their summer pursuits, although Justice Ginsburg had some choice words to say about Donald “I Alone” Trump on her way out the door. Maybe she should have abstained, and she’s acknowledged that, but no ethical rules were broken and I’m finding it hard to blame her. After all, you devote your existence to understanding the Constitution, and a would-be chief executive thinks it’s a menu. (Isn’t Article XII the taco bowl?) Yeah, I’m giving her a pass on that one.

The Court has also apparently started to communicate more about things it should have been telling people all along – namely, when changes are made to opinions after they are issued. The Court’s website is now flagging these changes.

Otherwise, not much to report. The plaintiffs in *O’Bannon v. NCAA* have agreed with the NCAA that the Supreme Court should grant cert in the case, though naturally seeking a different outcome. A bunch of high-profile IP professors decided to get into cheerleader uniforms – sorry, read that wrong, decided to get into a case about cheerleader uniforms – with an amicus brief discussing the relationship between conceptual and physical severability in the context of copyrights in useful articles.

**Reporters’ Privilege**

In New York, prosecutors handling a landlord-on-tenant murder case have won access to outtakes from a jailhouse interview conducted by a reporter for News 12. However, the court

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limited the production to statements by the defendant about murdering the tenant and their relationship. (Have I mentioned I’m glad I’m out of the NY rental market?)

The Concord Monitor successfully quashed a subpoena for one of its reporters to testify in New Hampshire state court in a voter suppression case. Meanwhile, Mark Boal, screenwriter of The Hurt Locker and Zero Dark Thirty, is trying to keep a dispute over recordings of his interviews with U.S. Army Sgt. Bowe Bergdahl out of a military court, filing his own declaratory judgment action in the Central District of California. A media coalition has jumped in offering an amicus brief in support.

Finally, a Middle East correspondent for the Wall Street Journal was detained and pressured to turn over her cell phones by the Department of Homeland Security when she landed at LAX after a trip to Beirut. DHS waived a document about searches of technology at the border, and she waived her status as a journalist right back at them. DHS backed down.

Defamation

What do Tony Schwartz and I have in common? We have both created Chaotic Evil characters, although in my case I was playing Dungeons & Dragons. My regret was brief, as my character got turned to stone by a basilisk pretty quickly, but Schwartz has found that it’s tough to atone – especially when Donald “I Love the 80’s” Trump comes down on you with a typically blustering C&D for speaking your mind.

Of course, Donald “Should’ve Made Martin Shkreli My VP” Trump doesn’t often follow through on his defamation threats, and DWT’s response on behalf of Schwartz is a classic.

New cases

Pete Rose sued John Dowd, the attorney who investigated Rose in 1989 for betting on the Reds, in E.D.Pa. over statements in a radio interview suggesting Rose misbehaved with underage female fans. Rose isn’t the only one responding to those kinds of allegations this month, though; we’ve got a former Boy Scout troop leader suing a newspaper in New Jersey over sexual assault and kiddie porn allegations, and a Mississippi man suing six different media outlets that identified him as a suspect in a sexual assault and robbery case.

A few new cases in the state courts of Florida, where thanks to Terry Bollea the tawdriest of disputes and the C-listiest of celebrities can now expect a warm welcome:
(Continued from page 8)

- Dr. Phil sued the National Enquirer over an alleged sixteen-year campaign of defamation, which makes one wonder about what happened to the statute of limitations.

- A Hillsborough woman sued a reporter for WFLA Channel 8 for two reports that allegedly portrayed her as a squatter.

- A dispute involving the tennis pro at the gated community occupied by the CEO of Marvel Entertainment and a Canadian businessman has evolved into a pair of dueling defamation claims between the two men. The former claims the latter surreptitiously collected his wife’s DNA in order to implicate him and his wife in criminal activity; the latter accuses the former of orchestrating a hate-mail campaign.

In Nevada, a water retailer claims that consumer advocates trying to assemble a class action defamed the company in its search for plaintiffs. In Montana, a pol from Bozeman is suing a citizen for writing a letter to the editor in which he allegedly confused a civil verdict against the plaintiff with a criminal conviction. In Washington state, a law firm was sued for allegedly defaming the opposing party in a client lawsuit on the firm’s website. And in the Eastern District of Michigan, the ex-CEO of the Detroit Public Lighting Authority sued WXYZ-TV over allegations of unethical dealing.

**Defense Wins**

In federal court: The U.S. District Court for the District of Columbia granted summary judgment to James Risen and Houghton Mifflin Harcourt. The plaintiff claimed that he was defamed by statements in a book by Risen that he had bilked the U.S. government with sales of bogus anti-terrorism technologies. The Eastern District of Pennsylvania dismissed federal claims over allegedly false statements by AG Kathleen Kane, and declined to retain jurisdiction over state-law defamation claims against Kane and the Philadelphia Daily News. The District of Arizona granted summary judgment to ProPublica and the Center for Investigative Reporting on allegations that they defamed a tech firm implicated in allowing a Chinese national access to a U.S. counterterrorism database.

In state court, a California judge put an end to the lawsuit filed against Christian Slater by his father. The elder Slater claimed his son defamed him by stating he was schizophrenic; the younger pointed to a diagnosis of his father in 1972. In Virginia, a high school principal lost her case over a critical letter published in the newspaper, with the court holding the statements not to be defamatory. And in Louisiana, a state judge dismissed claims by a Catholic priest against a TV station regarding allegations of sex abuse.

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Defense Losses

A $3.5 million verdict from the District of Massachusetts this month, with a jury holding that a Saudi Arabian scholar visiting Harvard University was defamed by a woman and her mother after the scholar allegedly had an affair with the woman’s husband. The ink is still fresh on the special jury verdict form, so we’ll be watching for developments.

Appeals

The Third Circuit affirmed the dismissal of a defamation claim by a truck driver against his employer, finding that he had not alleged knowing falsehood as necessary to overcome Pennsylvania’s conditional privilege for statements to a prospective employer.

On the other hand, the Third Circuit reinstated a firefighter’s claim against the New York Daily News over the juxtaposition of his photo with a story about a sex scandal. Coincidentally, the Daily Mail lost a photo juxtaposition case in the Ninth Circuit, with respect to the use of a photo of a porn star with an article about a different performer diagnosed as HIV-positive. And once again I say, did we learn nothing from Stanton?

In the Eighth Circuit, Jesse Ventura has sought rehearing on the reversal of his defamation win in the “American Sniper” case. The Eighth also affirmed a Better Business Bureau’s win on an injurious falsehood claim, finding that the statements of which the plaintiff company complained were either true or opinion.

The Texas Court of Appeals held that Tammy Wynette’s widower’s widow is a limited-purpose public figure with respect to the late singer’s former property. Accordingly, statements about her in that context were statements on matters of public concern for the purposes of Texas’ anti-SLAPP law, requiring the district court’s denial of an anti-SLAPP motion to be reversed.

Finally, the New Jersey Appellate Division affirmed a grant of summary judgment to dissatisfied dog purchasers, who had some choice statements to make about a breeder for selling them an off-breed pooch. All protected opinion, said the court.

Privacy

Rights of Publicity

The Seventh Circuit shut down a claim by a Hacky Sack world-record holder over an ad by the makers of 5-Hour Energy, affirming a district court determination that the ad didn’t identify...
the plaintiff or suggest his endorsement. Just goes to show, it’s about the shoes, not what you kick with them.

Drug lord Pablo Escobar’s brother Roberto wasn’t thrilled with Netflix’s hit show “Narcos,” but there’s nothing wrong with the show that a billion dollars wouldn’t fix (at least according to his demand letter). Somehow I don’t think he’ll be getting a credit on the next season.

And in the District of New Jersey, Fox News anchor Harris Faulkner will be allowed to proceed on her claims against Hasbro with respect to a hamster doll of the same name.

Disclosure of Private Information

It’s finally here, the long-awaited federal revenge porn bill from Rep. Jackie Speier. The worst bits that First Amendment advocates (including yours truly) expressed concerns about have been lopped off, and there’s a public interest exception, but it still raises some questions. Among other things, it nods at Section 230, while still leaving open a narrow path for liability for “intentionally promot[ing] or solicit[ing] content” known to be in violation of the section. Still pondering whether that’s all right. It’s also rewriting expectations of privacy in non-public settings, which could be problematic. And it lacks an intent requirement; apart from online intermediaries, for whom the standard is knowledge, the culpable state of mind under the statute is recklessness as to the victim’s lack of consent.

That’s not the only new federal bill targeting online sexual harassment; Reps. Katherine Clark and Susan Brooks also introduced a bill creating a crime of sexual extortion. The bill isn’t limited to the internet, but that’s where its primary effect is expected to be felt.

Meanwhile, the Georgia Court of Appeals noted a gap in state laws with respect to “upskirting,” which is one of those things I wish I didn’t know people do. A defendant escaped conviction as a result, but it’s likely that the legislature will address the issue quickly (as happened in Massachusetts in 2014 when the same problem was identified there).

We’ve also got a pair of secret recording cases to report on this month. First, we’ve got a new case from the state courts of Florida, where the owner of a soccer team claims a reporter for an Israeli sports network tricked him into streaming comments worldwide. Second, Vincent Gallo (whose Facebook identity theft woes we reported last month) was on the receiving end of an anti-SLAPP ruling from a state judge in California. The court held that a reporter did not violate Gallo’s rights by recording and posting an audio clip of comments made by the actor; there’s an interesting single
publication rule/statute of limitations ruling in there as well, discussing one’s responsibility for checking on the availability of online content.

Finally, the Florida Court of Appeals granted a provisional stay to Nick Denton against enforcement of the Hogan verdict, but only until the trial court issued a ruling on a stay. The trial court issued that ruling at the end of July, allowing Hogan to begin collection attempts against Denton personally. Denton has since declared personal bankruptcy.

**Intrusion**

I feel like we’ve been seeing a lot of cases over text messages recently. This month, there’s a new case in the Middle District of Florida against Universal Pictures, which is accused of spamming people with promotional texts for box-office flop *Warcraft*. (Okay, fine, China loved it.)

Over in the Northern District of California, Twitter found itself unable to escape from a claim based on text updates requested by a user but received by another person who inherited the user’s recycled phone number. A Section 230 argument in the case was creative but ultimately unavailing; given that the content of the messages wasn’t at issue, that’s not entirely surprising, but it does touch on an interesting question about what being “treated as a publisher” means.

There’s a fine line between that last case and another one in the same court, where mobile app company Life360 escaped liability for text spam. In the latter case, app users also initiated the messages; but they were one-time messages and the third-party recipients were selected by the users.

**False Light**

The Utah Supreme Court issued an interesting opinion on false light claims predicated on defamatory statements, holding that judges have an important duty to ensure that juries consider only statements susceptible of defamatory meaning. The Court reversed and remanded for a new trial because the trial court failed to put appropriate safeguards in place.

**Access/FOIA**

It’s getting dangerous to ask for public records these days! In Georgia, a the publisher of a local weekly and his attorney faced three felony charges after requesting access to county bank records. The paper sought information on whether the Chief Judge of the Appalachian Judicial Circuit had “cashed checks illegally”; the judge responded by asking the local DA to pursue
identity fraud charges against the two men. The charges were later dropped, but not before a night in prison and three urine tests for drugs or alcohol.

In Michigan, the Greenville Daily News filed an apparently innocuous FOIA request for documents related to the election for sheriff in Montcalm County, and found itself sued by the county government. The county was just seeking an injunction against disclosure, but it forced the paper into a decision on whether to fight the case. Luckily, a judge told the county that it had to make its own decisions on releasing records and face the consequences of its choices.

And then there’s the University of Kentucky, which sued a former student of the school who filed a public records request for information about the school’s Medical Services Foundation. The state AG previously ruled that the Foundation was subject to the state’s public records law, but the school is characterizing the requests as an attempt to disrupt operations and harass staff. Somehow, I don’t think the former student will be participating in Annual Giving this year.

New Cases

As a song about obsolete hardware claims, “Everything that boots is beautiful.” (The song was linked from my article last month; see what you miss when you don’t click?) According to a new case in D.D.C., the U.S Department of Justice has embraced that mantra wholeheartedly, using a decades-old computer system when conducting FOIA searches specifically to frustrate requesters.

Meanwhile, in S.D.N.Y., the New York Times is pursuing work-related e-mails sent and received by Defense Secretary Ash Carter on his personal e-mail account. The case was filed in May, but only reported recently. In Missouri state court, the ACLU has sued the St. Louis police department for systematically charging inappropriate fees for access to records. And in Minnesota, a coalition of media outlets is fighting for access to proceedings relating to the estate of decade-transcendent music icon Prince.

Access Granted

Speaking of work-related e-mail on personal accounts, the D.C. Circuit held that "an agency cannot shield its records from search or disclosure under FOIA by the expedient of storing them in a private email account controlled by the agency head." In another case, the D.C. Circuit held that when the Department of Homeland Security reconsidered a FOIA denial and released some documents, its initial denial was no longer “live” and the requester did not have to exhaust administrative remedies with respect to that decision.

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And in a third case, the D.C. Circuit held that the names of judges accused of misconduct could not be redacted from a FOIA response solely because the producing agency deemed them irrelevant to the request. Once a record is deemed responsive, the court said, specific sections can be redacted only if there is an applicable exemption; redactions cannot be used to delete specific material that is deemed unresponsive.

Also in D.C., the federal district court is turning up the heat the State Department with respect to Hillary Clinton, requiring in one case that State produce a Vaughn Index for 200 withheld emails from Clinton’s private server, allowing another case brought by the RNC with respect to the e-mail of Clinton’s top aides to proceed, and chastising State for reducing resources for FOIA processing after it released 30,000 of Clinton’s emails. The district court also smacked the NSA for its superficial search for information on surveillance of judges, stating that a backlog of FOIA requests was no excuse for a sloppy investigation.

The left hand is meeting the right hand in the Second Circuit, where the son of a Cuban diplomat was given another chance to pursue the CIA for records about his father. The court held that it’s tough for the CIA to claim that it can’t confirm or deny the existence of records when the FBI has been turning over responsive declassified documents.

In the states, the Illinois Appeals Court held that all police misconduct records back to 1967 are subject to public records requests; the police union unsurprisingly vowed a further appeal. In Colorado, a judge unsealed an arrest affidavit in a juvenile case (while, in a First Amendment twofer, also striking a prior restraint against publication of the youth’s photo). In California, the Sacramento News & Review won access to 79 emails in an ongoing battle with Sacramento Mayor Kevin Johnson. In Kentucky, the state AG said that Eye of the Tiger County Clerk Kim Davis violated the state’s public records law by withholding documents relating to her legal battle against same-sex marriage. And in Tennessee, the Commercial Appeal won a suit that we reported last month for access to applications for the position of Chief of Police of Memphis.

Access Denied

On balance, the D.C. Circuit was pro-disclosure this month, but missed a clean sweep with a ruling that the DOJ could withhold its internal guide on when to disclose evidence to defendants in criminal cases. It is truly pathetic that this is a matter of mystery and speculation; in fact, two of the judges on the panel said as much, while still holding that the law compelled this result.

The en banc Sixth Circuit handed the Detroit Free Press a bitter loss in their long-running effort to secure FOIA access to criminal
mug shots held by federal authorities. The opinion, which overrules twenty-year-old precedent, was driven by the effect on the privacy of those accused due to the persistence and ubiquity of online content.

Well, the court says “privacy.” What is seems to mean is a murky mélange of issues related to reputation and emotional integrity, and not anything relating to reasonable expectations of secrecy in government records related to an arrest. The court goes into various mechanisms of abuse (the mugshot racket rears its ugly head again), without explaining why the potential for abuse creates a broad privacy interest -- as opposed to, more logically, a right of action against particular wrongs. Internet FUD for the win.

In the U.S. Tax Court, an effort by the Guardian to unseal documents in a fight between Amazon and the IRS has been put on hold as the parties implement a protective order. In the U.S. Virgin Islands, the Attorney General has opined that 911 calls are not public records.

And in New Jersey, we have Chris Christie defeating an effort by New York Public Radio to obtain documents from a state office that was under scrutiny in connection with the George Washington Bridge scandal. I knew that “lock her up!” chant was somehow familiar...

Pending Appeals

The New Jersey Supreme Court has agreed to hear a case on whether electronic data and metadata held by state agencies is subject to the state’s public records law.

In Virginia, the Daily Press is pursuing a state supreme court appeal of a ruling denying access to a statewide court database; oral argument on the petition will take place later this summer.

Legislation

Illinois strengthened its FOIA protections this month, with a new law imposing heavy penalties for failing to abide by court orders or binding AG opinions that certain records must be released to the public.

On the downside, Missouri and North Carolina have both passed legislation to limit access to police body and dash cam footage. In Missouri, footage is not public until any investigation becomes inactive, if not longer. In North Carolina, the general public is excluded entirely; those actually in the recording may request a viewing of the footage, but cannot get a copy without a court order.
Newsgathering

Persecution of Journalists

The NYPD was sued by a Queens man this month for arresting him while recording their activities. (Speaking of which, if Brooklyn gets a Captain America statue—despite the fact that Cap was born in Manhattan—where’s the statue of Spider-Man for Queens, who calls Forest Hills home?)

Meanwhile, at least four reporters were arrested while covering Black Lives Matter protests in Rochester, NY, and Baton Rouge, LA, with one member of the local constabulary in the latter complaining, “I’m tired of y’all saying you’re journalists.” Yeah, we’re tired of your behavior too, buddy. The cops in Rochester also arrested a woman in the middle of giving an interview to a reporter, allegedly for standing in the street after being told to move (but they didn’t arrest the reporter, who was also in the street).

The last few charges in Texas against the activists who surreptitiously recorded video at Planned Parenthood have now been dropped. I suppose that’s a good thing, although I still feel the label “idiots” fits better than “journalists” in this case.

Finally, a new lawsuit was filed in D.D.C. by the family of murdered war correspondent Marie Colvin against Syria, alleging that she was deliberately killed by senior members of the Syrian government.

Drones

It’s wildfire season, and if you’ve got a drone, you might think it’s a cool idea to see about getting some amazing overhead footage. Think twice. In Utah, the legislature approved a measure allowing the police to shoot down, take control of, or otherwise disable drones in airspace restricted by the FAA due to wildfire. Meanwhile, California saw its first drone operator arrest, with a man who posted a video on social media of a wildfire in Sacramento being taken into custody by the state Department of Forestry and Fire Protection.

Credentialing & Convention Coverage

After journalists getting crash courses in reporting from conflict zones, we seem to have survived the conventions without journalists being denied access or anyone being shot. Apparently things could have been more pleasant in Philly, but the only real reporter mishap of which I’m aware was BuzzFeed’s D.C. bureau chief being wrestled to the ground at the outlet’s own party for blacklisted media in Cleveland. Apparently there was a misunderstanding with hotel security when he tried to ask Rudy Giuliani a question. Whoops.

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A different controversy arose with respect to the price of pool video, with five major networks allegedly jacking up their prices; other outlets are contemplating creating their own pool of digital video at lower rates. The networks have denied anti-competitive intent, saying that they’re just covering costs, but you just know someone’s going to start waving the antitrust flag sooner or later.

Outside of the conventions, there was a kerfuffle with a WaPo reporter who was excluded from Mike Pence’s first public event and patted down by police searching him for a cell phone. Pence’s campaign has expressed regret about the incident, showing a clear split with his running mate’s preferred tactics.

At the United Nations, the Committee to Protect Journalists has been accredited after years of struggle. Its application had been blocked by a subcommittee thanks to nations with poor records with respect to treatment of journalists, but the larger Economic and Social Council overrode that decision.

War Correspondents

The Pentagon’s Law of War Manual has softened a bit with respect to journalists. War correspondents are no longer treated as potential spies or targets for censorship, but scholars say that the manual’s description of protections for civilians in general is still problematic.

Prior Restraint

Well, I was hoping that this section would be empty this month. You might even have noticed that I squeezed a prior restraint case into the Access/FOIA section, to keep this space clear. But thanks to a judge of the New York Supreme Court, I can’t do that. Yep, this learned scholar of the law issued a preliminary injunction in a defamation case, which just shouldn’t happen.

But there were several orders striking down prior restraints as well, such as E.D. Ark. ruling that an Arkansas law banning political robocalls violated the First Amendment, and the appellate courts of both Georgia and Florida vacating gag orders in a custody dispute and anti-harassment case, respectively.

Broadcast/Cable/Satellite

Just a few items here:

- The D.C. Circuit once again held that the Tennis Channel failed to provide evidence to the FCC of broadcast discrimination by Comcast.
Tom Wheeler has said that the FCC won’t add new categories of de facto bad faith to its “totality of the circumstances” test for good faith retransmission consent negotiations. Meanwhile, Sinclair settled the FCC’s claim that it violated the good faith rule for $9.5 million.

The FCC’s set-top box plan continues to face obstacles and objections.

The FCC settled with Media General for $700K over allegations that it interfered with a rival’s effort to sell NBC affiliate WAGT in Augusta; Media General owns ABC affiliate WJBF in the region.

Frontier is facing a lawsuit in S.D.W.Va. claiming that it misused federal broadband stimulus funds in the course of fiber deployment.

A judge in C.D. Cal. denied AT&T’s motion to dismiss a lawsuit alleging that it failed to follow through on a promise to carry channels owned by Herring Networks if Herring helped AT&T gain government approval of its deal with DirecTV.

**Internet/New Media**

*Section 230*

When’s the last time you read Section 230(d)? And why would you? As far as I can tell from a quick Lexis search, there’s never been a reported decision relying on this provision, which adds a little compelled speech to the statute. Here’s what it says:

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

One kind of gets the impression that this subsection is a relic of the broader Communications Decency Act stricken by the Supreme Court back in 1997 (20th anniversary of *Reno v. A CLU* is next year, folks!). But that didn’t stop a mother from suing Snapchat in C.D. Cal. for failing to provide the required notices, after she caught her teenage son looking at adult content on the service.
I have my doubts about whether the compelled disclosures discussed here are constitutional (or even make sense), but that’s not the real problem. Ma’am, I hate to break this to you, but you’re not going to prevent your son from finding porn online by suing Snapchat.

One other loophole in Section 230 protection that’s rarely been explored is the argument that state law concepts of agency determine whether the individual who posts content is legally separate from the website that hosts that content. The potential mischief is obvious; one can only hope that if a state were to broaden its concept of agency in order to undermine Section 230, federal courts would not go along for the ride. In any case, the relationship between an online forum and third-party users was at the center of a decision out of S.D.N.Y. this month. Invoking New York agency law, the court held that Section 230 might not protect the forum for the actions of users given staff-like powers to moderate and control content.

The Sixth Circuit held that Google was not responsible for the conflation of the plaintiff’s name with information about a child indecency case in a search result for the Texas Advance Sheet, because the elision of the intervening material was in the original third-party content. The case has been flagged as an interesting example of a “Reverse Streisand Effect,” because the lawsuit resulted in the original questionable link being pushed down in search results by reporting about the lawsuit itself. Would-be plaintiffs take note, this only works when the original content isn’t actually about you.

In other Section 230 news, the California Court of Appeals redeemed itself a bit for its recent atrocious ruling in Hassell v. Bird, with a new decision granting Yelp’s anti-SLAPP motion in a case over allegedly disparaging reviews and photos. (Yelp has also started warning users about businesses that have a pattern of suing reviewers, which I’m sure those businesses will take calmly and rationally.) The Northern District of California held that Section 230(c)(1) blocked a pro se complaint over YouTube’s removal of user videos; oddly, for a case about removal of content, § 230(c)(2) was nowhere in sight.

The award for oddest Section 230 case this month goes to renowned Islamophobe Pam Geller, who has—get this—sued the U.S. government for passing Section 230, which she says violates her free speech rights because Facebook invokes it to remove her hate-filled screeds. Good luck with that.

Hate, Terror, and Other Internet Nastiness

That leads us into the darker corners of the Internet. The Massachusetts Supreme Judicial Court held that a teen who sent her peer text messages insisting that he follow through on his suicidal intent has to face trial for her role in his death. The Illinois Appeals Court held that the

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state’s cyberstalking law was invalid for lack of a mens rea requirement. After the shootings in Dallas, there was a rash of arrests as police went after those who were perceived to be threatening them online. And following the bile spewed forth at Leslie Jones on Twitter after she had the temerity to be a Ghostbuster while black and female, the site finally kicked Breitbart editor and recidivist troll Milo Yiannopolous off of Twitter for good. Cue the tedious claims of martyrdom by @nero and his followers.

Seriously, though – Ghostbusters. Well worth the price of admission, not without a few flaws but definitely my favorite movie of the summer so far.

Once more showing that online vigilantism is risky, the operator of a group of websites designed to name and shame sex offenders was whacked with a $325K verdict in the District of Arizona this month on claims of infliction of emotional distress, invasion of privacy, false light, and extortion. The defendant had attempted to invoke Section 230, claiming that he was drawing information from publicly available sources online.

Terms of Service

Eric Goldman and Venkat Balasubramani reported four separate cases upholding arbitration clauses in online terms of service this month. If you want a research study indicating that people probably didn’t read those clauses, a pair of scholars have got something for you to read. Meanwhile, a judge in D.Me. held that if you want to bind people to your TOS, you shouldn’t hide them behind an obscure link marked “Reference.” But, a judge in D. Conn. said, with the proper disclosures on one’s website, a service like Priceline can avoid liability on claims of hidden fees.

One presumes that most of those Pokémon Go players wandering the streets of Forest Hills didn’t read the clauses in the TOS requiring arbitration and prohibiting them from joining class actions against Niantic. On the other hand, Sen. Al Franken continues in his role as U.S. Designated Reader of Privacy Policies, and had a few questions for Niantic about what precisely the app is capturing as players are out trying to capture Mewtwo. It was worth asking – for a while, installing the app on iOS devices granted it full access to users’ Google accounts.

And that’s Niantic, not Nintendo. If you invested in Nintendo based on Pokémon Go, you might be kicking yourself a bit right now. Oh, and why is it that Microsoft Word knows that there’s an accent over the “e” in Pokémon? It doesn’t know “copyrightability,” but it knows Pokémon.
Net Neutrality

Just a quick note that trade organizations representing ISPs have sought en banc review of the D.C. Circuit’s decision on the FCC’s reclassification of broadband.

Miscellaneous

A few dribs and drabs:

- The United Nations has condemned the shutdown of internet access by governments trying to maintain control. Well, that’s nice.
- An Illinois judge ruled that Chicago would have to defend in court its effort to tax streaming media services, which residents alleged was discriminatory.
- A blogger defeated a defamation claim based on lack of personal jurisdiction in E.D. Va.; the plaintiff, the manufacturer of FIREClean gun cleaning oil, was upset about the blogger’s publication of research revealing that FIREClean was practically indistinguishable from Canola oil.
- Blizzard Entertainment, makers of “World of Warcraft” and generally good sports, sued a German company in C.D. Cal. over its business of selling software products that allow players in Blizzard’s various games to cheat.
- Ashley Madison, breakers of marriages and generally horrible people, has been targeted by the FTC over its alleged use of bots to make it appear that the female-to-male ratio on the site is balanced.
- Google has dropped its lawsuit in federal court in Mississippi to block AG Jim Hood’s investigation of the company, after the 5th Circuit ruled earlier this year that its suit was premature.
- Aaron Hirschman put up a Craigslist post offering to buy people’s votes for $20, but he had no intention of following through. An Oregon appeals court held that a law banning
offers to buy votes could not be constitutionally applied to someone who made offers that could not actually be accepted.

Internet Privacy

Hacking

It was a big month for the Computer Fraud and Abuse Act, with a pair of major rulings from the Ninth Circuit. In *U.S. v. Nosal* (that’s *Nosal II*, for those of you keeping score at home), the Court upheld the conviction of former Korn/Ferry International exec David Nosal, who used his former assistant’s password to access Korn/Ferry’s database after his own credentials were rescinded. The Court rejected the suggestion that the case was about using a shared password; rather, it found that the revocation of Nosal’s credentials informed him that he was no longer authorized to access the database, and that regardless of how he accomplished gaining access thereafter, such access was “without authorization” under the CFAA.

The Ninth Circuit followed up on that ruling with *Facebook v. Power Ventures*, in which the Court held that accessing Facebook after receiving a cease & desist letter saying that access was not authorized constituted access “without authorization” under the CFAA. The case involved Power.com, a service that allowed its users to aggregate their social media contacts, including those at Facebook. Armed with the permission of Facebook users (but not Facebook itself) Power scraped Facebook for the desired information. So far so good, said the Court – but once Facebook directly contacted Power and told it that its access violated Facebook’s Terms of Service and was not permitted, any further access by Power violated the CFAA.

What’s not at all clear, as Prof. Orin Kerr notes, is why violating a C&D is a CFAA violation, but violating the explicit directives of a website’s terms of service is not (per the Ninth Circuit’s earlier decision in *Nosal I*). Sure, criminalizing TOS violations is a bad idea, but in both cases you’ve got a direct statement from the site operator about what you’re allowed and not allowed to do. There’s a subtext here that no one actually reads terms of service, and that it’s unreasonable to impose criminal penalties (as opposed to civil responsibility) on the polite fiction that they do.

And a bonus CFAA order from the Ninth Circuit – Matthew Keys can’t stay out of prison while his appeal is pending, and has been ordered to begin his two-year sentence. He’s not the only one headed to the pokey on a CFAA rap; a former executive for the St. Louis Cardinals was sentenced to just shy of four years in prison for successfully guessing a password to an online database of Houston Astros data.
Control of Personal Information

For those of you who can’t get enough of the Ninth Circuit and privacy this month, there’s even more. The Court held that there’s a reasonable expectation of privacy in private e-mails on state-owned servers, enough so that a warrantless subpoena for the servers on which former Oregon Gov. John Kitzhaber’s emails were stored was deemed overbroad and in violation of the Fourth Amendment. And in a case over Pandora Media’s alleged sharing of users’ listening habits, the Ninth Circuit affirmed the dismissal of claims against the streaming service after the Michigan Supreme Court confirmed on a certified question that the plaintiff wasn’t a “renter” or “borrower” of music under the state’s rental privacy law.

In other notes from the other coast, we have: a biometric privacy case against Snapchat removed to C.D. Cal.; a class certified in N.D. Cal. on a claim that the Path social network collaborated with Apple to access plaintiffs’ contacts on mobile devices; and a ruling from the California Court of Appeals affirming the conviction of a teenager for misdemeanor invasion of privacy after he recorded a classmate in a bathroom stall. Sadly, the classmate committed suicide two weeks later.

And one more, from Cook County, Illinois: A mother is suing the hospital and ER nurse that treated her son, who died of a gunshot wound, after the nurse allegedly tweeted “degrading, dehumanizing and outrageous” information from the trauma room.

Intrusion

There were all sorts of bizarre reports about Pokémon Go players being sent to odd places this month, as the nation’s schadenfreude reached record levels. But mapping a virtual world onto the physical world can affect third parties as well, such as when the app sends these cheerful enslavers of innocent creatures onto private property.

Internet Surveillance

The Second Circuit handed Microsoft a remarkable win this month, holding that the company did not have to turn over customer data on a server in Ireland based on a warrant issued in the United States. The holding was based on the court’s interpretation of the Stored Communications Act, and a determination that it was not intended to apply extraterritorially. Less than a day later, the DOJ proposed a bill that would expand the reach of warrants under existing MLATs.
Meanwhile, Section 702 of the FISA Amendments Act faced a challenge in the Ninth Circuit during an oral argument this month. The case involves one of the rare defendants who knows he was targeted by bulk internet data collection under Section 702, and therefore has standing to challenge the application of the statute.

**Encryption & Other Security Measures**

So, it’s long been one of the law enforcement community’s little embarrassments that Tor, the anonymizing router network accused of facilitating criminal activity on the dark web, is funded by the U.S. State Department because it is also a critical resource for human rights activists in repressive regimes. But in a new funding bill, the Senate has tasked the State Department with ensuring that only the good guys use Tor. No hint, of course, about how you do that and maintain the effectiveness of the system when the whole point of Tor is hiding who uses it.

Besides, if Donald “Putin is My Co-Pilot” Trump is elected, we might need Tor to protect the Russian hackers he uses to dox his rivals.

**Intellectual Property**

**Copyright**

A few new copyright-related cases in July, but only a couple were typical. In C.D. Cal., Showtime was sued over its cable and online showings of the documentary “Sweet Micky for President,” allegedly without the permission of its producer (Pras Michel, co-founder of the Fugees). In S.D.N.Y., Fox News has been sued for use of a photo of the Mexico border on its website. Maybe the claims have merit, maybe they don’t, but they’re straight-up infringement claims.

The rest of the new cases, well, they’re a little different, each in its own way. In S.D.N.Y., a photographer sued Getty Images for selling licenses to 18,000 photographs that she had opened up to free use through the Library of Congress. In M.D. Fla., Sony was sued for failing to prevent the 2014 hack of its computer systems and thereby exposing several films to online piracy. The founder of KickassTorrents, the largest BitTorrent distribution site in the world, was arrested and faces multiple counts of criminal copyright infringement in N.D. Ill. And in D.D.C., the Electronic Frontier Foundation filed a declaratory judgment action against the Department of Justice over the application of the DMCA’s anti-circumvention provisions to security researchers.

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Plaintiffs had some luck in New York this month. The Second Circuit reinstated an infringement lawsuit brought by the composer of the “Iron Man Theme” from the 1960’s Marvel Super Heroes TV show against rapper Ghostface Killer. In S.D.N.Y., sports photographers’ claims against the NFL and Associated Press survived a motion to dismiss, with the court holding that the photos had sufficiently alleged that licensing agreements for the photos were void for unconscionability. Also in S.D.N.Y., a judge in a non-jury trial held that the website “Gossip Cop” infringed the copyrights in three celebrity photos, rejecting a fair use defense.

And it isn’t the first music copyright case of the election season and it’s unlikely to be the last, but W.D. Wash. denied a motion to dismiss a case against Ted Cruz’s campaign over its use of various songs in advertising.

For defense wins: HBO won a ruling in C.D. Cal. that its series Ballers did not rip off a project called “Off Season,” and the same court held that Fox’s Empire is not substantially similar to “gangsta pimp” Ron Newt’s Bigger Than Big. A California appellate panel affirmed the dismissal of an infringement claim against James Cameron over “Avatar.” (Seriously, though, James – four sequels? Please, just stop, we’re worried about you.) And the Seventh Circuit affirmed sanctions against members of Team Prenda arising out of its copyright trolling scheme.

In other copyright news: Carla Hayden has been confirmed as the new Librarian of Congress, to the acclaim of anyone with any sense. A bill to create a new copyright small claims court has been introduced, but the proposal has been criticized as susceptible to abuse. Nintendo is busily trying to shut down pirate versions of the Pokemon Go app making their way around the internet. (The “Gotta catch ‘em all!” joke is obvious, and has already been done by the linked story.)

And finally, I can’t wait to see how Stephen Colbert deals with what happened to “Stephen Colbert.”

**Patent**

Some good news for those fighting patent trolls in the Eastern District of Texas: Judge Rodney Gilstrap has dropped his controversial requirement that defendants ask his leave before filing a motion to declare a patent invalid as abstract under Section 101.

That’s of no help to Apple, though, which has declined to face a second trial in E.D. Tex. in a patent case over certain key features of its OS. The case resulted in a $625 million plaintiff’s verdict the first time around, and with a ruling against it on patent validity, Apple instead settled the case for $25 million. Well, yeah.

But on the other hand, Apple won a motion for a new trial in a patent case in which the plaintiff had previously won a verdict of $625 ... million ... wait a sec. [Jeff hurriedly checks

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the news reports.] Well, it does appear that there was a second patent verdict in E.D. Tex. for virtually the same amount that has also been vacated with a new trial ordered. Let’s see if Tim Cook wakes up tomorrow to find that it’s February 2 again.

Trade Secret & Misappropriation

Elizabeth Banks might have defeated a federal copyright lawsuit over *Walk of Shame*, but a follow-up suit in California state court has proved to have some teeth. A Superior Court judge denied a motion to dismiss claims that she breached an implied-in-fact contract with a screenwriter whose work she allegedly used.

Commercial Speech

Trademark

Three defense wins in the federal Courts of Appeals this month. In the 7th Circuit, a trademark claim over the *passing off of illegally copied “Slep-Tone” karaoke tracks* failed, with the court finding that the case was really a copyright dispute. The 9th Circuit affirmed a district court ruling that a valid “trademark co-existence agreement” barred an infringement claim over the “Crazy Horse” mark for adult entertainment. And the 11th Circuit rejected a claim over “Florida [Blank] University,” with the court noting the plethora of educational institutions using similar names.

In N.D. Cal., A&E and Lifetime are facing an infringement lawsuit over their “Fempire” feminist-oriented programming block; the plaintiffs are two women who claim to have established a brand related to female empowerment under the same mark.

In S.D.N.Y., Kanye West and Damon Dash, producers of the 2015 film “Loisadas,” fought off an infringement suit by the founder of a Latin band with the same name. The term is Spanish slang for “lower east siders” in Manhattan, and the court held that the term had artistic relevance to the film under the Rogers test.

False Advertising/Deception

In the California Court of Appeals, a dissatisfied consumer of alternative dispute resolution services sued JAMS for allegedly *misrepresenting the talents of a retired judge* on its website. JAMS fired back with an anti-SLAPP motion. The appellate court upheld the superior court’s denial of the motion, holding that the statements on the website were commercial in nature and thus excluded from the scope of California’s anti-SLAPP law.
The FTC settled a case with Warner Bros Home Entertainment over a promotional program where YouTube “influencers” were paid to promote the video game *Middle Earth: Shadow of Mordor*. The Commission alleged that WB had failed to disclose the material connection to the online promotion. In other news: they’re still making *Lord of the Rings* video games?

**Miscellaneous**

*Government Licensing & Public Fora*

We’re headed down south for this month’s licensing and public forum cases. So, [the KKK wanted to sponsor a highway in Georgia](https://www.adoptahighway.org/) under the Adopt-A-Highway Program. The state DOT rejected the application and the KKK appealed to the superior court. On cross-motions for summary judgment, the trial court held that the denial amounted to impermissible viewpoint discrimination. The DOT appealed as of right – but under the state’s procedures for administrative decisions, an appeal was only available following an application for discretionary review. The Georgia Supreme Court dismissed.

I’ll admit that I couldn’t remember which one the *Rooker-Feldman* doctrine was when I picked up this next decision from the U.S. Court of Appeals for the Fourth Circuit. Turns out that’s the one where you can’t file a federal complaint in order to get a federal court to review a state court’s decision. But, said the Fourth Circuit, that doesn’t stop you from filing parallel federal and state claims challenging the denial of a liquor license for your go-go dancing bar. Of course, the court noted, you might run into some res judicata issues depending on who reaches a decision first.

And then there is the long-running saga of the Charleston tour guides, who have claimed in D.S.C. that the city’s licensing scheme violates their First Amendment rights because all they’re doing is talking to folks. Plaintiffs moved for an injunction, Charleston moved to dismiss, and the court denied both. The court’s analysis of whether the regulation is content-based is actually quite fascinating, examining the point at which a law’s relationship to speech becomes so abstract that it cannot be deemed to target the meaning of speech. If anyone wants to chat about the implications of that line of thought, catch me sometime and bring along a whiteboard.
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**Political Speech**

In a decision that was fleetingly relevant, a judge in E.D. Va. held that Virginia law could not compel *state delegates to vote in accordance with the results of the state primary* (in this case, for Donald “What Anti-Semitic Tweet? That’s Just the Stellation of a Hexagon!” Trump). Well, something to keep in mind if we’re lucky enough to get another election someday.

**The True Miscellany**

A great ruling from the First Circuit this month in a case where the defendant was convicted on firearms charges, and then sentenced to 96 months in prison – more than triple the top end of the GSR recommendation. Quoth Judge Selya: “In this case, the sentencing court confused the message with the messenger. That led the court to blur the line between the artistic expression of a musical performer and that performer's state of mind qua criminal defendant.” I love this opinion because of the *distinction it draws between internal motive and expressed meaning*, which is often lost in free speech discussions.

And I’ll end on this one brought to y’all by loyal reader (and fellow Trek fan) Chuck Tobin:

Q: What did Gannett say to the president of North Jersey Media Group?

A: Resistance is futile.

Click the links if you don’t get it.

**Conclusion**

Thanks to everyone for your work on all of our core issues, and thanks especially to those of you whose summer vacations helped to make this a more leisurely column for me to write after last month’s double-header.

But the summer will end soon enough, and we want to see all of you in Virginia for the big conference. In particular, please find me and let me know what you think of this series of articles!

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