



# MEDIA LAW LETTER

Reporting Developments Through July 30, 2016

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# **MLRC Media Law Conference**

## **September 21-23, 2016 | Reston, Va.**

***Registration for the MLRC  
Media Law Conference is now open.***

In addition to the usual timely and topical breakouts and boutiques, this year's conference will feature plenaries commemorating the 25th anniversary of the Rodney King case – looking at both the copyright/fair use/First Amendment and police/press aspects; a Fred Friendly hypothetical case program starring Washington insiders on the eve of the election; a panel of once active MLRC members who are now federal judges; Floyd Abrams talking about his new book, "Why the First Amendment Matters"; as well as a rousing game of Family Feud: Journalism Edition; and a twist on the Next Big Thing, looking at the hits and misses of NBT sessions of the last ten years.

The full [Program](#) is also now available. We hope you will [register soon](#).

*From the Executive Director's Desk***Virginia Conference to be  
Timely – and Fun**

Two years ago, when I began working at the MLRC, the most frequently asked question I received was whether I was going to change the program and culture of our big [Virginia](#)



**George Freeman**

[Conference](#) and morph it into the characteristics of the ABA Forum's Boca Conference. Put more bluntly, the question was whether I was going to change the hard-working, barely-a-break MLRC Conference into one where we stop working at lunchtime, retire to golf, tennis or the ocean, have retrospective panels on old, interesting cases and play Journalism Jeopardy. (As the cognoscenti know, The Forum's Conference at Boca Raton was started some 20 years ago by Barbara Wall, Lee Levine and me only after I was rebuffed by the then-LDRC leadership when I asked for 2 hours during the Virginia Conference to organize something recreational, such as volleyball or softball. "No time for that," said Henry Kaufman, then GC of the LDRC.)

Over 20 years later, I find myself in charge of programming for our Virginia Conference and believe that each of the conferences should remain true to their traditions and culture and should not become indistinguishable from each other. Thus, at Reston, September 21-23, you will not play tennis or golf (unless you play hookey), you will not have huge amounts of free time on your hands, and you will not be playing Journalism Jeopardy (whose rights, I figure, are owned either by Merv Griffin or the ABA Forum).

But you will find very timely and entertaining (and practical and useful) programs – and you will have fun.

The [program](#) starts Wednesday afternoon with a look back, 25 years later, at the Rodney King case. Three experts will discuss the copyright litigation which ensued from TV stations' airing of the awful tape of his beating, and will debate whether there should be a First Amendment overlay on the fair use analysis. The panel will also discuss the quite similar Reginald Denny case which came out the other way just a year later. We are very pleased to have on the panel Steve Perry, who



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represented the media which “took” the King film, Bill Dunnegan, who just this year litigated a copyright case involving the taking of the iconic 9/11 photograph of workers holding the American flag at Ground Zero, and Lizanne Vaughn, who works for Getty Images and finds herself on both side of these disputes.

Perhaps even more important – and certainly very timely – the panel will also discuss police/press relations in the context of urban riots and unrest such as those that ensued after the violent King beating and have sadly continued in recent years in Ferguson, Baltimore and St. Paul. We are very pleased that the Police Chief of Washington, DC Cathy Lanier will be joining the panel and will be giving her views not only on the pressure the police are under in these situations, but also on how to improve the relationship between the cops and the press, access of journalists to demonstration and crime sites, Police BodyCam policies and more. Equally timely, Mickey Osterreicher, who just recently gave training sessions to the Cleveland and Philadelphia police in advance of the Republican and Democratic Conventions held in those cities, will also contribute to the session.



**Attorney David Bodney poses with the First Amendment Monument in Phoenix.**

Following that first plenary session, we will have a first: Chris Bliss, a comedian, will entertain us. But Chris is no regular comedian; he is an expert on the Bill of Rights and will riff on the First Amendment. Additionally, he will speak about his pet project: to establish Bill of Rights Memorials on the grounds of each of the 50 state capitols. With the help of our own David Bodney, he has succeeded in building such a memorial at Arizona’s state capitol, and is working on plans in additional states. Perhaps he can get some additional support from some of our members for what sounds like a terrific project.

The first night’s dinner will feature a comeback of the Laura Handman/George Freeman Fred Friendly hypothetical case study featuring a number of Washington insiders. The

focus of the hypo will be on the 2016 Presidential campaign - - and it’s hard to say what the

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issues will be since new and unbelievable fact situations seem to arise every day. Indeed, a week ago who could have imagined a Julian Assange and/or Russian-aided hack of Democratic National Committee emails, the Bartnicki question of whether the media should be publishing such illegally hacked materials, and now the GOP candidate for President saying that Russia should aid in uncovering the thousands of emails his opponent allegedly deleted. Add hidden camera pickup of a campaign meeting where a candidate talks about a lost 47 percent of the electorate and maybe the airing of a long-lost sex tape of Donald Trump and you can see why this should be an entertaining evening.

Among the panelists wrestling with these issues will be Karen Finney, a senior advisor and spokesperson on the Hillary Clinton campaign, Kevin Madden who played a similar role on the Romney campaign, both of whom are frequent television commentators; Ken Stickland, NBC News Washington Bureau Chief, and Sam Stein, Senior Politics Editor of Huffington Post; and media lawyer Barbara Wall of Gannett and plaintiffs' lawyer Tom Clare.

Thursday's breakfast – starting about 15-30 minutes later than two years ago – will feature two or three federal judges who used to be active MLRC members, including Mark Hornak (W.D. Pa) and Wendy Beetlestone (E.D. Pa). Both were superb media lawyers whom I worked with many years ago, and in this program, moderated by my former colleague and client Adam Liptak, currently The New York Times Supreme Court correspondent, they will talk about what media cases look like from their different vantage point on the federal bench.

At lunch Thursday we will not be playing Journalism Jeopardy, but we will be playing a more raucous game of Journalistic Family Feud. There will be four teams, each from a geographical region of the country – I was told having law firms compete might be a little too intense – trying to match audience answers to legal and journalistic questions. All registrants should look for the questions in early September, and please, please answer them so that what the "Survey Says" will be most accurate. Questions will range from who is your favorite news columnist to who was the best First Amendment Supreme Court justice and plenty others in between. I am not sure whether a Richard Dawson or Steve Harvey look-alike will be moderating.

Friday morning at breakfast – again scheduled later than in past years – Floyd Abrams will talk about Why the First Amendment Matters, the title of a new book he is writing. I have



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known Floyd for 42 years (since, as a summer associate, I walked into his office seeking work, was greeted with a “You’re just the man I was looking for”, and left – much to my chagrin and his glee – with a bankruptcy case involving a German bank). But in that time, I have never heard Floyd give a speech - or, more important, make an oral argument - which was not elegant, nuanced and thought-provoking. Indeed, with his dulcet tones that have persuaded many a judge, I am confident that our audience, even if just waking up from Thursday night partying, will be totally engaged.

Finally, at our closing lunch of Friday, as in past years, we will have a session focused on The Next Big Thing. But in addition to predicting a few hot trends in media law, this will be NBT with a twist. We will take a look back at prior NBT sessions over the last 10 years and revisit some of the NBT candidates to judge whether, in retrospect, they were hits or bloopers.

All of the above relates, of course, only to our plenary sessions. Space doesn’t allow me to summarize what for many are the most valuable part of our conference – the small group boutiques and breakout sessions. We will be presenting 15 boutiques on specialized and engaging topics in three different time slots, enabling an attendee, for example, to participate in boutiques on Data Privacy 101 (in response to popular demand in evaluations last year, this will be a beginner’s course on the subject), Cross-Border Vetting (subtitled “You’re Not in Kansas Anymore”) and Encryption and Protecting Reporters’ Materials (a new subject). Or another attendee might elect to go to boutiques in FOIA & BodyCams, Trial Tales (focusing on the Hulk Hogan v. Gawker and Mitre v. HBO trials) and Entertainment Law. A session on Ethics will also be available for those hungry for CLE credits in that department.

And, of course, we will have breakout sessions in three omnibus topics: Digital Media (including sec. 230 developments, right to be forgotten and more); Intellectual Property Torts (copyright, trademarks, ROP, best practices in IP clearance and, very timely given a number of bands’ from the Rolling Stones to Queen (“We Are the Champions”) objections to the playing of their songs at the national conventions, the use of music in election campaigns; and Publication Torts (developments in old-fashioned libel and privacy).

All of this ignores maybe the best reason to attend: the ability to hobnob and network with old friends, colleagues and clients and potential clients at our many receptions and meals. Given all of the above, how can you not be there? [See you in Virginia!](#)

*We welcome responses to this column at [gfreeman@medialaw.org](mailto:gfreeman@medialaw.org); they may be printed in next month’s MediaLawLetter.*

## *What Happens When You Condense a Month of Stories into a Single Article?*

### **The Monthly Daily**

#### **An Ongoing Experiment in Drinking from the Firehose**

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.

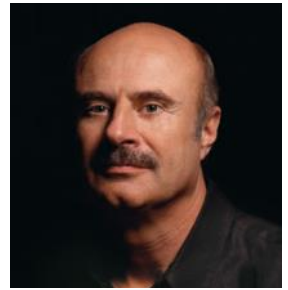
A few new cases in the state courts of Florida, where thanks to Terry Bollea the tawdriest of disputes and the C-listiest of celebrities can now expect a warm welcome:

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- [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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*(Continued from page 9)**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

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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



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# D.C. Cir. Sides with Microsoft to Quash Stored Communications Act Warrant

## *Contents of Email Account Stored in the Cloud from Server Located Outside the United States*

By Alison Schary

On July 14, 2016, the Second Circuit issued a long-awaited decision in Microsoft's challenge to a search warrant seeking the contents of an email account stored in the cloud overseas, quashing the warrant as unlawful for its extraterritorial reach. [\*Microsoft v. U.S.\*](#)

### Background

The case started in 2013, when a magistrate judge in New York issued the warrant in question under the Stored Communications Act, 18 U.S.C. 2703(a) in connection with a criminal narcotics investigation. Microsoft complied in part with the warrant by producing certain “non-content information” about the account. But Microsoft refused to produce the contents of the requested emails because they were stored in Ireland, arguing that this would constitute an unlawful extraterritorial execution of the warrant. In July 2014, the federal district court denied Microsoft's motion to quash the warrant and upheld its validity. Microsoft appealed to the Second Circuit. The case drew significant *amicus* support, with briefs submitted by coalitions of media companies, technology companies, academics, and civil liberties groups from the U.S. and Europe.

The case centered on how to interpret the warrant at issue. Section 2703(a) of the Stored Communications Act states that in order to obtain the contents of electronic communications stored for less than 180 days, the government must obtain a warrant “issued using the procedures described in the Federal Rules of Criminal Procedure” or state warrant procedures. Rule 41 of the Federal Rules of Criminal Procedure, which concern the issuance of warrants, restricts the geographical reach of such warrants to U.S. federal districts and other U.S. jurisdictions, including U.S. territories, possessions, and diplomatic or consular missions.

The government argued that a Section 2703(a) warrant should not be considered a traditional “warrant” – which cannot be executed abroad – but rather a “hybrid” instrument combining aspects of both a warrant and a subpoena. It argued that the proper focus of the inquiry is the place of “compelled disclosure.” Because Microsoft has remote access to the contents of user accounts no matter where in the world they are stored, the government argued that the SCA

**The government argued that the SCA warrant should be considered to be executed where Microsoft is located – in the United States – regardless of where the target emails are stored.**

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warrant should be considered to be executed where *Microsoft* is located – in the United States – regardless of where the target emails are stored.

Microsoft argued that on its face, an SCA warrant is still a search warrant – and warrants cannot be executed abroad. The Stored Communications Act is silent on the issue of extraterritoriality, and it is therefore subject to the general presumption against extraterritorial application of U.S. law. Supported by *amici*, it also argued that allowing the U.S. government to compel Microsoft to turn over email accounts outside the United States would bring U.S. law into conflict with foreign privacy regimes; damage the ability of U.S. technology companies to operate in foreign markets; and embolden other countries, such as China and Russia, to take the same approach by ordering companies operating within their borders to disclose the contents of emails in the United States.

An *amicus* brief on behalf of a coalition of 29 U.S. and foreign media organizations also addressed the First Amendment implications of the case, reminding the court that the cloud serves as an electronic newsroom and that warrants to search that newsroom must comply not only with basic Fourth Amendment protections but also with the requirements of the First Amendment, the Privacy Protection Act, and other applicable laws and regulations. Microsoft and its *amici* further objected to the government’s position, accepted by the district court, that the emails in question should be considered the “business records” of Microsoft rather than the personal documents of the user.

**An amicus brief on behalf of a coalition of 29 U.S. and foreign media organizations also addressed the First Amendment implications of the case.**

### Second Circuit Decision

Following a lively oral argument in September 2015, the court took over 10 months to reach a decision. On July 14, Judge Carney issued the Court’s opinion. The decision focused closely on the text and history of the statute, finding that it used the term “warrant” as a term of art that carried with it a presumption against extraterritorial application. The court also considered the Act’s focus on user privacy, both by its terms and its legislative history, to bolster its opinion that the “focus” of the warrant should be where the email is located – here, in Ireland – rather than where Microsoft is located. Based on the text of the statute and the overall focus of the Act, the court held that the SCA warrant could not compel disclosure of the contents of emails stored outside the United States and accordingly ordered it quashed.

Judge Lynch concurred in the court’s judgment, but wrote separately to explain that he came to this conclusion on narrower grounds. Judge Lynch emphasized that he did not agree with the majority’s finding that this case concerned user privacy, noting that Microsoft had the sole

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discretion to decide where user emails would be stored and that the record does not even indicate whether the emails belong to a U.S. or an Irish citizen. Ultimately, however, Judge Lynch agreed that the Stored Communications Act, both on its face and through its use of the term “warrant,” did not contemplate extraterritorial application – and therefore must be held to the general presumption against it. As he did at oral argument, Judge Lynch invited Congress to revisit the law in light of the modern technological landscape.

It remains to be seen whether the government will seek cert on the Second Circuit’s decision. Nevertheless, the case is an important one, and this issue is sure to arise again. Above all, the case highlights the severe limitations of the Electronic Communications Privacy Act, which was passed in 1986. In the 30 years since, the technological landscape has changed dramatically. With the advent of mobile communications and cloud storage, the complexity of these legal issues already far exceeds the use cases envisioned by the law’s drafters. Bringing ECPA and other technologically-outdated laws into the 21<sup>st</sup> century should be a key policy issue for the next administration.

**The case highlights the severe limitations of the Electronic Communications Privacy Act, which was passed in 1986.**

*Laura Handman and Alison Schary of Davis Wright Tremaine LLP submitted an amicus brief on behalf of a coalition of media organizations in support of Microsoft’s Second Circuit appeal. Peter Karanjia of Davis Wright Tremaine LLP submitted an amicus brief on behalf of Amazon and Accenture in support of Microsoft’s Second Circuit appeal. Microsoft was represented by E. Joshua Rosenkranz, Robert Loeb, and Brian P. Goldman of Orrick, Herrington & Sutcliffe LLP; James M. Garland and Alexander A. Berengaut of Covington & Burling LLP; and Guy Petrillo of Petrillo Klein & Boxer LLP.*

## Recent MLRC Committee Publications

### **Legal Considerations for U.S. Media Companies Who Send Employees Into "Harm's Way"**

An updated outline containing practical tips and guidance to help keep media employees safe whether working in the U.S. or abroad.

### **Using Trademarks in Expressive Works**

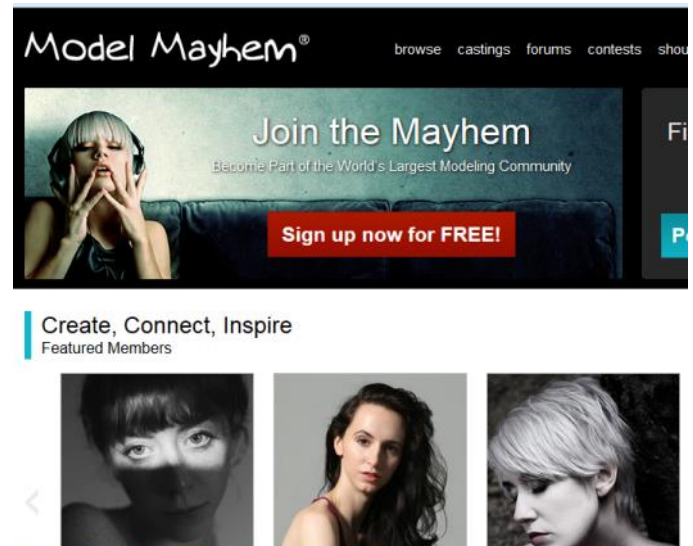
An in-depth discussion of the main legal defenses that may enable content creators to avoid the time and expense of establishing that consumer confusion is unlikely under the applicable multi-factor test.

# Ninth Circuit Limits Scope of Communications Decency Act Section 230 Protections

By Brook Hopkins and Rauvin Johl

Courts overwhelmingly interpret Section 230 of the Communications Decency Act to broadly immunize internet service providers from liability for user generated content. In *Doe v. Internet Brands*, the United States Court of Appeals for the Ninth Circuit departed twice from that consensus interpretation and narrowed the scope of this important immunity—first in 2014 and again in May of this year after it reheard the case, which is still subject to a pending petition for rehearing en banc. In both panel opinions, the Court held that Section 230 did not bar a negligence claim alleging that an online media company failed to warn users of a criminal scheme targeted at site users. [\*Doe v. Internet Brands\*](#), No. 12-56638, 2016 WL 3067995 (9th Cir. May 31, 2016).

The Ninth Circuit's May 2016 opinion focused on the specific facts of *Doe v. Internet Brands* and was complicated by some uncertainty about whether the perpetrators actually used the website to communicate with their targets. Ultimately, the panel held that the claim did not treat the website as a publisher of third-party content and therefore that Section 230 did not bar the claim. Although the decision can be confined to its facts, it nevertheless creates uncertainty about the scope of Section 230 immunity and could lead to an increase in burdensome litigation against website operators.



## Background

Internet Brands, Inc. owns ModelMayhem.com, a networking site for professionals in the modeling industry. The case arises out of a contemptible scheme perpetrated by two men who used ModelMayhem.com to lure models to fake auditions where the men drugged and raped them and later sold videos of the attacks as pornography.

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Jane Doe, a victim of this scheme, brought a negligence suit against Internet Brands alleging that it had knowledge of the scheme but failed to warn ModelMayhem.com users. Internet Brands moved to dismiss the suit, arguing that Doe's claim was barred by Section 230 and, in the alternative, that Internet Brands did not owe Doe a duty. The district court did not reach the issue of whether Internet Brands had a duty to warn its users, as it granted the motion to dismiss and held that because the duty to warn alleged by Doe was based on Internet Brands' status as a publisher of third party content, the claim was barred by Section 230. *Doe No. 14 v. Internet Brands, Inc.*, CV 12-3626-JFW at 4 (C.D. Cal. Aug. 16, 2012). Doe appealed to the Ninth Circuit.

In the initial appellate decision in the case, issued in September 2014, a unanimous panel of the Ninth Circuit reversed on the grounds that Doe's failure to warn claim was outside the scope of Section 230 protection. (Both the September 2014 and May 2016 panel decisions were unanimous and authored by Judge Richard R. Clifton. The other panel members were Ninth Circuit Judge Mary M. Schroeder and District Judge Brian M. Cogan of the Eastern District of New York, sitting by designation.)

The panel explained that Section 230 was intended to prevent liability against providers of interactive computer services for claims that treat them as publishers based on whether and how they exercise editorial control over user-supplied content. According to the initial panel decision, Doe's claim was not premised on Internet Brands' role as a publisher of user content. Instead, her contention was that Internet Brands had a special relationship with its users that created a duty to warn them of criminal activity associated with the website. Because this duty supposedly "would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content," the panel held that the claim was not barred by Section 230. *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 897 (9th Cir. 2014), *reh'g granted*, opinion withdrawn, 778 F.3d 1095 (9th Cir. 2015), and opinion superseded *sub nom.* No. 12-56638, 2016 WL 3067995 at \*8 (9th Cir. May 31, 2016).

The panel's initial decision also reasoned that the free speech concerns underlying Section 230 were not implicated by Doe's claim. Section 230 was passed to "avoid the chilling effect upon Internet free speech ... occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." *Id.* at \*13 (quoting *Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 387 (Ct. App. 2006)). Since Doe was injured as a result of Internet Brands failing to notify her of the criminal scheme rather than from harmful messages communicated on ModelMayhem.com, the panel's initial decision held that Section 230 did not apply.

**Although the decision can be confined to its facts, it nevertheless creates uncertainty about the scope of Section 230 immunity.**

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Internet Brands sought rehearing and a coalition of industry associations and social media platforms filed an amicus brief in support. These amici stressed the negative impact that a narrowed interpretation of Section 230 would have on interactive computer service providers who could face burdensome litigation over third-party interactions facilitated by their websites.

The panel immediately agreed to rehear the case and held a new oral argument in April 2015. But its subsequent decision, issued May 31, 2016, largely mirrored the original decision. The new opinion expanded the panel's rationale for holding that the claim did not treat Internet Brands as a publisher by noting that the claim was not based on the content of Jane Doe's published profile or information gleaned by Internet Brands through monitoring its site. The new opinion also emphasized that Internet Brands was alleged to have obtained its knowledge of the scheme from outside sources and stressed that interactive service providers were not required to monitor the content of their sites to discover content that might merit a warning. Perhaps understanding that its opinion represented a departure from the broad interpretation ordinarily given to Section 230, the panel noted that Congress could have used broader language in drafting the CDA if it wanted Section 230 protection to be wider in scope. *Id.* at \*14. Internet Brands has filed a further petition for rehearing en banc.

**Amici stressed the negative impact that a narrowed interpretation of Section 230 would have on interactive computer service providers who could face burdensome litigation over third-party interactions facilitated by their websites.**

### Analysis

The new panel decision is a departure from the consensus among courts that the protections that Section 230 affords to online service providers should be liberally construed. *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (describing Section 230 immunity as “robust”); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) (explaining that there “has been near-universal agreement that section 230 should not be construed grudgingly”). Whether the decision will have lasting effects, however, is unclear. Assuming the latest decision survives further appellate review, defendants will likely seek to limit the holding of the decision to its unusual facts.

Although the latest opinion is somewhat muddled on this point, the holding appears to be based on the panel's understanding that the perpetrators never used the website to communicate to their victims, which in the panel's view meant that Doe's failure to warn claim did not in any sense treat Internet Brands as a publisher of harmful communications from the perpetrators. *Doe v. Internet Brands*, 2016 WL 3067995, at \*11 (9th Cir. 2016) (stating that “Doe does not

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claim to have been lured by any posting that Internet Brands failed to remove”). Instead, the panel viewed the failure to warn claim as entirely based on the alleged special relationship between Doe and the website. By contrast, in the ordinary suit against interactive service providers, the claim is based at least in part on the content of messages communicated through the defendant’s website. *See e.g., Doe v. MySpace Inc.*, 528 F.3d 413, 416 (5th Cir. 2008) (declining to hold a webpage liable after a minor was contacted via the webpage and assaulted).

The impact of the new panel decision may also be mitigated by the fact that, to prevail on her negligence claim, Doe must still show that Internet Brands owed her a special duty in order for her negligent failure to warn claim to succeed. That is a question of state law that requires further litigation. If and when that question is presented on remand, there is a substantial prospect that the district court will hold, as a matter of California law, that interactive computer service providers and their customers do not share a “special relationship” and, therefore, that no duty to warn exists in these circumstances.

Even with its unusual facts, *Doe v. Internet Brands* could have a significant impact on interactive computer service providers. The Ninth Circuit’s decision may be seen by some plaintiffs’ counsel as an invitation to try to skirt Section 230 immunity by fashioning their claims against websites as failure to warn suits. Claims previously barred by Section 230—for example, that a social networking website did not adequately regulate access to content, which resulted in an underage user being lured into danger—could be reframed as a failure to warn users of the dangers associated with online anonymity.

**If the new panel decision remains intact and state law were deemed to impose a duty to warn, the practical consequences of adhering to such a duty could be enormous.**

If the new panel decision remains intact and state law were deemed to impose a duty to warn, the practical consequences of adhering to such a duty could be enormous. Operators of websites and other online platforms would arguably be required to provide users with warnings of all manner of evils and harms that might befall users of their services or else face litigation and possible liability. Given the ubiquity of the online services and the dangers that may stem when millions of people communicate with one another regarding virtually any topic, the burdens associated with providing such warnings, or with having to defend litigation for failing to provide them, could be extraordinary. The panel’s recent decision seemed to make light of such concerns, suggesting that the “liability would make operating an internet business marginally more expensive,” without acknowledging the logistical difficulty associated with delivering warnings. *See Doe v. Internet Brands*, 2016 WL 3067995, at \*14.

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In fact, if interactive service providers were to face liability based on failure to warn theories, they may have little choice other than to bombard their uses with emails and pop-up messages alerting them to various dangers, however remote. The revised panel decision provides scant guidance as to when those warnings would be required, potentially leaving website operators to figure it out through trial and error under constant threat of litigation.

The Ninth Circuit's decision also creates tension among the circuits and conflicts with its own precedent. In *Barnes v. Yahoo!, Inc.*, the Ninth Circuit rejected an attempt to cleverly fashion a claim in order to obscure the fact that the claim was based on the publication activities of the defendant. See 570 F.3d 1096, 1102 (9th Cir. 2009) (“a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory . . . to negligence”).

The First Circuit recently held that claims that a website facilitates illegal conduct necessarily treat the website as a publisher. See *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (holding that Section 230 protects websites from liability for structuring its website to facilitate human trafficking). *Doe v. Internet Brands* and *Doe v. Backpage.com* treat similar conduct—failure to prevent the criminal activity of users and failure to warn about criminal activity—in an opposite manner. This leaves websites hosting user generated content without clarity regarding when the protections of Section 230 will apply.

Internet Brands has petitioned for rehearing and rehearing en banc, and an industry amicus coalition has once again weighed in in favor of that petition. If the petition is granted, the Ninth Circuit will face a choice about whether to continue its formerly broad interpretation of Section 230 in cases like *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003), and *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc), or to narrow the scope of the immunity and undermine the protection that Congress intended to provide.

*Brook Hopkins is Counsel and Rauvin Johl, a summer associate, at Wilmer Cutler Pickering Hale & Dorr. The firm represented a group of amici in support of Internet Brands at the Petition for Rehearing stage.*

# The Latest on Network Neutrality

By Christopher W. Savage

## What Just Happened?

On June 14, 2016, the D.C. Circuit upheld the FCC's 2015 *Open Internet Order* against a wide range of legal challenges. *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (2015) (*Open Internet Order*), affirmed, [\*United States Telephone Ass'n v. FCC\*](#), 2016 U.S. App. LEXIS 10716 (D.C. Cir. June 14, 2016).

The FCC's Open Internet rules were adopted in March 2015, and have formally been in effect since June 2015, when the court denied requests for a stay while the case was on appeal. This means that, from a certain narrow perspective, **nothing** just happened: rules the FCC promulgated 15 months ago, and that had been in effect for a year, remained in effect.

Continuing (for a bit) with this narrow perspective, it is also noteworthy that the substance of the FCC's current Open Internet rules is generally consistent with how the FCC has been approaching this issue for a decade, dating from the FCC's Open Internet "principles" from back in 2005. Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*) at ¶ 4.

Back then, the FCC declared that consumers are generally "entitled" to: (a) access the lawful Internet content of their choice; (b) run applications and use services of their choice; (c) connect their choice of legal devices that do not harm the network; and (d) have competition among network providers, application and service providers, and content providers. The 2015 Open Internet rules reflect various changes, driven by several turns of the regulatory wheel, as compared to the 2005 "principles." Even so, in their essential features, the 2015 rules are not dissimilar to what the FCC was trying to do a decade ago. The key features of the just-sustained rules are:

- ISPs may not block access to edge providers, content, or the use of non-harmful devices (subject to reasonable network management practices);
- ISPs may not "throttle" (degrade the speed/quality of) access to edge providers, content, or use of non-harmful devices (again, subject to reasonable network management);
- ISPs may not enter into "paid prioritization" deals, *i.e.*, may not get paid by a third party to give that third party's content a faster/smooth path through the ISP's network.
- As a general standard of conduct, ISPs may not do anything unreasonably interferes with end users' ability to access lawful content or to use non-harmful devices, or with edge providers' ability to disseminate their content.

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- ISPs have to meaningfully disclose the technical characteristics of their services (speed, latency, packet loss) as well as any network management practices they employ.
- The FCC will entertain case-by-case review of situations where the terms on which an ISP interconnects its network with other networks might interfere with the agency's Open Internet goals.

All of the above rules apply to wireless broadband providers just as they do to landline providers (noting that the different technical characteristics of wireless networks might lead to different network management activities being deemed acceptable). While the substance of the 2015 rules is clearly derived from prior efforts, in the earlier versions, wireless broadband providers were expressly subject to less stringent requirements. So even under the “nothing has really changed” perspective, this is a pretty big change.

Moreover, it's not even clear that the FCC's new rules are particularly controversial in practice. There will certainly be disputes about particular ISP practices as things go forward, but in the main, major ISPs have said that they generally *support* network neutrality, don't want to restrict what their subscribers can download, etc. *See, e.g.,* C. Silliman, “Net Neutrality: a path forward” (March 21, 2016), available at: <http://www.verizon.com/about/news/net-neutrality-path-forward> (accessed July 15, 2016). Mr. Silliman is listed as Verizon's General Counsel and Executive Vice President for Public Policy. *See also* “Comcast is Committed to an Open Internet,” <http://corporate.comcast.com/openinternet> (accessed July 15, 2016).

So, if all that happened is that the court affirmed the latest version of rules implementing a decade-old FCC policy that ISPs, on the whole support, then what's the big deal?

**The real, significant controversy animating the last decade of regulatory debate about network neutrality has been over whether the FCC can regulate “the Internet” at all and, if so, how and under what legal authority.**

### **The Big Deal: The Courts Just Upheld Broad FCC Authority to Regulate the Internet**

The real, significant controversy animating the last decade of regulatory debate about network neutrality has been over whether the FCC can regulate “the Internet” at all and, if so, how and under what legal authority.

In 2005, the Supreme Court approved an earlier FCC ruling (from 2002) holding that broadband Internet access provided by cable companies was an integrated “information service,” not subject to traditional common carrier regulation of the kind applied to telephone companies. *National Cable Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Common carrier regulation applies in various forms to a wide range of

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industries. At the federal level, for telecommunications carriers, common carrier regulation is embodied in Title II of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201 *et seq.*

The FCC adopted its open Internet “principles” in the wake of that Supreme Court ruling. The problem of the legal basis for FCC regulation arose when the FCC tried to enforce the “principles.” The FCC – pointing to that same Supreme Court case – said that it had “ancillary” authority to treat its principles as enforceable rules, but the D.C. Circuit disagreed. In an early 2010 decision, the court held that because information services were deregulated, there was nothing that the principles were “ancillary” to. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The FCC’s “ancillary” regulatory authority derives from 47 U.S.C. § 154(i), which empowers the Commission to “make such rules and regulations ... as may be necessary in the execution of its functions.”

On remand from that decision, the FCC (at the end of 2010) came up with a set of actual rules (rather than just principles) and, following up on a suggestion from the D.C. Circuit, said that its authority to regulate broadband ISPs arose from Section 706 of the Telecommunications Act of 1996 (codified at 47 U.S.C. § 1302) – which it had alluded to in its defense of the “principles,” but which it had much earlier said did *not* provide any independent authority to act. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

This was still not good enough for the D.C. Circuit. In 2014, the court ruled that yes, the FCC had identified a good reason to regulate the relations between broadband ISPs and their customers, and yes, Section 706 was a sound legal basis for taking action – even though ISPs were information service providers. And, no, there were no immediate substantive issues with the rules the FCC had adopted. But there was still a problem: saying that ISPs could not block or discriminate against lawful edge provider content looked to the court like a form of common carrier regulation, and the Communications Act is very clear that if someone *isn’t* a common carrier, the FCC can’t impose common-carrier-like regulation on them. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The ban on regulating non-carriers as though they were carriers is in the definition of “telecommunications carrier,” which states that an entity shall be treated as a common carrier “only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(51).

The *Verizon* decision laid the groundwork for the current FCC rules. The FCC could have tried to accomplish its regulatory goals by fashioning rules under Section 706 that did not amount to common carrier regulation – indeed, that was evidently its first choice when it issued its proposal in May 2014. See *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Open Internet NPRM*) at ¶¶ 110-41. But by the time it reached its decision, it instead chose to re-think its earlier view that broadband Internet access was an information service and, instead, to reclassify that activity as a

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“telecommunications service,” at least in theory subject to the full range of traditional utility-style common carrier regulation. *Open Internet Order* at ¶¶ 341-63.

In practice, the FCC chose to “forbear” from applying most traditional regulatory obligations to broadband ISPs. (Under 47 U.S.C. § 160, the FCC may choose to forbear from, i.e., not apply, any provision in the Communications Act as long as various specific conditions are met. At a high level, forbearance is permitted if enforcing the regulation is not needed to ensure that the regulated entity’s services will be offered on just and reasonable terms and that consumers will remain protected.)

Notably, however, the FCC did **not** forbear from applying Sections 201 and 202 of the Communications Act. Those two sections are in many ways the bedrock of traditional regulation, banning any “charges, practices, classifications, and regulations” of the regulated service that are “unjust or unreasonable,” and banning “unjust or unreasonable” discrimination among customers. By deciding **not** to forbear from those two key sections, the FCC created a situation in which, even if its rules turn out to be manageable for broadband ISPs (and, as suggested above, there will certainly be some disputes about those rules), Sections 201 and 202 will hang like the proverbial Sword of Damocles over the broadband industry. If the agency ever decides that it wants to impose more stringent requirements on broadband ISPs, the continued applicability of Sections 201 and 202 will provide a fertile ground from which to begin.

Not surprisingly, the industry sought to have the FCC’s action set aside on appeal.

### What the D.C. Circuit Held

The court split 2-1, with Judges Tatel and Srinivasan in the majority and Judge Williams writing a partial dissent. The majority opinion:

- Sustained the FCC’s authority to reclassify mass market broadband Internet access as a telecommunications service (as opposed to an information service);
- Sustained its authority to include interconnection between broadband ISPs and other networks within the scope of its regulations;
- Sustained its authority to treat broadband wireless Internet access the same as wired broadband;
- Sustained its decision to forbear from applying most Title II obligations to broadband ISPs;
- Sustained its specific “open Internet” rules; and

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- Rejected claims that the rules violate the First Amendment.

Judge Williams partially dissented, arguing that there were fatal flaws in the economic analysis the FCC used to justify its rules. He argued that the FCC could not logically impose its specific rules – no blocking, no throttling, and no paid prioritization – without first concluding that broadband ISPs have market power, a conclusion that the FCC seems specifically to have chosen to avoid reaching. Judge Williams did not, however, question the legal authority of the agency to reclassify broadband Internet access as a telecommunications service.

By confirming that the FCC’s traditional regulatory authority extends to the provision of mass market broadband Internet access, the court dealt a significant blow to claims that broadband providers either must as a legal matter, or should as a policy matter, be left to operate largely free of traditional common carrier (or “Title II”) regulation. Those challenging the FCC’s rules may continue to pursue those claims by seeking rehearing by the entire D.C. Circuit and/or review in the Supreme Court.

The court’s analysis of the main issues is outlined in more detail below.

### **Reclassification of Broadband as a Telecommunications Service**

The issue of reclassifying mass market broadband services from the category of “information service” to the category of “telecommunications service” applies to both landline and wireless broadband (although wireless presented some additional, specific issues noted below). On the overall issue, the court rejected several arguments asserting that the FCC could not lawfully interpret the definition of “telecommunications service” in the Communications Act to encompass broadband Internet access:

First, the court rejected the claim that broadband Internet access unambiguously falls within the definition of an information service. In *Brand X* the Supreme Court had held that the relevant statutory definitions were ambiguous, which gives the agency authority to adopt any reasonable interpretation of the language.

Second, the court rejected the claim that the FCC’s order reflected an unreasonable interpretation of the statute, specifically upholding the agency’s conclusion that DNS and caching were best viewed as managing or facilitating the provision of broadband transmission – and thus carved out of the definition of “information service” – not as activities that converted the overall offering into an information service. (These are the key broadband-related functions

**Those challenging the FCC’s rules may continue to pursue those claims by seeking rehearing by the entire D.C. Circuit and/or review in the Supreme Court.**

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on which the FCC relied to treat broadband as an information service in its original 2002 decision regarding cable modem service.)

Third, the court ruled that the FCC had adequately explained the change from its previous position that broadband was an information service.

Fourth, the court rejected Judge Williams' argument that the FCC was required to find that broadband providers exercised market power as a prerequisite to classifying broadband as a regulated telecommunications service, holding that nothing in the language of the statute requires such a finding.

Fifth, the court rejected claims that the FCC had not adequately considered reliance by the industry on the previous classification of broadband.

Finally, the court rejected the claim that before broadband providers can be classified as "telecommunications carriers" under the Communications Act, the FCC must show that they meet the common law test for "common carriers" under *NARUC v. FCC*.

The court also rejected two procedural claims: First, it ruled that the FCC had provided sufficient notice that it was considering reclassification. Second, it ruled that complaining parties had had an adequate opportunity to address the Commission's reliance on consumer perceptions of what ISPs offer as a basis for its ruling.

### **Regulating Interconnection between Broadband ISPs and Other Networks**

A particularly controversial aspect of the FCC's ruling was its decision to assert regulatory authority over interconnection arrangements between broadband ISPs and other networks. The agency stated that if such arrangements were not subject to its authority, broadband ISPs could undermine the effectiveness of the substantive rules by restricting or manipulating the interconnection terms available to other networks.

Those challenging the FCC's order first argued that the agency had not given adequate notice that it might regulate interconnection. The court, however, rejected that claim, pointing to FCC statements that showed that the issue had indeed been teed up for consideration.

On the merits, the challengers argued that, under the court's earlier *Verizon* decision, the FCC could not treat interconnection with other networks as regulated without finding that broadband providers were offering a telecommunications service, not just to end users, but also to "edge providers" (*i.e.*, providers of online content, such as Google or Facebook). Some had argued that because edge providers do not pay broadband providers for service, the functions the edge

**A particularly controversial aspect of the FCC's ruling was its decision to assert regulatory authority over interconnection arrangements between broadband ISPs and other networks.**

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providers receive do not constitute a “telecommunications service and, therefore, cannot be subject to common carrier regulation. The court ruled, however, that once the agency reclassified the end user offering as a telecommunication service, it was reasonable to extend regulation to interconnection as well, on the grounds that such interconnection was needed to provide the newly-regulated service.

### **Regulating Mobile Broadband on the Same Terms as Wired Broadband**

The FCC’s decision to regulate mobile broadband on the same terms as wired broadband was controversial both because of the generally-recognized differences in the technical characteristics of wired and wireless networks and because of a number of separate statutory provisions that apply to mobile services.

The key legal question was whether mobile broadband meets the statutory definition of an “interconnected” mobile service, which in turn depends on whether mobile broadband service permits connections to the “public switched network.” Historically, the FCC understood the “public switched network” to refer to the “public switched *telephone* network.” In extending regulation to mobile broadband, the FCC changed its understanding of that term to include the Internet as well. On that basis, it concluded that mobile broadband was indeed an “interconnected” service.

The court rejected claims that the FCC had not provided adequate notice of the possibility of extending regulation to mobile broadband, noting that various wireless industry parties had debated the issues in detail in submissions to the agency. On the merits, the court held that the FCC had acted within its authority. It noted that Congress had specifically empowered the agency to set the definitions of both the term “interconnected” and the term “public switched network,” and rejected the claim that Congress itself required treating that term as limited to the *telephone* network. In the most technically complex part of its ruling, the court upheld the FCC’s reliance on the fact that mobile broadband users can use VoIP applications to call standard mobile (and landline) telephone numbers, and vice versa, as sufficient grounds to conclude that mobile broadband was indeed “interconnected” both with the Internet at large and the traditional telephone network “because it gives subscribers the ability to communicate to all users of the newly defined public switched network.”

### **Forbearance from Applying Most of Title II to Broadband ISPs**

Although the FCC reclassified mass market broadband service as a telecommunications service subject to Title II, it also refrained from applying most provisions of Title II to broadband providers, relying on its authority to “forbear” from applying those provisions if

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certain conditions are met. One petitioner, Full Service Network (“FSN”), argued that the Commission could not exercise its forbearance authority on its own without following the same procedures the Commission had established for private party applications seeking forbearance. The court rejected that claim, noting that the Commission had wide discretion to interpret its own procedural rules, which in any event did not, on their face, apply to Commission-originated forbearance. The court also held that the Commission had provided adequate notice of its potential forbearance actions.

FSN also objected to the FCC decision to forbear from applying the local competition provisions of Sections 251 and 252 of the Act (notably, its unbundling obligations) to broadband ISPs. First, FSN argued that the FCC had to make separate findings supporting forbearance for each affected statutory provision and each affected local geographic market. The court rejected this claim, affirming an earlier holding that the statute gives the FCC discretion to act on a nationwide basis. Second, FSN argued that in order to forbear from the interconnection requirements of Section 251, the FCC had to find that it would retain adequate authority to protect the public interest which, according to FSN, the FCC could not do because of supposed limitations on the scope of the Commission’s authority to regulate interconnection under Section 201 (which the agency left in effect). The court rejected this argument, affirming the FCC’s authority to regulate interconnection under Section 201. The court also rejected FSN’s claim that forbearance from Section 251 would create problems in the case of purely intrastate broadband services, over which the FCC (absent Section 251) lacks jurisdiction. This FSN argument failed because – as the FCC held and as the court had previously affirmed – broadband Internet service is inherently interstate in nature. Finally, the court rejected FSN’s claims that the FCC had not adequately justified its decision to forbear from applying Sections 251 and 252, citing the FCC’s extensive discussion of the rationale for its actions.

### **Challenges to Specific Open Internet Rules**

In 2015, the FCC promulgated five Open Internet rules. It banned blocking, throttling, and paid prioritization; it imposed a “general conduct” rule, banning any actions that unreasonably interfere with end users’ or edge providers’ ability to send and receive information; and it imposed an enhanced transparency/disclosure rule. In court, petitioners challenged the ban on paid prioritization as beyond the FCC’s authority, and the “general conduct” rule as unconstitutionally vague.

With regard to the paid prioritization ban, the court held that its earlier decision in *Verizon v. FCC* confirming the Commission’s authority to promulgate rules under Section 706 showed that the Commission was empowered to impose the paid prioritization ban under that provision. (The obstacle to the FCC’s prior action was that, in its 2010 *Open Internet Order*, the agency

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had not classified broadband as a Title II “telecommunications service” – which is what it did in it the order addressed by the court’s ruling.) With regard to the general conduct rule, the court held that the Commission’s discussion of the purposes of the rule, along with its articulation and discussion of seven specific factors that it will consider in assessing whether particular practices violate the rule, gave broadband ISPs enough of an understanding of what conduct was prohibited to defeat the vagueness challenge. How the general conduct rule may be applied in the context of specific enforcement actions, of course, remains to be seen.

### **First Amendment Challenge**

Some petitioners argued that the Open Internet rules violated the First Amendment by requiring broadband ISPs to transmit information with which they might disagree. The court rejected this argument, noting that broadband ISPs, when acting in that capacity, were functioning as a conduit for the speech of others, and that their customers would not, therefore, attribute the views expressed in the transmitted information to the broadband ISPs. On the other hand, nothing in the Open Internet rules in any way restricts a broadband ISP from expressing itself, via the Internet or otherwise. Essentially, the court ruled that a common carrier’s First Amendment rights are not infringed by being required – as a common carrier – to transmit or disseminate others’ views.

**Essentially, the court ruled that a common carrier’s First Amendment rights are not infringed by being required – as a common carrier – to transmit or disseminate others’ views.**

### **Judge Williams’ Dissent**

Judge Williams’ dissent raises several interlocking points:

First, in his view, the FCC was required to determine that broadband ISPs had market power before it could impose common carrier regulation on them – something the FCC had seemingly intentionally avoided doing in its ruling.

Second, this failure to consider market power led to a flawed analysis by the agency of the likely effects of its rules on broadband investment and consumer welfare.

Third, in his view, the FCC’s decision to forbear from applying most of Title II to broadband ISPs necessarily implies that those entities lack market power, which means that applying Title II was unjustified in the first place. (Judge Williams noted that this so-called “strategic ambiguity” is “just a polite name for arbitrary and capricious decisionmaking.”)

Fourth, Judge Williams signaled his agreement with Judge Silberman’s concurrence in *Verizon* that Section 706, on which the FCC relied in part to justify the ban on paid prioritization and other rules, does not authorize the Open Internet rules.

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### Further Legal Challenges?

Those opposing the Open Internet rules may seek rehearing by the D.C. Circuit *en banc*, and may also seek Supreme Court review of the panel's opinion. Either option will result in the final legal status of the FCC's rules remaining in limbo for quite some time – perhaps a year or more. We will provide updates on any further challenges as they occur.

### Practical Impact of the Ruling

This ruling is clearly an important step in the government's shifting stance towards regulating Internet access. As noted above, the FCC's Open Internet rules have been in effect since June 2015, and since that time the agency has not undertaken any high-profile enforcement actions against any major broadband providers under the rules; one possible reason for this is that the agency may have been awaiting a ruling sustaining its rules before undertaking any major actions under them. It is possible, therefore, that the court's ruling will embolden the agency to begin more aggressively enforcing its rules.

Two factors suggest that any change in the FCC's enforcement stance may be more measured. First, as noted, additional legal challenges are quite possible, so the FCC could reasonably conclude that prudence in pursuing enforcement actions remains a sound path. Second, the issue of the FCC's authority over broadband providers has been politically controversial for several years. Given that we are in the midst of a contentious Presidential election cycle, the agency may conclude that it should refrain from taking any potentially controversial enforcement action until after the election. Thus, while enforcement actions could be underway, these political factors may work to limit their scope, at least until further court review – and the election season – concludes.

Finally, earlier this year the FCC initiated a major proposed rulemaking regarding the privacy obligations of broadband providers. That action is legally premised on the FCC prevailing on the question of reclassifying broadband as a telecommunications service under the agency's jurisdiction. Had the court ruled against the FCC, the entire privacy rulemaking would have been placed into legal limbo.

**This ruling is clearly an important step in the government's shifting stance towards regulating Internet access.**

*Christopher W. Savage is a partner in the Washington, D.C. office of Davis Wright Tremaine LLP. He is co-chair of the firm's Communications Group and chair of the firm's Technology Committee. All views expressed in this article are the author's own, personal observations, and should not be attributed to Davis Wright Tremaine LLP, to any of its other attorneys, or to any of its clients.*



# D.C. Circuit: FOIA Follows Agency Chief's Emails Stored on a Private Server

By Charles D. Tobin

The U.S. Court of Appeals for the District of Columbia Circuit has decided that a White House agency cannot avoid its public records obligations to look for emails that an agency head stored on a private server. [\*Competitive Enterprise Institute v. Office of Science and Technology Policy\*](#), No. 15-5128 (D.C. Cir. July 5, 2016).

In a closely watched decision that in many respects mirrors former Secretary of State Hillary Clinton's use of private email networks, the panel unanimously found that the Office of Science and Technology Policy (OSTP) had improperly responded to a Freedom of Information Act (FOIA) request for records of its director, John Holdren.

The decision stems from a lawsuit filed by the Competitive Enterprise Institute (CEI), a libertarian think-tank. CEI had sent the White House a FOIA request for "all policy/OSTP-related email sent to or from jholdren@whrc.org (including as cc: or bcc:)."

The "whrc.org" domain is owned by the Woods Hole Research Center, where Holdren previously had worked as director. On its website, CEI describes Woods Hole as "an environmental pressure group". CEI had learned in earlier litigation that Holdren continued to use his old email address for government-related work.

OSTP responded to the lawsuit with a motion to dismiss, arguing that because the Woods Hole account is under the control of a private organization, and not the government, it was "beyond the reach of FOIA." The agency further claimed it was physically unable to search that account to comply with CEI's request.

The district court agreed with the government, dismissing the complaint under Federal Rule 12(b)(6). The district judge held that only government-controlled records systems were within FOIA's reach.

The D.C. Circuit panel, composed of Judge Sri Srinivasan and Senior Judges Harry Edwards and David Sentelle, strongly disagreed in two separate opinions. In the controlling decision for the court, Senior Judge Sentelle characterized the White House's argument as an assertion that agency heads can avoid FOIA through "the simple expedient of using a private email account rather than the official government communication system." The court flatly rejected that premise.

**In a closely watched decision that in many respects mirrors Hillary Clinton's use of private email networks, the panel unanimously found that the Office of Science and Technology Policy had improperly responded to a FOIA request for records of its director.**

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The court observed that while the White House may not operate the Woods Hole email servers, the account remains under Holdren's control. Noting that that "an agency always acts through its employees and officials" the court held that government records "do not lose their agency character just because the official who possesses them takes them out the door". Otherwise, the court noted, an agency head could avoid FOIA requests for "hard copy documents by leaving them in a file at his daughter's house and then claiming they are under her control."

The court remanded the decision to the district court with no specific instructions, but with an implicit suggestion that the trial judge order OSTP to require Holdren to search his Woods Hole account for responsive documents. The court of appeals also made clear it was "not ordering the specific disclosure of any document," and that any assertions of exemptions, or that the records yielded in a search do not constitute "agency records" under FOIA, must await further litigation in the district court.

Judge Srinivasan wrote a separate opinion, concurring in the judgment. His opinion chiefly departed from the majority's application of the precedent *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 147 (1980). In *Kissinger*, the Supreme Court held that FOIA did not require the government to retrieve and produce records that former National Security Advisor Henry Kissinger had gifted to the Library of Congress.

The majority in this case distinguished *Kissinger* on grounds that there, the agency had "ceded" the records to the agency head before he donated them to the Library of Congress. In contrast, the court held, there is no suggestion here that the White House had ceded to records to Holdren. And, under federal law governing records disposal, "it seems unlikely the agency could legally cede the records" to Holdren, according to the majority.

Judge Srinivasan in his concurrence noted that in *Kissinger*, the agency head had received a government legal opinion that the papers he donated, and which were later FOIA'd, were his personal papers. Kissinger himself therefore held the document under a "claim of right". Given that, Judge Srinivasan wrote, the law does not hold in blanket fashion that "because an agency acts only through individuals, an agency holds documents whenever an individual holds he documents." Instead, he would have resolved the case more narrowly:

I would conclude here only that a current official's mere possession of assumed agency records in a (physical or virtual) location beyond the agency's ordinary domain, in and of itself, does not mean that the agency lacks the control necessary for a withholding.

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Judge Srinivasan added that he would leave the government free, on remand, to “present additional facts that would make it apparent that Holdren is holding the emails in his private account under a claim of right.”

The facts of this case make the ruling compelling precedent for the several pending FOIA cases regarding former Secretary of State, and now Democratic Presidential Candidate, Hillary Clinton’s use of a private email network at her home. Ironically, the appeals court in the *CEI v. OSTP* case released its ruling the same week as the Department of Justice announced the decision that it would not prosecute Clinton. We may expect, with that announcement and this new precedent, that the Clinton FOIA cases will proceed more rapidly now.

*Charles D. Tobin is a partner with Holland & Knight LLP in Washington D.C.*

*The Appellant Competitive Enterprise Institute was represented by Hans F. Bader and Sam Kazman, with the Competitive Enterprise Institute.*

*The Appellee Office of Science and Technology Policy was represented by Daniel Tenny, Benjamin C. Mizer, Vincent H. Cohen, Jr., and Matthew M. Collette, with the U.S. Department of Justice.*

*KatieLynn Townsend, with the Reporters Committee for Freedom of the Press, Washington D.C., represented a group of news media organizations appearing as amici curiae.*



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# Unusual 6th Circuit En Banc Split Ends (For Now?) 20 Year Federal FOIA Fight for Mug Shots by Detroit Free Press

By Herschel P. Fink

The Sixth Circuit U.S. Court of Appeals on July 14, 2016 released a closely split *en banc* opinion in the long-running fight by the Detroit Free Press for access to mug shots under the federal Freedom of Information Act. [\*Detroit Free Press v. U.S. Dept. Justice\*](#). The 9-7 ruling reversed a 20 year precedent in the Circuit that criminal defendants have no privacy interest in preventing release of their mug shots.

The availability of mug shots under federal FOIA has been hotly contested in the Sixth Circuit for 20 years, with the Detroit Free Press having previously won repeated skirmishes against the U.S. Department of Justice and its Marshals Service.

In 1996 the Free Press won a decision, *Detroit Free Press v. Dep't of Justice*, 73F.3d 93 (6<sup>th</sup> Cir. 1996), which held that persons currently charged with federal crimes, who had already been indicted by a grand jury and had already appeared in open court, had no privacy interest under federal FOIA in release of their mug shots. Following contrary decisions in the 10<sup>th</sup> and 11<sup>th</sup> circuits in 2011 and 2012, the DOJ unilaterally decided in December, 2012 that it was free to ignore the *Free Press* precedent in the Sixth Circuit. The Free Press sued, as it initially had in 1994, and again in 2005 when the DOJ also attempted to reverse course.

Based upon the 1996 precedent, the Free Press won rulings in the district court, and before a three judge panel in August, 2015, which recommended that the entire court reconsider *en banc* its earlier decision in light of the conflicting 10<sup>th</sup> and 11<sup>th</sup> circuit decisions.

Although the July 14, 2016 decision resolves the circuit split, its razor thin margin, the vigorous dissent by seven judges, and unusual line-up of liberal and conservative judges on *both sides* of the issue, suggest it could still be a *cert* candidate, although no decision has been made by the Free Press.

Professor Jonathan H. Adler, in his July 14, 2016 *The Volokh Conspiracy* blog post, suggested that everything you need to know of both sides' reasoning in the 23 page decision is found in the beginning and ending paragraphs of the majority and dissenting opinions.

Judge Deborah Cook, a George W. Bush appointee, joined by appointees from both parties, began her opinion for the majority:

**The 9-7 ruling reversed a 20 year precedent in the Circuit that criminal defendants have no privacy interest in preventing release of their mug shots.**

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In 1996, we held that the Freedom of Information Act (FOIA), 5 U.S.C. 552, required the release of booking photos of criminal defendants who have appeared in court during ongoing proceedings, finding that criminal defendants lack any privacy interest in the photos. *Detroit Free Press, Inc. v. Dep't of Justice (Free Press I)*, 73 F.3d 93 (6<sup>th</sup> Cir. 1996). Twenty years and two contrary circuit-level decisions later, we find *Free Press I* untenable. Individuals enjoy a non-trivial privacy interest in their booking photos. We therefore overrule *Free Press I*.

Her opinion ends:

In 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades. See *Free Press I*, 73 F.3d at 97 (finding that, unlike booking photos, rap sheets include information “that, under other circumstances, may have been lost or forgotten”). Experience has taught us otherwise. As the Tenth and Eleventh Circuits recognize, individuals have a privacy interest in preventing disclosure of their booking photos under Exemption 7(C). Of course, some public interests can outweigh the privacy interest, but *Free Press I* wrongly set the privacy interest at zero. We overrule *Free Press I*, reverse the grant of summary judgment, and remand to the district court for proceedings consistent with this opinion.

Judge Danny Boggs, a Reagan appointee, wrote the dissent, also joined by judges appointed by both parties, which begins:

More than twenty years ago, this court determined that the Freedom of Information Act, a federal statute dedicated to open government, requires the release of federal indictees’ booking photographs. The Supreme Court did not correct our reading, and neither did Congress. Nevertheless, today’s majority reverses that determination, citing as justification only a vague privacy interest in inherently non-private matters. Today’s decision obscures our government’s most coercive functions – the powers to detain and accuse – and returns them to the shadows. Open government is too dear a cost to pay for the mirage of privacy that the majority has to offer.

The dissent concludes:

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I am not unaware of the consequences of releasing booking photographs in the Internet Age. Ever since the nineteenth century, booking photographs have proven to be a source of discomfort to those depicted.... But today's decision does nothing to prohibit DOJ from using its broad discretion to release booking photographs when it chooses. Nor does today's decision do anything to protect the likenesses of those arrested by state authorities, the majority of which disclose booking photographs to the media upon request.... All that today's decision does is to provide the DOJ with a tool to selectively shield itself from public scrutiny.

It is possible that other means could be used to achieve a sensible balance between reputational concerns and the free flow of public information. See, e.g., Act of May 6, 2013, Sec.1, 2013 Ga. Laws 613, 614 (requiring website owners to remove booking photographs of those acquitted of criminal activity); *Taha v. Bucks County*, 9 F.Supp. 3d 490, 494 (E.D. Pa. 2014) (holding that individual depicted on "bustedmugshots.com" with the "legend 'BUSTED!' in large bold letters over his mugshot" could maintain state-law "false light" tort claim where individual's arrest record had in fact been expunged). But today's decision, which deprives the public of vital information about how its government works and does little to safeguard privacy, is not the correct answer.

**The next few months will tell whether the issue will remain resolved in favor of secrecy.**

The next few months will tell whether the issue will remain resolved in favor of secrecy, or whether – particularly in light of the growing controversy over claims of selective arrests and alleged police misconduct – courts, including the Supreme Court, will get to decide that mug shots could serve to literally put a face on the government's prosecutions, all the better for the public to see "what the government is up to."

*Detroit Free Press has been represented by Herschel P. Fink, its legal counsel, throughout its 20-year long mugshot battle, and by a Washington-based Orrick appellate team, headed by Robert Loeb, in the en banc proceeding.*

# Libel Claim Against Blogger Dismissed for Lack of Personal Jurisdiction

## *Publication on the Internet and Having Readers ‘Like’ a Facebook Post Not Enough to Subject Writer to Suit*

By Jeremy Kutner

In a forceful ruling affirming that traditional boundaries of personal jurisdiction still protect publishers in the Internet era, a federal judge in the Eastern District of Virginia has dismissed a defamation action against a sophisticated blogger specializing in coverage of the firearms industry. [\*FireClean, LLC v. Tuohy\*](#), No. 1:16-CV-294, 2016 WL 2952093 (E.D. Va. July 21, 2016).

The court held that merely contacting the subject of articles for comment, publishing articles on an open website, promoting those articles on Facebook, and being “liked” by readers is not enough to confer personal jurisdiction in the home state of the subject of the articles. In doing so, the court explained why the “effects test” of *Calder v. Jones* is not conclusive in this context.

### Background

This case chiefly involves two figures in the firearms community: FireClean, LLC, a prominent gun oil manufacturer based in Virginia, and Andrew Tuohy, a former Naval petty officer turned hiking guide who lives in Arizona and is the creator of the popular Vuurwapen Blog (“Vuurwapen” means “Firearm” in Dutch).

In early Fall 2015, rumors began swirling within the firearms community that FireClean’s chief product, a gun oil also called FIREClean, was nothing more than a common vegetable oil or Crisco, which could be purchased in bulk at any supermarket.

Tuohy decided to investigate. On his blog, Tuohy frequently assesses the performance of various gun products, including FireClean, which Tuohy had previously praised as a lubricant. Tuohy contacted one of FireClean’s principals for his reaction to the rumors, which he denied. Tuohy then contacted a chemistry professor at the University of Arizona to perform a chemical test on the gun oil to assess its chemical structure. Tuohy published a blog post summarizing the professor’s findings that FireClean “was probably a modern unsaturated vegetable oil virtually the same as many oils used for cooking.” He included FireClean’s denial.

Subsequently, Tuohy wrote another blog post about a YouTube video of a test, posted by a firearms industry consulting firm, that supposedly demonstrated FireClean’s ability to keep

**Promoting articles on Facebook, and being “liked” by readers is not enough to confer personal jurisdiction.**

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guns free of unwanted residue. Tuohy's post was critical of the test, which Tuohy said showed evidence that different types of ammunition were used and that this may have affected the test results. Tuohy opined, sharply, that this reflected negatively on the company's trustworthiness.

After seeing these articles, an undergraduate at the Worcester Polytechnic Institute in Massachusetts, Everett Baker, contacted Tuohy and offered to perform additional tests of FireClean using sophisticated equipment and more advanced testing methods at his university, under the supervision of professors. Tuohy published a third post summarizing the findings of Baker and another chemistry expert who worked separately and also conducted advanced tests. The results matched the initial assessment: that FireClean's chemical makeup appeared similar to common vegetable oils. Baker posted his own summary on his blog as well.

In March of this year, FireClean brought suit against Tuohy and Baker, alleging defamation based on statements in the various posts that FireClean was similar to common vegetable oils, that the product was overpriced and not ideal for certain uses, and that the company may have misled customers about their product. The company also alleged a conspiracy between Tuohy and Baker (who have never met), asserting that they agreed to disparage FireClean's product. The company claimed that the negative reviews had harmed its business.

Tuohy and Baker then separately moved to dismiss for lack of personal jurisdiction and also on the merits.

### Case Analysis

**What, exactly, is required to hale an internet publisher into court in a specific jurisdiction.**

The motion to dismiss presented squarely the question of what, exactly, is required to hale an internet publisher into court in a specific jurisdiction. Given the ease of access to internet publications by anyone, there is an understandable logic to the argument that publishers should expect to cause harm anywhere an article might be read. But courts have proved vigilant in policing constitutional due process safeguards.

Despite strained efforts to first ignore, and then to distinguish it, FireClean was unable to sidestep the leading case in the Fourth Circuit, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). In that case, the court held that Virginia courts did not have personal jurisdiction over Connecticut newspapers that had posted articles online that allegedly defamed a Virginia prison warden because the newspapers did not "manifest an intent to direct their website content . . . to a Virginia audience." *Id.* at 263. What matters for this analysis is whether the publisher expressly aimed its conduct towards the forum state, not whether the article had some eventual effect there.

FireClean's complaint asserted that personal jurisdiction existed over Tuohy for the following reasons: Tuohy specifically targeted a company he knew was based in Virginia, and

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this caused harm there; Tuohy had repeated contact with FireClean's Virginia-based principals in preparing his articles; some subscribers to Tuohy's blog resided in Virginia, and those subscribers both "liked" the blog's Facebook page and likely received email updates alerting them to new blog posts; Tuohy used FireClean products during his tests (and presumably got those products from the Virginia-based company); and Tuohy's blog and Facebook page may have resided on internet servers in Virginia. Together, FireClean asserted, these facts formed the sufficient "minimum contacts" needed to demonstrate specific personal jurisdiction in Virginia.

Tuohy (and Baker) argued that this was exactly the type of case the Fourth Circuit had in mind when it decided *Young*: Tuohy was attempting to reach readers interested in gun equipment generally, not those in Virginia specifically; any Virginia connection was entirely by happenstance.

Instead of responding directly, however, FireClean first moved to take jurisdictional discovery, adopting the curious position that while it had sufficiently pled facts to support personal jurisdiction, discovery was also necessary.

Its discovery requests to both Tuohy and Baker were striking in their breadth. FireClean sought a list identifying Tuohy's Virginia-based subscribers to both his blog and Facebook page, all communications with the company itself, and the information for everyone who bought a promotional blog t-shirt. The company even sought names and contact information of individuals who had contributed to Tuohy's legal defense fund, something the company later retracted as a "mistake." Interestingly, FireClean also asked for third party subpoenas to Facebook and the hosting company for the blog itself.

After briefing and argument, the Magistrate Judge rejected these requests as a "fishing expedition." In a well-reasoned opinion that turned out to foreshadow the ultimate ruling by the district court judge, the magistrate held that none of the requested information would shed relevant light on the question that mattered: whether the articles, and the websites that hosted them, had been intended to target Virginia. Any Virginia individuals who happened to subscribe to the blog were the kind of "random, fortuitous" contacts that have long been held insufficient to sustain personal jurisdiction. And whether or not third party internet sites happened to shuttle internet content between servers that might, by chance, be in Virginia was not only beyond Tuohy's control, any such connection was purely speculative.

Thus frustrated, FireClean went forward with its opposition to the motion to dismiss. In it, the company argued primarily that Tuohy's alleged intent to harm a Virginia-based company satisfied the requirements of personal jurisdiction, invoking a Supreme Court case that preceded the internet era, *Calder v. Jones*, 465 U.S. 783 (1984). There, applying what has come to be known as the "effects test," the Court held that California had jurisdiction over a Florida newspaper and its Florida-based reporters where the publication's largest (hard-copy)

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distribution was in California, and where the article focused on the California activities of a California-based actress, causing her injury in Hollywood where her career was centered. The company also argued that because Facebook allows a high degree of interaction between Tuohy and his Virginia-based readers, and because some of those readers may have received automated email updates to new blog posts, Tuohy had demonstrated an intent to target Virginia specifically, and the defamatory statements had actually been published there.

The district court judge rejected all of these arguments, dismissing the case without reaching the defendants' merits arguments.

Taking each of FireClean's asserted bases for personal jurisdiction in turn, the court found no evidence of a manifest intent to target Virginia.

First, the court set aside the claim that exchanging emails and calls with FireClean to seek comment on the articles was sufficient, observing that "the quality of those communications is negligible because they account for only passing references in the September 12, 2015 article and do not form the basis of Plaintiff's defamation claims."

Then, the court dispensed with the notion that the possible hosting of Tuohy's blog on a Virginia server supported personal jurisdiction. "To the extent a hosting company transmits Tuohy's online content though servers located in Virginia, those unilateral actions by the hosting companies are not evidence of Tuohy's purposeful targeting of Virginia."

Nor were Facebook "likes" enough, the court noting that it "is not alone in placing minimal emphasis on readers' ability to 'like' or comment on a Facebook or blog posting."

Finally, the court emphasized what really mattered for personal jurisdiction analysis on the Internet: "Tuohy's articles and comments never reference Virginia and do not focus on FIREClean's Virginia origin or affiliations. Instead, the articles and comments plainly focus on FIREClean's chemical composition, recommended uses for FireClean, and product testing performed outside of Virginia. Those topics were addressed to a nationwide audience of firearms enthusiasts and had no special appeal for Virginia readers."

Having found no personal jurisdiction over Tuohy, the court easily reached the same conclusion as to Baker, and also overruled FireClean's perfunctory objection to the magistrate judge's ruling on the motion for jurisdictional discovery.

**This case offers some very helpful language for internet publishers whose posts address a nationwide, or global audience.**

## Conclusion

This case offers some very helpful language for internet publishers whose posts address a nationwide, or global audience. It also pushes back on the notion that social media is so inherently interactive that "likes," comments, and posts reach in to any jurisdiction where

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readers happen to reside. Finally, it may help other litigants to avoid expensive jurisdictional discovery by its emphasis on the point that, when it comes to internet publications, the focus of the jurisdictional inquiry is squarely on the contents of the article and the website themselves.

*Andrew Tuohy is represented by Jay Ward Brown, Dana Green and Jeremy Kutner of Levine Sullivan Koch & Schulz, LLP. FireClean, LLC is represented by Bernard DiMuro and Stacey Rose Harris of DiMuroGinsburg, P.C.*



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# Utah Court Overturns Multi-Million Dollar Verdicts Predicated on Allegedly Injurious Speech Between Business Rivals

By Jeffrey J. Hunt, David C. Reymann, and Austin J. Riter

On July 1, 2016, the Utah Supreme Court vacated and remanded for a new trial a \$13.2 million tortious interference damage award and a \$100,000 false light damage award, both of which were predicated on allegedly injurious speech between business rivals published with alleged improper purpose. [\*SIRQ, Inc., et al. v. The Layton Companies, Inc., et al.\*](#), 2016 UT 30 (the “SIRQ-Layton Case”).

After construction company SIRQ, Inc. and its controlling shareholder, Alan J. Peterson (collectively, “SIRQ”) began appropriating the employees and documents of its competitor The Layton Companies, Inc. and Layton Construction Company (collectively, “Layton”), Layton asked its own employees to sign a noncompetition agreement, which restricted them from working for SIRQ and from soliciting other Layton employees to work for SIRQ, and circulated a memorandum to them explaining why they should do so. In response, SIRQ sued Layton, claiming, in relevant part, that Layton had intentionally interfered with SIRQ’s economic relations and cast SIRQ in a false light in the industry. After the jury returned verdicts in SIRQ’s favor and the trial court denied Layton’s post-trial motions, Layton appealed.

The Utah Supreme Court held that Utah’s recent abolishment of the improper purpose branch of tortious interference, coupled with the trial court’s submission of a number of non-actionable statements to the jury, undermined confidence in SIRQ’s verdicts, warranting a new trial.

**The Utah Supreme Court vacated and remanded for a new trial a \$13.2 million tortious interference damage award and a \$100,000 false light damage award,**

## Background

After Peterson resigned as Layton’s President and a member of Layton’s Board of Directors, he formed a competing construction company called SIRQ, which began hiring away Layton employees and using forms and other documents created by Layton. In June 2007, in an attempt to protect its employees from SIRQ’s actions, Layton asked its professional-level employees to sign a Noncompetition Agreement prohibiting them from working for SIRQ for two years after leaving Layton and from soliciting other Layton employees to do the same. Along with the Agreement, Layton circulated a Memorandum explaining why it was necessary

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for its employees to sign the Agreement and why, in its opinion, SIRQ's actions were improper. Among other things, the Memorandum described SIRQ's practices as "inappropriate," and stated that those practices, "if permitted to continue, would threaten our very existence." Layton only circulated the Agreement and Memorandum internally—to Layton's professional-level employees and prospective employees applying for those positions.

In response, SIRQ sued Layton. It claimed, in relevant part, that the Noncompetition Agreement and explanatory Memorandum, as well as a handful of other non-actionable statements of opinion by Layton executives, had interfered with SIRQ's contractual relations and cast SIRQ in a false light. Despite Layton's arguments in several pre-trial motions that these statements were non-actionable speech, and thus could not support any tort—including tortious interference—as a matter of law, the trial court ultimately allowed SIRQ's claims to reach the jury. In doing so, the trial court rejected Layton's proposed special verdict form, which specifically identified each of the allegedly actionable statements at issue. At SIRQ's urging, the trial court instead adopted a special verdict form that permitted the jury to find liability on SIRQ's claims without identifying which specific statements it found actionable.

Thereafter, the jury returned special verdicts in favor of SIRQ, awarding \$7.2 million in compensatory damages on the tortious interference claim and \$1 million in compensatory damages on the false light claim. The jury also awarded an additional \$5 million in punitive damages on the tortious interference claim.

After judgment was entered, Layton filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial or remittitur ("Post-Trial Motion"). Even though the trial court admitted in ruling on the Post-Trial Motion that it had erroneously submitted a number of non-actionable statements to the jury—statements that, because of SIRQ's insistence on a vague verdict form, it was impossible to be certain were not the predicate of the verdicts—the trial court denied the motion except for proposing a remittitur of the \$1 million damages award on the false light claim to \$100,000, which SIRQ accepted. Layton timely appealed.

### **Tortious Interference Claim**

With respect to SIRQ's tortious interference claim, the Utah Supreme Court held that the jury had been improperly instructed that such a claim could be predicated solely on improper purpose, rather than improper means. 2016 UT 30, ¶ 24. Although this was the law at the time the jury was instructed, while SIRQ-Layton Case was pending on appeal, the Court changed the law by repudiating improper purpose as an independent basis for tortious interference liability. *See Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553. The Court did so because the improper purpose branch of tortious interference required "[j]uries to look into the defendant's soul and

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discern which of her mixed motives was the real cause of her action,” which meant that “any significant evidence of improper purpose would allow juries to find even the most commonplace commercial conduct tortious,” *id.* ¶ 48, and that “[t]he outcome of improper-purpose claims would . . . depend more on jurors’ personal sympathies for one party or the other than on any generally applied legal rule.” *Id.* ¶ 50.

Because this change in the law applied retrospectively to the SIRQ-Layton case, 2016 UT 30, ¶ 31, the Court found legal error by the trial court. And even though SIRQ asserted that the tortious interference verdict could still be upheld based on improper means, the Court agreed with Layton’s argument that SIRQ heavily infused its case with allegations of Layton’s malice and ill will, making it likely that the outcome may have been different had the jury been instructed that it could not rely on improper purpose. *Id.* ¶ 34. Because that was sufficient to undermine the Court’s confidence in the tortious interference verdict, it ordered a new trial on that claim. *Id.* ¶ 35.

### False Light Claim

The Utah Supreme Court also ordered a new trial on SIRQ’s false light claim. It held that the trial court erred by submitting a number of statements to the jury that were non-actionable as a matter of law, describing them as “garden-variety comments made by one business competitor about another.” *Id.* ¶ 42. Because SIRQ’s false light claim was based on publication of allegedly false and injurious statements, the Court held that the claim was subject to the same First Amendment protections as a defamation claim and, therefore, could not be based on non-defamatory statements. *Id.* ¶¶ 39, 50. As a result, the Court ruled, the trial court erred in its “gatekeeping function” of “assuring that only statements capable of defamatory meaning are considered by the jury in entering its verdict.” *Id.* ¶ 40.

The Court explained that, generally, there are two ways in which the trial court may perform this gatekeeping function—first, by screening statements in advance of trial on a motion for summary judgment or motion *in limine* and instructing the jury to consider only those statements that are capable of defamatory meaning; and second, by “giv[ing] the jury a special verdict form requiring the jury to identify specific statements it finds false or defamatory.” *Id.* But the trial court in the SIRQ-Layton case followed neither of these approaches. Despite “Layton’s efforts to require the jury to state on a statement-by-statement basis which statements it found to be defamatory,” the Court explained, the trial court “had performed no pretrial narrowing of the pool of statements or categories of statements capable of defamatory meaning,” and “there was no special verdict form allowing the jury to identify the statements it relied on”—and thus no means of judicial review of the statements underlying the verdict. As a

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consequence, the Court could not assure “that the jury would have reached the same outcome without considering the erroneously submitted remarks,” *id.* ¶ 53, and, therefore, ordered a new trial on the false light claim.

In doing so, the Court rejected SIRQ’s reliance on Utah’s “general verdict rule,” pursuant to which the reviewing court “exercise[s] every reasonable presumption in favor of the validity and affirm[s] if there is even one valid basis upon which the jury could have reached its conclusion.” *Id.* ¶¶ 51-52 (internal quotations omitted). Based on that rule, SIRQ argued that “because there was at least one statement capable of defamatory meaning that was submitted to the jury,” the Court could still affirm the false light verdict. *Id.* ¶ 51.

The Court disagreed “in light of the First Amendment dimensions of the district court’s failure to fulfill its gatekeeping role,” and instead held that “[w]hen nondefamatory statements are submitted for the jury’s consideration, we may affirm only if we are confident that the jury would have reached the same outcome without considering the erroneously submitted remarks”—a confidence that, given the possibility that “scores of nondefamatory remarks were improperly considered by the jury,” the Court lacked in the SIRQ-Layton Case. *Id.* ¶¶ 52-53, 55.

Overall, the Utah Supreme Court’s opinion provides helpful guidance on how to try a tortious interference claim in jurisdictions that have abandoned the improper purpose prong of the tort. And through its emphasis on the critical nature of the trial court’s gatekeeper role and of specific identification of the statements the jury finds actionable in speech-based tort cases, it provides strong precedent for the news media in seeking pre-trial dismissal of speech-based claims and reversal of verdicts based on such claims on appeal.

*Jeffrey J. Hunt, David C. Reymann, and Austin J. Riter are media and business litigation attorneys at Parr Brown Gee & Loveless, P.C. in Salt Lake City, Utah. Along with their partners Robert S. Clark and James L. Ahlstrom, they represented Layton in the appeal of the SIRQ-Layton Case to the Utah Supreme Court. SIRQ and Mr. Peterson were represented in the appeal by Maralyn M. English and D. Jason Hawkins, both of whom are business litigation attorneys at Snow, Christensen & Martineau, also in Salt Lake City.*

**The Utah Supreme Court’s opinion provides helpful guidance on how to try a tortious interference claim in jurisdictions that have abandoned the improper purpose prong of the tort.**



# 8th Circuit Affirms Summary Judgment for Better Business Bureau *Consumer Warning Was Protected Opinion*

By Joseph E. Martineau

## The BBB's Warning to St. Louis Consumers

When Others First, a Michigan charity, mailed solicitations for car donations to St. Louis consumers, the St. Louis Better Business Bureau (BBB) investigated and posted a News Warning (Warning) on its website. The Warning urged caution when dealing with the charity because of its association with Rick Frazier, a for-profit fundraiser identified in some documents as the charity's "founder" and who had been "criticized for alleged improprieties in running similar programs," according to news reports in a Detroit newspaper. The Warning also noted a possible conflict of interest on the part of Maurice Banks, an officer of the charity who resigned shortly before obtaining his own lucrative for-profit contract with the charity.

## The Michigan Lawsuit / Lack of Personal Jurisdiction

When the BBB refused to take down the Warning, the charity sued the BBB for defamation and tortious interference in Michigan federal court. The charity claimed the Warning falsely identified Frazier as its founder, falsely claimed that Banks had a conflict of interest, and that the BBB issued the Warning to benefit a competing BBB member charity.

The BBB moved to dismiss, claiming the Michigan court did not have personal jurisdiction over it. In response, while acknowledging that the BBB did not have sufficient contacts with Michigan to support general personal jurisdiction, the charity claimed specific jurisdiction existed based upon its Michigan headquarters, phone calls and e-mails the BBB made to Michigan, the publication of the Warning on the internet, and the BBB's use of Search Engine Optimization ("SEO") to ensure prominence of the Warning to persons conducting an internet search.

After full briefing and oral argument, the District Court granted the BBB's motion and dismissed the case. *Others First, Inc. v. The Better Business Bureau of Eastern Missouri and Southern Illinois*, 2014 WL 6455682, 2:14-cv-12066-GCS-PJK (E.D. Mich Nov. 17, 2014). In doing so, it analyzed the case using the two commonly-accepted, but not identical, criteria for ascertaining personal jurisdiction based upon internet publications.

First, the court looked to the *Calder v. Jones*, 465 U.S. 783 (1984) "effects test." The court noted that mere allegation of intentional tortious conduct which injures a Michigan resident

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does not, by itself, show sufficient purposeful action directed towards Michigan to establish personal jurisdiction there. Moreover, simply having a website that damages a Michigan resident, even if Michigan residency is known, is insufficient. The court recognized that, although the Warning was about a Michigan company and posted on the internet, the primary focus and intended audience were St. Louis, not Michigan, consumers. The BBB's use of SEO did not change things because any enhanced prominence given to the warning was the same everywhere and no more directed to Michigan than anywhere else. The court also found it significant that the charity did not limit its activities to Michigan. Consequently, the charity should expect to be subject to criticism elsewhere for its activities, without the critic being hailed into a Michigan court to defend the criticism. Finally, because the BBB's e-mails and telephone calls to Michigan were for the purpose of investigation, and not to solicit business with or from the charity, the court held they were insufficient to provide the minimum contacts required for jurisdiction to exist.

Second, the court analyzed the case under another jurisdictional analysis used for internet-based disputes set forth in *Zippo Manufacturing Co. v. Zippo DOT-Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997). Under the Zippo test, the determination of whether the operation of a website is sufficient to satisfy personal jurisdiction focuses on the extent to which the website is interactive and establishes repeated on-line contacts with residents of the forum state, as opposed to websites which are passive where the defendant simply posts information. The court noted that while the BBB's website was somewhat interactive (in that it encouraged persons to contact the BBB for information and to submit complaints), "the majority of the press release serves as a caution to consumers doing business with [the charity] in St. Louis, without any interaction from the consumer." This, along with the fact that the charity did not allege any interaction between the BBB and Michigan residents using the website, caused the court to conclude that personal jurisdiction would not lie under the Zippo test.

Finding personal jurisdiction lacking under both the Calder effects test and the Zippo test, the court dismissed the action without prejudice.

### **The Missouri Federal Court Rejects the Suit on Its Merits**

Within weeks of losing the jurisdiction battle in Michigan, the charity filed another federal lawsuit; this time in St. Louis. The lawsuit was nearly identical, but alleged injurious falsehood (instead of defamation) and tortious interference. The change from defamation to injurious falsehood was presumably because the Missouri two-year statute of limitations for defamation had expired, but the five-year statute of limitations for injurious falsehood remained open. Like most states, however, Missouri considers the substantive components and protections of defamation law applicable to claims for of injurious falsehood.

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In its Missouri lawsuit, the charity also alleged that in the interim between dismissal of the federal suit in Michigan and re-filing in Missouri, a Kansas City television station broadcast an investigative news piece concerning the abysmal proportions of charitable donations made by the charity in comparison to the revenues paid to its for-profit consultants, Banks and Frazier. The charity claimed the BBB induced the newscast, but did not identify anything false in the newscast.

The BBB moved to dismiss on the grounds that the Warning was based on truthfully-disclosed facts and that the statements advising consumer caution and alerting them to possible conflicts of interests were protected opinion. Because allegations in the Complaint implied that some of the factual background recited in the Warning was inaccurate, the BBB also moved for summary judgment at the same time, including documents and affidavits identifying the factual support for each fact statement made in the Warning.

The charity responded with its own affidavits, denying the substance of the previously-published criticism about Frazier, but never refuting the existence of such reports. It also disputed the claim of a conflict of interest between the charity and its since-retired officer, Banks, but did not refute the factual basis for the BBB's conflict of interest statement. The charity also claimed a need to do discovery to determine whether the BBB issued the Warning with bad motives and hoping to benefit a member charity, as speculated in its Complaint and opposing affidavits.

After reviewing all of the briefing and evidence, the court granted summary judgment in favor of the BBB. *Others First, Inc. v. The Better Business Bureau of Greater St. Louis, Inc.*, 105 F.Supp.2d 923 (E.D. Mo. 2015). The court held that statements critical of Frazier could not be deemed "of and concerning" the charity. Regardless, the court also found that "it is indisputably true that Frazier has been criticized for alleged improprieties in running similar programs. That [the charity] does not like the fact that the BBB choose to inform readers that Frazier has been accused by others of improprieties while running other charitable donation programs does not render the statement false or defamatory." Statements in the Warning referencing Frazier's "ties" to the charity and identifying it as his "newest venture" were neither false nor defamatory, according to the court, given the indisputable fact that the charity had hired Frazier to run its program. Moreover, the Warning did not state that Frazier was the charity's "founder;" it merely identified the undisputed fact "that he was described as such (albeit 'erroneously') in one of [the charity's] own press releases" and other media.

Regarding the thrust of the Warning—that consumers should exercise caution before dealing with the charity—the court held that "no reasonable fact-finder could conclude that an expression of caution conveys anything other than an opinion...." The same was true for the conflict of interest statement. The court agreed that it, too, was protected opinion because it was qualified by a statement that "it appears," and because the underlying factual support was

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accurately recited. The court “conclude[d] that no reasonable fact-finder could ever find that the BBB stated anything other than the truth and its seemingly well-informed opinions about [the charity].” Accordingly, the injurious falsehood claim failed.

Because the sole basis for the tortious interference claim was the Warning, the court held that claim failed as well. The fact that the BBB used SEO to give continued prominence to the Warning could not support that claim because there was nothing wrongful about giving repeated publicity to truthful facts and opinion. The court noted that the charity spent a “great deal of time and effort in decrying the BBB’s motives in publishing the release,” but held that statements of opinion are protected “even if made maliciously or insincerely.” The court concluded:

“If [the charity] dislikes the BBB’s opinions, its remedy lies where it found the release—in the free marketplace of ideas—not a court of law. As the release is true and contains protected opinions, the BBB is entitled to judgment as a matter of law on all counts of the amended complaint.”

### **The Eighth Circuit Court of Appeals Affirms**

Unwilling to concede despite its two trial court defeats, the charity appealed, but with no more success. On July 12, 2016, the U.S. Court of Appeals affirmed the District Court’s summary judgment. [\*Others First, Inc. v. Better Business Bureau of Greater St. Louis, Inc.\*](#), No. 15-2184 (July 12, 2016).

The court agreed with the District Court that statements in the Warning were protected opinion based on disclosed facts, all of which were shown truthful in the BBB’s summary judgment submissions, and none of which were adequately refuted in the charity’s response. As such, any injurious falsehood or defamation claim failed.

The court also agreed that the BBB had a legitimate interest in warning consumers of business practices it found questionable. Accordingly, because the charity provided no evidence of any wrongful action on the part of the BBB, other than the non-defamatory Warning, the charity’s tortious interference claim failed. The court concluded, “The district court properly granted summary judgment dismissing Others First’s claim of injurious falsehood because all the challenged statements were either true statements of fact or protected opinion, and properly granted summary judgment dismissing the tortious interference claim given the absence of wrongful defamation.”

*Joseph E. Martineau, a member of Lewis Rice LLC in St. Louis, Missouri, represented the BBB in both the Michigan and Missouri lawsuits. Robin Luce-Hermann, a member of Butzel Long in Detroit, Michigan, was local counsel for the BBB in Michigan.*

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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

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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

**Detroit Free Press**

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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 it 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.

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*(Continued from page 52)***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.

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- 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. ACLU* 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 teenaged son looking at adult content on the service.

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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.

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### *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](#)



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[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.

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*(Continued from page 59)**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.

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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](#).

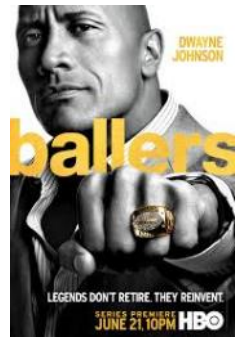
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Plaintiffs had some luck in New York this month. The Second Circuit [reinstated an infringement lawsuit](#) brought by the composer of the “[Iron Man Theme](#)” from the 1960’s *Marvel Super Heroes* TV show against rapper Ghostface Killer. In S.D.N.Y., [sports photographers’ claims against the NFL and Associated Press](#) survived a motion to dismiss, with the court holding that the photogs 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.

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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](#) 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!

*Jeff Hermes is a deputy director of the Media Law Resource Center.*