'Pocket Dial' Enters The Dictionary — And Case Law

Law360, New York (September 23, 2015, 9:53 AM ET) -- At the end of August, the Oxford English Dictionary made its quarterly announcement of new words that have been officially recognized based on "evidence from a wide range of sources … that they have widespread currency in the English language."[1] While the good people at Oxford assure us that "everyone should find something they think is awesomesauce," much of the list is little more than slang that no respectable attorney should ever be caught saying.

One term, however, may be of particular interest, because it is entering the dictionary and English language at the same time that it is entering the Federal Reporter as part of judicial precedent. On July 21, 2015, the Sixth Circuit Court of Appeal issued an opinion in Huff v. Spaw, No. 14-5123, addressing whether a person violates federal law by recording an inadvertently placed "pocket dial."

As now officially defined by the Oxford Dictionary, a "pocket dial" (alternatively known by a more vulgar synonym) is "[a]n inadvertent call made on a mobile phone in one's pocket, as a result of pressure being applied accidentally to a button or buttons on the phone."[2] That is what happened in Huff, when James Huff — chairman of the Kenton County, Kentucky, Airport Board — "pocket dialed" Carol Spaw, the executive assistant of the airport that Huff oversaw. Spaw stayed on the line for 91 minutes, while she transcribed and recorded conversations allegedly implicating Huff in discriminatory practices against the Airport CEO. Huff later sued Spaw for violation of Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2510 et seq., which makes it unlawful to "intentionally intercept[] ... any wire, oral, or electronic communication."

The district court granted summary judgment in favor of Spaw against Huff, and the Sixth Circuit affirmed, noting that the statute only protects communications in which a person has a reasonable expectation of privacy. Adopting the framework from Katz v. United States[3] and the plain-view doctrine in the Fourth Amendment context, the Sixth Circuit held that Huff lacked such an expectation because the communication was intercepted through Huff's own neglect, like a homeowner whose criminal activity can be seen when he "neglects to cover a window with drapes." The court observed that "Huff admitted that he was aware of the risk of making inadvertent pocket-dial calls and had previously made such calls on his cellphone," but that Huff failed to employ any number of measures that "can prevent pocket-dials from occurring," such as "locking the phone, setting up a passcode, and using one of many downloadable applications that prevent pocket-dials." It also noted facts indicating that Huff may have failed to terminate the call immediately, even after realizing a pocket dial had occurred.[4]

The Sixth Circuit clearly recognized the "pop culture" nature of the case before it. The court cited a tech blog for the availability of apps to prevent pocket dials, and it referenced the film "American Pie" for the risks a person takes "by inadvertently leaving on his webcam." Yet the actual decision is grounded in well-established doctrines about reasonable expectations and inadvertent disclosures.

Indeed, the framework described by the Sixth Circuit is very similar to the considerations relevant to the inadvertent disclosure of documents protected by the attorney-client privilege or work-product privilege. Under Federal Rule of Evidence 502(b), an inadvertent disclosure does not operate as a waiver if (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error. Adopted in 2007, the rule is similar to — although it does

not expressly codify — the balancing test and factors described in cases such as Lois Sportswear U.S.A. Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985), Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985), and similar cases.

In the context of e-discovery, for example, the Advisory Committee Notes to Rule 502(b) suggest that "a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure." In practice, courts have ranged from expressing skepticism about, to endorsing, the use of computer-driven privilege review.[5] The question of a reasonable expectation of privacy and privilege in the use of technology also frequently arises in the context of employees using devices provided by their employer.[6]

Ultimately, what precautions are "reasonable" will vary based on the statutory and factual context, and the narratives one creates. In many ways, Huff's actions do not seem all that unreasonable. Many of us, including the author of this article, lock our phones and use passcodes, but pocket dials still happen.[7] But it is not coincidence that the Sixth Circuit borrowed not only legal concepts from the search-and-seizure context, but also moral and intuitive ones. Spaw may have been snooping, but she caught Huff in potential wrongdoing, and Huff is the one responsible for the call in the first instance. Indeed, much of the fascination around "pocket dialing" surrounds people, in everyday situations, getting caught for inappropriate behavior, as the Oxford Dictionary reflects in its "example sentences," such as: "He pocket-dialed his main girl and she heard everything," and "Two sisters were arrested after inadvertently pocket dialing the hotel they had allegedly just robbed."[8]

In contrast, in discovery, the inadvertent disclosure occurs in context in which the entire production process is compelled by another party. Even then courts are looking for a story about the parties' precautions and reasonableness: how much forethought went into the search filters, whether a disclosure was based on mere ignorance about how a technology works or what data or metadata is retained or can become readable, whether the parties established protocols in advance, what volumes of data were involved, and how much time did the party have to complete the review and production, among other considerations.

The California Supreme Court, meanwhile, is set to resolve whether there is any protection for documents inadvertently produced by a state agency in response to a public records request. The case is Ardon v. City of Los Angeles, No. S223876. As a logophile of the Oxford Dictionary's updates, one might say that it remains to be seen whether the U.S. Supreme Court will view the disclosure as waiving the privilege or "NBD" (no big deal), but either way, it would be "awesomesauce" if one of the attorneys concludes oral argument with a "mic drop."

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[1] OxfordDictionaries.com Quarterly Update: New Words Added Today Include Hangry, Grexit, and Wine O'Clock (Aug. 27, 2015), http://blog.oxforddictionaries.com/press-releases/oxforddictionaries-com-quarterly-update-new-words-added-today-include-hangry-

grexit-and-wine-oclock/.

[2] OxfordDictionaries.com, Pocket-Dial,http://www.oxforddictionaries.com/us/definition/american_english/pocket-dial?q=pocket+dial+ (last visited Sept. 15, 2015).

[3] 389 U.S. 347 (1967).

[4] Spaw is not off the hook entirely, however. The Sixth Circuit vacated the grant of summary judgment as to the claims of Huff's wife, whose conversations with her husband in their hotel room were also recorded. The Court held that she held a reasonable expectation of privacy that was not waived simply because she was conversing with someone who, she knew, was carrying a device susceptible of intercepting and transmitting her communications.

[5] Compare, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008), with Good v. Am. Water Works Co., No. 14-cv-01374 (S.D. W. Va. Oct. 29, 2014).

[6] See, e.g., Quon v. City of Ontario, 560 U.S. 746 (2010) (declining to decide any "far-reaching issues" about the right to privacy in an evolving technological world, but holding that the department had a right to conduct reasonable audits of pager text messages by police officer on department-issued devices); Louise L. Hill, Gone but Not Forgotten: When Privacy, Policy and Privilege Collide, 9 N.W. J. of Tech. & Intellectual Property 565 (Summer 2011) (collecting cases on workplace privacy issues with various forms of communications).

[7] Just this past weekend, the author repeatedly "pocket dialed" his wife while coaching a little league game. Of course, nothing was overheard except cheers and positive reinforcement.

[8] OxfordDictionaries.com, Pocket-Dial, supra note 2.