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Cybercrime and Wrap-up

Class 14 – December 5, 2008

SI 519 / PubPol 688

Bryce Pilz

Fall 2008

Schedule

- 2:10 – Introduction/Pizza
- 2:20 – Student Presentation: Art of Music Sampling
- 2:35 – Student Presentation: Digital Divide
- 2:45 – Guest Speaker: International Dispute Resolution and Arbitration
- 3:10 – Cybercrime Introduction
- 3:20 – Jake Baker Case
- 3:50 – Break
- 4:00 – Student Presentation: Comic Copyright Issues
- 4:10 – Class Drill: MySpace Cyberbullying
- 4:40 - Closing

ICANN Board of Directors

“Section 3. CRITERIA FOR SELECTION OF DIRECTORS

ICANN Directors shall be:

- 1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;”

Source: ICANN Bylaws, Article VI, Section 3, Clause 1 ([full text](#))

ICANN Board of Directors

- “2. Persons with an understanding of ICANN's mission and the potential impact of ICANN decisions on the global Internet community, and committed to the success of ICANN;”

Source: ICANN Bylaws, Article VI, Section 3, Clause 2 ([full text](#))

ICANN Board of Directors

- “3. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section;”

Source: ICANN Bylaws, Article VI, Section 3, Clause 3 ([full text](#))

ICANN Board of Directors

- “4. Persons who, in the aggregate, have personal familiarity with the operation of gTLD registries and registrars; with ccTLD registries; with IP address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; “

ICANN Board of Directors

- “5. Persons who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and”

Source: ICANN Bylaws, Article VI, Section 3, Clause 5 ([full text](#))

ICANN Board of Directors

- “6. Persons who are able to work and communicate in written and spoken English.”

Source: ICANN Bylaws, Article VI, Section 3, Clause 6 ([full text](#))

ICANN Board of Directors

- “In order to ensure broad international representation on the Board... at all times each Geographic Region shall have at least one Director, and at all times no region shall have more than five Directors on the Board...”

Source: ICANN Bylaws, Article VI, Section 5,
[\(full text\)](#)

ICANN Board of Directors

- "Geographic Region" = Europe; Asia/Australia/Pacific; Latin America/Caribbean islands; Africa; and North America.
- "Geographic Regions" - reviewed by the Board from time to time (but at least every three years) to determine whether any change is appropriate, taking account of the evolution of the Internet."

Source: ICANN Bylaws, Article VI, Section 5,
[\(full text\)](#)

ICANN Meetings

- Rotate between Geographic Regions
 - Paris in June '08
 - Cairo in November '08

ICANN Staff

- 73 staff members
- NO members from Latin America,
- 4 from Africa ,
- 13 from Europe, and
- 45, or 62% of staff members, are from the North American region, of which 41 are from the United States.

Cybercrime Overview

Cybercrime

- Criminal law v. criminal procedure
- Study of Cybercrime – analysis of criminal law and criminal procedure in the context of the Internet or computer networks

Cybercrimes

- Traditional crimes performed with computers
- Criminal intellectual property violations
- Unauthorized access to computers
- Crimes in a virtual world

Kerr: Criminal Law in Virtual Worlds

- Physical perspective v. virtual perspective
- Applying criminal law in virtual worlds?

Criminal Law Overview

- Actus Reus v. Mens Rea
- Actus Reus
 - The act – a bodily movement
- Mens Rea
 - The required mental state
 - Not always expressly provided
 - General v. specific intent

Jake Baker Case

Facts

Facts

- Communicated over usenet and email with Canadian detailing plans for pretty bad things
- Discovered by UM alum in Russia
- DPS confiscated evidence, found other emails
- Federal agents charged Baker with violating 18 U.S.C. §875(c)

18 U.S.C. §875(c)

- “(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”

§875(c)

- Mens rea element?
- Courts have interpreted 875(c) requires proof that a reasonable person would have taken the statement as “a serious expression of an intention to inflict bodily harm.”

Source: United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)

History of 875(c)



Charles Lindbergh

Source: <http://hdl.loc.gov/loc.pnp/cph.3b16304>

History of 875(c)

- 1932: intended to prevent use of the mail to transmit threats
 - Sender must have intended “to extort... money or other things of value”
- Motivated by kidnapping of Lindbergh’s infant and kidnapper’s use of mail to convey threats

Source: 1932 Extortion Statute
(July 8, 1932, ch. 464, Sec. 1, 47 Stat. 649)

History of 875(c)

- 1934: modified to extend to any kind of communication (due to telegraph and telephone)



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History of 875(c)

- 1939: expanded to extend to non-extortionate threats
 - Adjusted punishment based on extortionate intent

District Court

- Supreme Court – true threats not protected by First Amendment
 - “true threats” = express and unconditional
 - E.g. LBJ case – overturned conviction based on “If they ever make me carry a rifle the first man I want to get in my sights is LBJ”
- Source: *Watts v. United States*, 394 U.S. 705 (1969)
- District Court – dismissed indictment on First Amendment grounds
 - Baker’s statements fell short of “true threats”

6th Circuit

- Government appealed to 6th Circuit

6th Circuit Holding

- Did not address First Amendment
- Held that indictment failed to state claim because it did not satisfy the “communicate a threat” element of 875(c)

6th Circuit Reasoning

- A literal reading of 875(c) would lead to absurd results

6th Circuit Reasoning

- Therefore, “a communication containing a threat” must be such that a reasonable person
 - (1) would take the statement as a serious expression of an intention to inflict bodily harm (mens rea); and
 - (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus)

6th Circuit Reasoning

- “no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation.” Source: U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997)
 - Government failed to allege a communication containing a threat
- Purpose was to “foster a friendship” not to convey a threat.

Impact on Cybercrime

- “new technology such as the Internet may complicate analysis [by courts] and may sometimes require new or modified laws.”

Source: U.S v. Baker, 890 F.Supp. 1375 (E.D. Mich. 1995)

- First decisions to apply 875(c) to electronic media
- Some commentators concerned that court applied 875(c) differently b/c this was new technology

- Whether it's a First Amendment analysis or a strict reading of 875(c), we see concerns over chilling expression or over-reaching in the criminal context

Dissent

- Statutory interpretation issue
- “The words in §875(c) are simple, clear, and concise, and unambiguous. The plain, expressed statutory language commands only that the alleged communication must contain ‘any threat’ to kidnap or physically injure ‘any person’, made for ‘any reason’ or ‘no reason.’”

Source: U.S. v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997)

MySpace Cyber-bullying – Lori Drew

Facts

Falling out

13-year old
victim

Drew's 13-year
old daughter



Fall 2006: "Josh Evans" account created

Join MySpace Here!

Already a member? [login](#)

Email Address:

Confirm Email Address:

Password:

Confirm Password:

First Name:

Last Name:

Country:

State:

Postal Code:

Date Of Birth:

Allow others to see when it's my birthday

Gender: Female Male

Preferred Site & Language:

Verification: 

Musician

If you are a Musician, [Sign up here](#)



COMEDIAN

If you are a comedian, [Sign up here](#)









FILMMAKER

If you are a film maker, [Sign up here](#)



Why Join MySpace?

-  Create a Custom Profile
-  Upload Pictures
-  Share Photo Album
-  Send Mail and IM's
-  Write Blogs & Comments
-  It's FREE!

MySpace understands that user privacy is the key to our success.

Already a member?

Please read our [privacy policy](#)



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“Josh Evans”


Victim

“The world would be a better place without you.”

“You’re the kind of boy a girl would kill herself over.”




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“Josh Evans”

Victim

MySpace Terms of Service

Terms & Conditions



MySpace.com Terms of Use Agreement

February 28, 2008

MySpace, Inc. ("MySpace" or "we") operates MySpace.com, which is a social networking service that allows Members to create unique personal profiles online in order to find and communicate with old and new friends. The services offered by MySpace include any MySpace-branded URL (the "MySpace Website"), the MySpace instant messaging service, the MySpace application developer service and other features (for example, music and video embedded players), MySpace mobile services, and any other features, content, or applications offered from time to time by MySpace in connection with MySpace's business (collectively, the "MySpace Services"). The MySpace Services are hosted in the United States.

This Terms of Use Agreement ("Agreement") sets forth the legally binding terms for your use of the MySpace Services. By using the MySpace Services, you agree to be bound by this Agreement, whether you are a "Visitor" (which means that you simply browse the MySpace Website, including through a mobile device, or otherwise use the MySpace Services without being registered) or you are a "Member" (which means that you have registered with MySpace). The term "User" refers to a Visitor or a Member. You are only authorized to use the MySpace Services (regardless of whether your access or use is intended) if you agree to abide by all applicable laws and the terms of this Agreement. Please read this Agreement and save it. If you do not agree to be bound by this Agreement and to follow all applicable laws, you should leave the MySpace Website and discontinue use of the MySpace Services immediately. If you wish to become a Member, communicate with other Members and/or make use of the MySpace Services, you must read this Agreement and indicate your acceptance during the registration process.

MySpace TOS

- “you represent and warrant that (a) all registration information you submit is truthful and accurate;”
- “you will maintain the accuracy of such information;”

Source: <http://www.myspace.com/index.cfm?fuseaction=misc.terms>

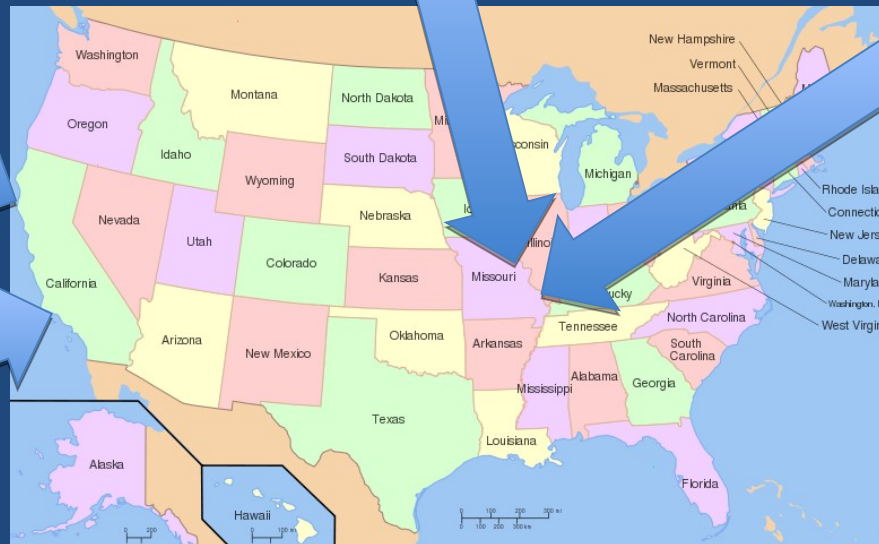
MySpace TOS

- Will not use information obtained from MySpace to “harass, abuse, or harm other people;”
- Will not “solicit personal information from anyone under 13;” and
- Will not promote “information known to be false or misleading.”
- Will not use pictures of person without that person’s permission.

Source: <http://www.myspace.com/index.cfm?fuseaction=misc.terms>

Jurisdiction

Source: <http://www.myspace.com/>



Victim

Defendant

Source: http://en.wikipedia.org/wiki/U.S._Map

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Prosecution in Missouri?

- Missouri harassment laws at the time limited to telephone harassment
- Obscenity laws didn't fit
- No "Threat" under §875(c)
- Homicide laws didn't fit (problems with the actus reus)

Indictment in C.D. Cal

- Computer Fraud Abuse Act
- Felony counts – causing emotional distress
 - Greater than 1 year in prison
- Misdemeanor counts – not requiring emotional distress
 - 1 year or less in prison

Computer Fraud and Abuse Act

- Intentionally accessing a computer without authorization; or exceeding authorized access,
- And thereby obtaining information from any protected computer
- Involving interstate or foreign communication

CFAA

- “without access” not defined
- “exceeds authorized access” = “to access a computer without authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter”

Source: The Computer Fraud and Abuse Act (18 USC 1030)

CFAA History

- 1984 – Counterfeit Access Device and Computer Fraud and Abuse Act
- House Committee: “section 1030 deals with an ‘unauthorized access’ concept of computer fraud rather than the mere use of a computer. Thus, the conduct prohibited is analogous to that of ‘breaking and entering’ rather than using a computer ... in committing the offense.”

Closing Argument – U.S.

- "Folks, that's Josh Evans right there," U.S. Attorney O'Brien told the court. "Lori Drew decided to humiliate a child. The only way she could harm this pretty little girl was with a computer. She chose to use a computer to hurt a little girl, and for four weeks she enjoyed it."

Reference: U.S.A. v. Lori Drew, No. 2:08-cr-582 (C.D. Cal., 2008)

Closing Argument - Defense

- "If you hadn't heard the indictment read to you, you'd think this was a homicide case," Drew's attorney, Dean Steward said. "And it's not a homicide case. This, ladies and gentlemen, is a computer case, and that's what you need to decide."

Reference: U.S.A. v. Lori Drew, No. 2:08-cr-582 (C.D. Cal., 2008)

Final Message Excluded

- "The world would be a better place without you"
- Sent via IM, and not through interstate commerce
 - So excluded

Verdict

- Convicted of 3 misdemeanors under CFAA
 - Misdemeanors punishable by year or less in jail
- No conviction on felony charges under CFAA (to inflict emotional distress)
 - Felonies punishable with over a year in jail

Verdict

- 8 of 12 would have convicted on felonies: "I would have liked to see this lady go to jail to change the way Internet sites are run," said Kunasz, 25, a former hairdresser who lives in Los Angeles County.

Source: Kohler, Jeremy and David Hunn. "Most jurors favored felony conviction for Lori Drew." *St. Louis Dispatch*. 2 December 2008 ([article](#))

Verdict (cont.)

- "The thing that really bothered me was that [Drew's] attorney kept claiming that nobody reads the terms of service," she said. "I always read the terms of service... If you choose to be lazy and not go through that entire agreement or contract of agreement, then absolutely you should be held liable."

Source: <http://blog.wired.com/27bstroke6/2008/12/jurors-wanted-t.html>

Next Steps?

- Judge Wu has option to overturn verdict
 - Indicated that issue of whether Drew read TOS was “complicated legal question”
- Appeal to 9th Circuit
- New laws?

MySpace Cyber-bullying Drill

Group 1 – “Breaking Up Is Hard To Do”

- New Missouri Cyber-bullying Statute
 - Criminalizes “two or more acts” that “serve no legitimate purpose” and “would cause a reasonable person... to be frightened, intimidated, or emotionally distressed.” Source: Missouri SB 818 ([full text](#))
 - Aggravated crime if the actor is over 21 and the other person is under 17

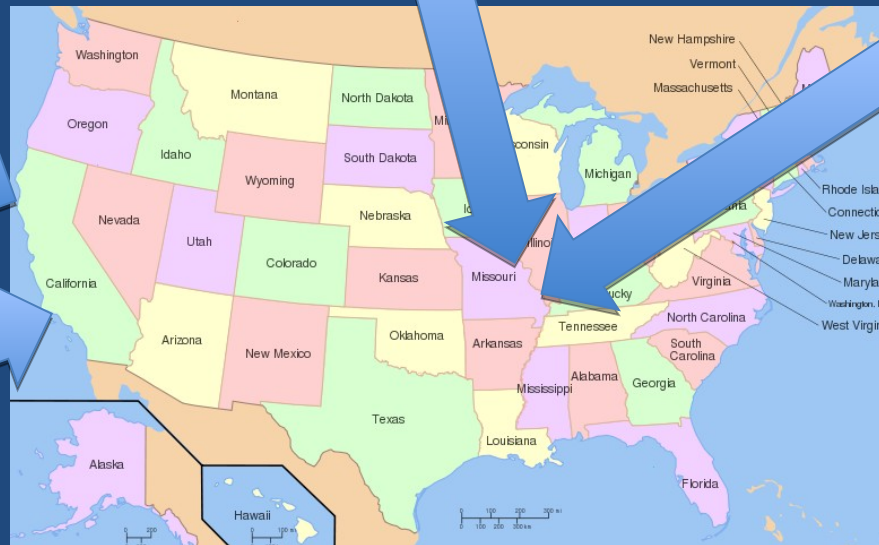
“legitimate purpose”

- What about:
 - First email: “let’s break up” (get a nasty response)
 - Second email: your nasty response
 - Third email: more nasty response
 - Jail???

Group 2: “Where did it all go
wrong?”

Jurisdiction

Source: <http://www.myspace.com/>



Victim

Defendant

Source: http://en.wikipedia.org/wiki/U.S._Map

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Issues

- Interstate commerce? (not knowingly)
- California?
 - What act occurred in California?
 - Do you agree? (should intent matter?)

Group 3: Just Like Your Mortgage Agreement

- USA Today editorial defending verdict

Under the statute, website owners have the right, much like the property owner who posts a "No Trespassing" sign, to spell out, as did MySpace, what access or use is "unauthorized." The concept that Drew should not be held responsible if she did not read MySpace's terms of service is as absurd as arguing that if you default on your mortgage payments, your bank cannot foreclose on your house because you did not read your mortgage agreement.

Source: Ackerman, Nick. "The law fits the crime."
USA Today. 3 December 2008. ([article](#))

TOS

“You may not use the Services and may not accept the Terms if (a) you are not of legal age to form a binding contract with Google,” *Google Terms of Service*, § 2.3, <http://www.google.com/accounts/TOS> (last modified Apr. 16, 2007).

“[Y]ou agree to . . . provide accurate, current and complete information about you as may be prompted by any registration forms on the Site ("Registration Data") . . . [and] maintain and promptly update the Registration Data, and any other information you provide to Company, to keep it accurate, current and complete” *Facebook Terms of Use*, <http://www.facebook.com/terms.php> (last modified June 7, 2008).

TOS

- Another example – Match.com

Group 4: Let's Be Civil

There are better ways to handle the Lori Drews of the world. As the family of murder victim Ron Goldman showed by winning damages from O.J. Simpson, it's possible to pursue justice through civil courts. And since the Missouri tragedy shows how dangerous cyberbullying can be, it makes sense to update harassment laws to attack it directly. That could provide a way to hold the next Lori Drew liable — without making potential criminals of innocent people in the process.

Source: "MySpace case bends the law." *USA Today*. 3 December 2008. ([article](#))

- Civil: money not incarceration; preponderance of evidence not incarceration; less constitutional protection for defendant; only a remedying harm to a person, not necessarily to the public

Group 5: What about MySpace?

- Supreme Court denied cert on case applying §230 to shield MySpace from claim that it doesn't provide adequate safeguards against sexual predators.
- Should §230 protect MySpace if it was sued in civil court by the victim's family in the Lori Drew case?

Group 6: Who's there?

- Okay to have narrow statute targeting improper anonymous uses of Internet?
- Pending federal legislation targets anyone who uses “electronic means” with intent to “coerce, intimidate, harass, or cause emotional distress to a person” involving interstate commerce. Source: H.R.6123 Megan Meier Cyberbullying Prevention Act
- Too broad? Ways to narrow?

Evaluations

1 – First Amendment

- Content regulated → strict scrutiny: compelling gov. interest + narrowly tailored to that interest + no less restrictive means
 - Hard to overcome
 - 10 years since COPA enacted; still no enforceable law
- Anonymity is protected by itself
- This is a check on any regulation of expression: IP, defamation, election law, criminal laws, etc.
- Expression on Internet is protected (Reno v. ACLU, 1997)

2 - Copyright

- Purpose is to promote learning!
 - This includes both promoting creation of works and public's access to those works
- When you lose sight of this purpose, you get:
 - Ambiguous fair use
 - No formalities, making it difficult to get permission
 - Long term
 - Derivative works protection
- Consistent with First Am.? Idea/Expression, Fair Use

3 – Public Licenses

- Rely on IP protection, don't compete with it
- As *Jacobsen v. Katzer* (2007) case held – this is a different manner of licensing your rights (your rights don't change)
 - Makes your public license much more enforceable, allowing owner to pass along openness requirements downstream

4- Privacy

- 4th and 14th Amendments are primary constitutional protections against Gov. invasion
 - Issue is “expectation of privacy”
- Federal laws governing private parties are piecemeal
- Lessig: many uses of personal information are beneficial, so it’s not an easy answer

Closing

Thank you and good luck