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Chair
Richard Raysman

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New York Courts Continue to Confront Complicated Issues under State Cyberstalking Statute

Richard Raysman
Peter Brown

Holland & Knight LLP

Richard Raysman is a partner at Holland & Knight LLP and Peter Brown is the principal at Peter Brown & Associates. They are co-authors of "Computer Law: Drafting and Negotiating Forms and Agreements" (Law Journal Press).

In 1999, the New York Legislature amended the state Penal Law to reflect the fact that "criminal stalking behavior" had by then "become more prevalent in New York State in recent years." The resulting law, N.Y. Penal Law § 120.45, otherwise known as the cyberstalking statute, requires in relevant part in one subsection, that the government, on behalf of the complainant, establish that the:

> defendant intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct ... is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct.

Id. § 120.45(3). In general, cyberstalking is considered to be manifest by activities such as, *inter alia*, false accusations, false victimization, monitoring, attacks on data and equipment, and information gathering. According to a study conducted by the Bureau of Justice Statistics entitled "Stalking Victimization in the United States," one in four stalking victims had been cyberstalked a well. The same study concluded that approximately 1.2 million people had been victims of cyberstalking during the relevant time period.

In July of 2015, a criminal court in lower Manhattan interpreted the statute to preclude a claim based on harassing emails sent to the work email of the complainant. *People v. Marian*, — N.Y.S.3d —, 2015 WL 4231664 (N.Y. Crim. Ct. July 14, 2015). Specifically, the court concluded that a work email address could not be a "place of employment or business," as such a characterization can only refer to an "actual, physical location." This holding was premised at least in part on the fact that other New York courts have consistently recognized that an "actual place of business" is a place "where the person is physically present with regularity, and that person must be shown to regularly transaction business at that location." *See Rosario v. NES Medical Services of New York, P.C.*, 963 N.Y.S.2d 295 (2d Dept. 2013).

It goes without saying that the Internet has almost innumerable aspects which generally promote altruistic ends. For instance, there's a website that donates 10 grains of rice to the World Food Programme every time a user answers a trivia question correctly. On the other hand, a surfeit of popular sites (Reddit, Facebook, Twitter) are often awash in venom. Such bile and maliciousness is often exacerbated because of the ability to exploit and disseminate the private information of the victim to a wide audience with alacrity. Thus, it is hardly surprising that the regrettable, age-old practice of stalking has migrated to the virtual world, where the consequences are often more deleterious. According to one study, cyberstalking is

known to cause higher levels of depression and anxiety for victims when compared to "normal" bullying. This is believed to stem from the anonymity of the perpetrators.

This column will focus on recent developments in New York law with respect to judicial attempts to adjudicate vexing questions that arise subsequent to acts of cyberstalking, including: what actions can be appropriately defined as threating under New York Penal Law 120.45, and whether otherwise defamatory speech about the CFO of a charity can escape federal prosecution under that cyberstalking statute because it is protected by the First Amendment.

ANOTHER NEW YORK STATE COURT REJECTS A CYBER STALKING CLAIM

A case even more recent than *Marian* in the criminal court located in New York City also confronted the scope and burden of proof when dealing with the knowledge element of the cyberstalking statute. As in *Marian* described *supra*, the court dismissed the claim on grounds that it did not adhere to a predicate element of the statute, namely the mens rea component. *See People v. Selinger*, 48 Misc. 3d 1218(A), 2015 N.Y. Slip. Op. 51161(U) (N.Y. Crim. Ct. Aug. 11, 2015).

In *Selinger*, the complainant averred violations of the cyberstalking statute on the following grounds. First, the defendant, who was the half-sister of the complainant, posted a photograph on Instagram that included the phone number of the latter, with associated text suggesting that the latter sought assignations. The text of the posting claimed that the author requested "#anytakers? #foragoodtime." This posting precipitated 15 calls to the complainant soliciting sexual relations. Second, the defendant, via the wedding facilitator website TheKnot.com, RSVP'd to the complainant's wedding in her own name as well as *that of her dog and the parties shared deceased father*. The defendant was not invited to this wedding. Finally, in a bit of depraved ingenuity, the defendant *named a cockroach after the complainant* through a wildlife conservation website. All told, surely these series of decisions exemplify one of the worst uses of the Internet in recent memory.

In the same vein, the court characterized the conduct of the defendant as "idiotic and infantile, and was vexing and annoying to the complainant to a degree far beyond which any person should ever have to be subjected." Nonetheless, it granted the defendant's motion to dismiss under Penal Law § 120.45(1). This subsection mandates that the defendant, with either actual or constructive knowledge, must engender a "reasonable fear of

material harm" to the complainant's specified interests. Such a fear requires evidence of an actual or implied threat of danger, lest the defendant's conduct be classified as annoying or obnoxious and thus non-actionable.

Accordingly, since the conduct of the defendant, while arguably deplorable, was best described as "seriously annoying," it thus did not contain either an actual or implied threat of danger. This doomed the cyberstalking claim. As defendant's behavior was obnoxious and non-threatening, or in other words, "the Internet equivalent of having pizza delivered to an enemy, albeit over and over again," the defendant could not have known, either constructively or actively, that the complainant would perceive such behavior as threatening. Further, such indicia of an implied threat of danger, such as physical proximity or trespass or previous threatening behavior, were absent from the instant case.

A SOUTHERN DISTRICT DECISION THAT REJECTS FIRST AMENDMENT IMMUNITY FOR VIOLATIONS OF FEDERAL CYBER STALKING STATUTE

A federal court case in the Empire State recently attempted to resolve the seeming tension that can materialize when constitutional protections and the federal cyberstalking statute could theoretically be in conflict. *See U.S. v. Sergentakis*, 2015 WL 3763988 (S.D.N.Y. June 15, 2015). This statute, codified at 18 U.S.C. 2261A(2), proscribes "with the intent to kill, injure, harass, intimidate or place under surveillance … [uses] any interactive computer service or electronic communication service or electronic communication system … to engage in a course of conduct that places that person in reasonable fear of the death of or serious bodily injury to a person … or causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person."

In *Sergentakis*, the defendant had worked at a non-profit that funds cancer research ("LLS"). In 2006, he pled guilty to a variety of white collar crimes, including mail fraud and conspiracy, related to his participation in a kickback scheme involving the allocation of the LLS' service contracts. Upon his release from prison in 2010, the defendant created and maintained a series of websites, all of which contained highly derogatory allegations about John Walter, the former CFO of LLS. Such allegations included, *inter alia*, that (1) Walter "enjoys beating helpless animals"; (2) "can rape your wife, molest your children and bum [sic] down your house; and (3) that the website exists in part because "We all have a responsibility to keep children safe from pedophiles like [Walter]."

The defendant also established a Facebook page which reiterated much of the same information. Finally, he emailed much of this content to individuals, LLS donors and the media. For instance, the defendant emailed a Missouri TV station, claiming that "the head of a major nonprofit was arrested for child molestation and case fixing." A link to his aforementioned website was affixed to this email.

In January 2015, the defendant was charged with witness retaliation (not discussed here) and cyberstalking, pursuant to 18 U.S.C. § 2261A(2). The defendant moved to dismiss on First Amendment grounds. Specifically, the defendant contended that the statements made on his website referencing Walter constituted protected speech on matter of public concern under this Amendment.

The Southern District disagreed. After collecting cases of as-applied challenges to 18 U.S.C. § 2261A(2) that often reached decidedly opposite results, it concluded that Walter could not be considered a limited purpose public figure, and as such, the defendant's statements could not receive the protection sought under the First Amendment. Specifically, the court contrasted Walter with the complainant in another cyberstalking case in federal court in Maryland. *See U.S. v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011). Whereas the complainant in *Cassidy* had an ample Twitter following (in excess of 17,000), been the subject of a non-fiction book by a journalist at *The Washington Post*, and had produced dozens of online, publicly accessible videos that had been viewed in excess of 140,000 times, Walter exemplified no such vestiges of public figure status.

Rather, the defendant in the instant case could not produce any "clear evidence" of Walter's "general fame, notoriety, or pervasive involvement in the affairs of society to warrant public-figure status" for all or limited purposes. Notably, the court concluded that it would be "improper" to designate Walter as a public figure simply because he served on the executive board of a well-funded and generally known charity.

Though the court devoted most of the opinion to the question of Walter's public figure status, the real impetus for the court's conclusion may have been the vitriolic nature of the defendant's comments. It characterized the defendant's "campaign of personal attacks … concerning allegations of child molestation, animal cruelty, case fixing, and rape" as "a thinly veiled attempt to immunize the defendant's personal attacks on Walter by claiming to speak on public issues." Therefore, defendant's speech was "speech integral to criminal conduct" under 18 U.S.C. § 2261A(2), and exempted from any constitutional protection.

CONCLUSION

For all intents and purposes, cyberstalking is not going away. To assume so would be to concomitantly assume that most computer usage does the same. Also unlikely to dissipate or even attenuate is the intuitive and seemingly straightforward notion that certain types of cyberstalking are so extreme and menacing that they must be addressed by the law. However, the courts that have adjudicated cyberstalking cases to date have acknowledged the complexities involved in attempting to legally redress these claims.

Specifically, questions arise because almost all cyberstalking claims arise at the intersection of canonical legal issues and constructs like free speech, knowledge requirements, and the sometimes inchoate distinction between criminal harassment and merely annoying and distasteful conduct. The overarching ethos of the Internet, that is, as a place where robust speech protections should be afforded virtually without exception, also likely contributes to the uneasiness with which courts confront otherwise offensive and actionable conduct.

Ultimately, as the doctrine continues to settle, perhaps more uniformity in decisions will materialize, but given the fact-specific and competing nature of cyberstalking claims, trends will be difficult to foresee.

NOTES