

**Legal Aspects of
Computer Network Defense -
A Government Prospective
&
A Year In Review:
Precedents in Computer and Internet
Security Law
2004-2005**

**Black Hat Briefings
USA 2005
July 27, 2005
Major R.W. Clark
U.S. Army, JAGC**

Agenda

- **History**
- **Computer Network Defense**
- **Computer Crime Prosecutions, Arrests & Indictments July 2004 to June 2005**
- **Computer & Internet Legal Precedents July 2004 to June 2005**
- **Issues in Computer & Internet Security**
- **Materials**

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History

Courts Discover “computer”

■ 1900 – 1910	11
■ 1910 – 1920	7
■ 1920 – 1930	3
■ 1930 – 1940	10
■ 1940 – 1950	13
■ 1950 – 1960	24
■ 1960 – 1970	411
■ 1970 – 1980	4,268
■ 1980 – 1990	15,513
■ 1990 – 2000	36,122
■ 2000 – May 1, 2005	30,216

History

Computers Recognized by the Courts

- ***Comptograph Co. v. Universal Accountant Mach. Co.***, 142 F. 539 (N.D. Ill. January 19, 1906)
- ***In re Spitzglass***, 96 F. 2d 1002 (C.C.P.A. June 6, 1938)
- ***Sperry Rand Corp. v. Bell Tel. Labs.***, 171 F. Supp. 343 (S.D.N.Y. March 19, 1959)
- ***Sperry Rand Corp. v. Bell Tel. Labs.***, 208 F. Supp. 598 (S.D.N.Y. September 6, 1962) *appeal dismiss'd*, 317 F. 2d 491, 493 (2d Cir. NY 1963)
- ***Eckert v. Commissioner***, 19 T.C.M. (CCH) 1465 (November 30, 1960)

History

Hacking Invented

- **1960s The Dawn of Hacking**
 - MIT & “Hack”
- **1970s**
 - Phone Phreaks and Cap'n Crunch
- **1980s**
 - Hacker Message Boards and Groups
 - The 414 gang - six teenagers
 - CFAA & Morris
- **1990s**
 - Poulsen, Def Con, Minnick oh my!
- **2000s**
 - Like you don't remember!

Authority for Computer Network Defense

- **Common Law Principle**
- **Property is “the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”**
 - **George J. Siedel, Real Estate Law 21 (1979), *citing*, W. Blackstone, Commentaries 138**
- **Property in its nature is an unrestricted and exclusive right. Hence it comprises in itself the right to dispose of the substance of the thing in every legal way, to possess it, to use it, and to exclude every other person from interfering with it.**
 - **Mackeldey, Roman Law § 265 (1883).**

Authority for Computer Network Defense

- Right to exclude people from one's personal property is not unlimited.
- Self defense of personal property one must prove that he was in a place he had a right to be, that he acted without fault and that he used reasonable force which he reasonably believed was necessary to immediately prevent or terminate the other person's trespass or interference with property lawfully in his possession
 - *Moore v. State*, 634 N.E.2d 825 (Ind. App. 1994) and *Pointer v. State*, 585 N.E. 2d 33, 36 (Ind. App. 1992)

Authority for Computer Network Defense

- **Common Law Doctrine-Trespass to Chattel**
- **Owner of personal property has a cause of action for trespass and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use**
- **One may use reasonable force to protect his possession against even harmless interference**
- **The law favors prevention over post-trespass recovery, as it is permissible to use reasonable force to retain possession of a chattel but not to recover it after possession has been lost**
 - ***Intel v. Hamidi*, 71 P.3d 296 (Cal. Sp. Ct. June 30, 2003)**

Authority for Computer Network Defense

- Defense Information Assurance Program, 10 U.S.C. § 2224 (West 2005)
- CJCSI 6510.01D, Information Assurance (IA) and Computer Network Defense (CND), June 15, 2004
- CJCSM 6510.01, Defense in Depth: Information Assurance (IA) and Computer Network Defense (CND), March 25, 2003
- AR 25-2, Information Assurance, November 14, 2003
- Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a) (West 2005)
- Electronic Communication and Privacy Act, 18 U.S.C. § 2510 *et seq.*, (West 2005)
- Pen Registers and Trap Devices, 18 U.S.C. § 3121 *et seq.*, (West 2005)

Department of Defense

Computer Network Defense

- **United States Strategic Command will:**
 - **Direct DOD-wide CND operations to defend DOD computer networks.**
 - **Develop coordinated defensive response actions necessary for a synchronized defense of DOD computer networks in response to unauthorized activity.**
 - **(U) CJCSI 6510.01D, Information Assurance (IA) and Computer Network Defense (CND), 15 June 2004, Enclosure C, paragraph 3, Commander US Strategic Command Responsibilities**

Department of Defense

Computer Network Defense

- Actions taken to **protect, monitor, analyze, detect, and respond** to unauthorized activity **within** DoD information systems and computer networks
- **Monitoring, analysis, detection** activities, including trend and pattern analysis, are **performed** by **multiple disciplines** within the Department of Defense, e.g., network operations, CND Services, intelligence, counterintelligence and law enforcement.
 - CJCSI 6510.01D

Department of Defense

Computer Network Defense

- **Multiple disciplines** use their **inherent capabilities** and accomplish specific CND actions within their larger functional areas to defend DOD computer networks... CND requires **close coordination** between Network operations (CERTs/NOSCs), intelligence, communications, counterintelligence and law enforcement to successfully defend DOD computer networks.
 - CJCSI 6510.01D

Department of Defense Computer Network Defense

Event Will Determine DOD Response and Legal Authority

- **Multiple disciplines**
 - **Network Ops-
CERTs/NOSCs**
 - **Intelligence**
 - **Counterintelligence**
 - **Law enforcement**
 - **Commander-in-Chief**

Army CERT Computer Network Defense

- (1) ensure proper performance under **service provider exception** in the normal course of employment to keep the service operational/ protect the rights or property.
- (2) authorized to use **CIO/G-6-approved** automated monitoring **tools** . . . SA/NA does not have unlimited authority in the use of these monitoring tools. . . . tools are used only for their intended purpose.
- (3) discover possible **criminal offense**, immediately **report to LEA**
- (4) Only LE/CI personnel are authorized to intercept the content of an individual's communication, after obtaining appropriate legal authority
 - AR 25-2, paragraph 4-5t

Army CERT Computer Network Defense

- **18 U.S.C. § 2511(2)(a)(i)**
 - “may intercept or disclose communications on its own machines “in the **normal course** of employment while engaged in any activity which is a **necessary** incident to . . . the **protection of the rights or property** of the provider of that service.”

Private Organization Computer Network Defense

- **18 U.S.C. § 2511(2)(a)(i)**
 - “may intercept or disclose communications on its own machines “in the **normal course** of employment while engaged in any activity which is a **necessary** incident to . . . the **protection of the rights or property** of the provider of that service.”

Computer Network Defense

- **The Service Provider Exception is a limited exception. Not a criminal investigator's privilege.**

18 U.S.C. § 2511(2)(a)(i)

Computer Network Defense

- Broad exception, however, Provider must conduct reasonable, tailored monitoring to protect itself from harm.
- **Doesn't allow unlimited monitoring**
 - Need “substantial nexus” b/w threat and property
 - *U.S. v McLaren*, 957 F. Supp 215, 219 (M.D. Fla. 1997)
- System administrators **can track hackers** within their networks in order to prevent further damage.
 - *U.S. v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993)

Computer Network Defense

- **Notification of Monitoring**
- **Banners**
- **Computer Use Policies**

Legal Precedents 2004-2005

- ***In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 2005 Bankr. LEXIS 415 (Bankr. S.D.N.Y. March 21, 2005)(As Amended, March 23, 2005)**
- **Privacy in Workplace Computers & E-mail - 4 Factors:**
 - (1) does the corporation maintain a policy banning personal or other objectionable use;
 - (2) does the company monitor the use of the employee's computer or e-mail;
 - (3) do third parties have a right of access to the computer or e-mails; and,
 - (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies

Legal Precedents 2004-2005

- Evidence of corporate policies banning certain uses or monitoring employee e-mails.
 - Charles Carroll, the debtor's former general counsel
 - Emphatically stated Asia Global did not enact or enforce a policy that e-mails on the company server belonged to the company
 - He never told anyone that Asia Global had such a policy.
 - He understood that company policy permitted personal use of the e-mail system
 - He never told employees that their e-mails would be monitored, and he did not monitor any employee's e-mail. (Id., at P 5.)
 - Each of the Insiders submitted nearly identical declarations containing similar statements.
 - *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 2005 Bankr. LEXIS 415 (Bankr. S.D.N.Y. March 21, 2005)(As Amended, March 23, 2005)

Legal Precedents 2004-2005

- **Trustee disputes these assertions**
 - **Corporate E-mail Policy**
 - **The Corporate E-mail systems, and all data and information transmitted through [the Corporate E-mail systems] are owned and operated by the Corporation for the sole purpose of conducting the Corporation's business.**
 - **Incidental and occasional personal use of E-mail is permitted, but such messages are property of the Corporation, and are treated no differently than any other message.**
 - **. . . Communications on the Corporate E-mail systems are not private or secure**
 - ***In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 2005 Bankr. LEXIS 415 (Bankr. S.D.N.Y. March 21, 2005)(As Amended, March 23, 2005)**

Legal Precedents 2004-2005

- **Trustee disputes these assertions**
 - **Messaging Policy**
 - **Authorized users shall access messaging systems solely for the purposes of conducting the Corporation's business, or for other appropriate activities authorized by management. Corporation . . . reserves the right . . . to engage in random or scheduled monitoring of business communications. . . . Privacy is not guaranteed, nor implied. . . responsibility of every user to be aware of, and comply with, all corporate policy and guidelines while using messaging systems. All data and content is the property of the Company. No content shall be withheld from the Company's authorized security personnel or others specifically authorized by the chief executive officer of the Company.**
 - ***In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 2005 Bankr. LEXIS 415 (Bankr. S.D.N.Y. March 21, 2005)(As Amended, March 23, 2005)**

Legal Precedents 2004-2005

- ***Borninski v. Williamson*, 2005 U.S. Dist. LEXIS 9401 (N.D. Tex. May 17, 2005)**
 - **Consent to Monitor**
 - **Title I of the ECPA (Wiretap Act)**
 - **Title II of the ECPA, Stored Communications Act**

Legal Precedents 2004-2005

- ***In the Matter of the Application of the United States for a Nunc Pro Tunc Order for Disclosure of Telecommunications Records, 352 F. Supp. 2d 45 (D. Mass. January 3, 2005)***
 - **Retroactive 18 U.S.C. § 2703(d)**
 - **Emergency Disclosure**
 - **18 U.S.C. § 2702(c)**
 - **18 U.S.C. § 2702(b)(8)**

Legal Precedents 2004-2005

- ***Freedman v. Am. Online, Inc.*, 294 F. Supp. 2d 238 (D. Conn. December 5, 2003)**
 - AOL Dismissed-Wrong Jurisdiction
- ***Freedman v. Am. Online, Inc.*, 303 F. Supp. 2d 121 (D. Conn. February 4, 2004)**
 - ECPA Disclosure Violation
 - Congress intent:
 - (1) protect personal privacy against unwarranted government searches
 - (2) preserve the legitimate needs of law enforcement.
 - S. REP. NO. 99-541 (1986)
 - Putting the burden and obligation on *both* the government and ISPs is consistent with Congress' intent to protect personal privacy. Violation by one does not excuse the other.

Legal Precedents 2004-2005

- ***Freedman v. Am. Online, Inc*, 325 F. Supp. 2d 638 (E.D. Va. July 12, 2004)**
 - Title II of ECPA regulates disclosures by ISPs of both subscriber information and the contents of its subscriber's communications
 - AOL properly concedes that it violated ECPA but contends that it is not liable because:
 - no evidence that AOL violated the statute "with a knowing or intentional state of mind" as required by the statute's civil enforcement provision
 - AOL relied in good faith on the warrant application and thus is immune from liability under § 2707(e), the statute's good faith defense provision.
- Court rules against AOL and again in AOL's reconsideration ***Freedman v. Am. Online, Inc*, 329 F. Supp. 2d 745 (E.D. Va. August 11, 2004)**

Legal Precedents 2004-2005

- ***United States v. Long*, 2005 CCA LEXIS 155, (U.S.N.M.C.C.A. May 11, 2005)**
- ***United States v. Maxwell*, 45 M.J. 406, (C.A.A.F. 1996)**
- ***United States v. Hambrick*, 55 F. Supp. 2d 504 (W.D. Va. July 7, 1999)**
 - **The defendant cites *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) as the only published federal decision that deals with the question of the expectation of privacy in information obtained from an ISP. Although some of the facts of *Maxwell* appear to be similar to the facts in the present case, *Maxwell* has little or no precedential value because the United States Court of Appeals for the Armed Forces decided the case. That court reviews the convictions of a court-martial and is entirely separate from the United States Courts of Appeals.**

Legal Precedents 2004-2005

- ***United States v. Long*, 2005 CCA LEXIS 155, (U.S.N.M.C.C.A. May 11, 2005)**
 - Appellant 17 pages of e-mails regarding her drug use and fears of detection
 - System administrator searches and seizes e-mails in response to specific request from LEA (no warrant)
 - System Administrator act as LEA ergo fourth Amendment Applicable
 - Held- Unlawful search. Authorized users of government computer network have limited expectation of privacy in their e-mails as to LEA searches
 - Distinguishes REP as to work place searches under *O'Connor v. Ortega* and searches done by LEA

Legal Precedents 2004-2005

- ***United States v. Plush*, 2004 CCA LEXIS 230 (U.S.A.F.C.C.A. September 21, 2004)**
- ***State v. Lasaga*, 269 Conn. 454; 848 A.2d 1149 (Jun. 1, 2004)**

Legal Precedents 2004-2005

- ***Moulton and Network Installation Computer Services, Inc., v. VC3*, 2000 U.S. Dist. LEXIS 19916 (N.D. Ga. 2001)**
 - **Port Scanning**
 - **Defendant admits slow down negligible at best**
 - **No reasonable jury could conclude interference**

Legal Precedents 2004-2005

- ***United States v. Szymczyk*, 2005 CCA LEXIS 184 (U.S.N.M.C.C.C.A. June 23, 2005)**
 - **Voluntary disclosure of information by public ISP to police**

DoJ Quick Reference Guide

	Voluntary Disclosure Allowed?		Mechanisms to Compel Disclosure	
	Public Provider	Non-Public Provider	Public Provider	Non-Public Provider
Basic subscriber, session, and billing information	Not to government, unless § 2702(c) exception applies [§ 2702(a)(3)]	Yes [§ 2702(a)(3)]	Subpoena; 2703(d) order; or search warrant [§ 2703(c)(2)]	Subpoena; 2703(d) order; or search warrant [§ 2703(c)(2)]
Other transactional and account records	Not to government, unless § 2702(c) exception applies [§ 2702(a)(3)]	Yes [§ 2702(a)(3)]	2703(d) order or search warrant [§ 2703(c)(1)]	2703(d) order or search warrant [§ 2703(c)(1)]
Accessed communications (opened e-mail and voice mail) left with provider and other stored files	No, unless § 2702(b) exception applies [§ 2702(a)(2)]	Yes [§ 2702(a)(2)]	Subpoena with notice; 2703(d) order with notice; or search warrant [§ 2703(b)]	Subpoena; ECPA doesn't apply [§ 2711(2)]
Unretrieved communication, including e-mail and voice mail (in electronic storage more than 180 days)	No, unless § 2702(b) exception applies [§ 2702(a)(1)]	Yes [§ 2702(a)(1)]	Subpoena with notice; 2703(d) order with notice; or search warrant [§ 2703(a,b)]	Subpoena with notice; 2703(d) order with notice; or search warrant [§ 2703(a,b)]
Unretrieved communication, including e-mail and voice mail (in electronic storage 180 days or less)	No, unless § 2702(b) exception applies [§ 2702(a)(1)]	Yes [§ 2702(a)(1)]	Search warrant [§ 2703(a)]	Search warrant [§ 2703(a)]

http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.htm#_IIIF_

DoD's Active Response

Law Enforcement

- **Investigation of a crime**
 - **Constitution, 4th Amendment**
 - **Domestic Statutes**

Intelligence Community

- **Intelligence Organizations**
- **E.O. 12333**
- **DoDD 5240.1, DoDD 5240.1-R**
- **Foreign Intelligence Surveillance Act**

Commander-in-Chief Authority

- **Constitution**
- **Standing Rules of Engagement**
 - **CJCSI 3121.01A, Enclosure F, 15 JAN 2000**
- **Hostile act/intent**
- **Use of Force**
- **Article 2(4) refrain from threat or use of force**
- **Article 39 Security Council Determination**
- **Article 51 Self Defense in response to “armed attack”**
 - **Necessity & proportionality**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Sabathia* (E.D. Cal. July 28, 2004)**
- **Charges- charged with ten counts of fraudulently using her computer to embezzle more than \$875,035 from North Bay Health Care Group**
- **Why- She pled guilty during this conference last year**
- **Sentence- Potential 5 years; fine \$250,000**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Salcedo* (W.D. N. Car. December 15, 2004)**
- **Charges- Pled to 4 Counts of 14 Count Indictment- Unlawful Access to Lowe's Nationwide Computer System**
- **Sentenced to 108 months imprisonment longest since Kevin Mitnick's 68-months**
- ***United States v. Botbyl* (W.D. N.Car. December 15, 2004)**
- **Charges- Pled to Count One, Conspiracy**
- **Sentenced to 26 months imprisonment**
- ***United States v. Timmins* (W.D. N. Car. April 2005)**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Jiang* (S.D.N.Y. February 28, 2005)**
- **Charges- Pled to 5 Counts relating to computer fraud and software piracy involving Kinko's Inc.**
- **Sentenced to 27 months imprisonment followed by 3 years supervised release.**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Trowbridge* (Wash. D.C. January 18, 2005) &**
- ***United States v. Chicoine* (Wash. D.C. January 18, 2005)**
- **United States v Tanner (D.C. May 31, 2005)**
 - **Charges- Pled to 1 Count of conspiracy to commit felony criminal copyright infringement (P2P)**
 - **Sentence- Potential- 5 years; fine \$250,000**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Greco* (C.D. Cal. March 22, 2005)**
- **Charges- Pled to 1 Count of threatening to damage the computer system of Myspace.com (CAN-SPAM)**
- **SPIM**
- **Sentence- Potential- 5 years**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Lytle*** (N.D. Cal. March 11, 2005) [Deceptive Duo]
- **Charges- Pled to 5 Counts of computer crimes in violation of 18 U.S.C. § 1030.**
- **Sentence- Potential- 10 years; fine \$250,000; 5 years; fine \$250,000; 1 year; fine \$100,000**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Mantovani* (N.J. October 28, 2004)**
- **www.shadowcrew.com**
- **Charges- 19 Individuals - 62 Count Indictment**
- **4,000 members**
- **Computer Wiretap**
- **Allegedly trafficked in 1.7 million stolen credit cards causing losses in excess of \$4 million dollars**
- **Sentence- Potential- ranging from three to 15 years in prison**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Parson* (W.D. Wash. January 28, 2005)**
- **Charges- Pled to intentionally causing and attempting to cause damage to a protected computer (Variant of MSBlaster Worm)**
- **Sentence- 18 months; 3 years supervised release; no video games, no chat rooms; no anonymous friends; real world friends**

Arrests, Indictments & Prosecutions 2004-2005

- ***United States v. Rodriguez, (S.D.N.Y. August 17, 2004)***
- **Okay not the MLB player, but...**



Arrests, Indictments & Prosecutions 2004-2005

- *United States v. Rodriguez*, (S.D.N.Y. August 17, 2004)
- Alex Rodriguez arrested alleged sale and supplying others with pirated computer software in Manhattan.
- Operates a stand on East 14th Street
- Twice sold pirated software to undercover FBI agent
- Supplied illegal computer software to another individual who operated a stand on East 23rd Street
- Faces a maximum sentence of 10 years in prison and a fine of \$250,000 or twice the gross gain or gross loss from the offense.

Legal Precedents 2004-2005

■ METRO-GOLDWYN-MAYER STUDIOS, INC.; COLUMBIA PICTURES INDUSTRIES, INC.; DISNEY ENTERPRISES, INC.; PARAMOUNT PICTURES CORPORATION; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL CITY STUDIOS LLP, f/k/a Universal City Studios, Inc.; NEW LINE CINEMA CORPORATION; TIME WARNER ENTERTAINMENT COMPANY, LP; ATLANTIC RECORDING CORPORATION; ATLANTIC RHINO VENTURES, INC., d/b/a Rhino Entertainment, Inc.; ELEKTRA ENTERTAINMENT GROUP, INC.; LONDON-SIRE RECORDS, INC., LP; WARNER BROTHERS RECORDS, INC.; WEA INTERNATIONAL INC.; WARNER MUSIC LATINA, INC., f/k/a WEA Latina, Inc.; ARISTA RECORDS, INC.; BAD BOY RECORDS; CAPITOL RECORDS, INC.; HOLLYWOOD RECORDS, INC.; INTERSCOPE RECORDS; LAFACE RECORDS; MOTOWN RECORD COMPANY; RCA RECORDS LABEL, a unit of BMG Music d/b/a BMG Entertainment; SONY MUSIC ENTERTAINMENT, INC.; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; WALT DISNEY RECORDS, a division of ABC, Inc.; ZOMBA RECORDING CORP., Plaintiffs-Appellants, v. GROKSTER LTD.; STREAMCAST NETWORKS, INC., f/k/a Musiccity.Com, Inc., Appellees, and SHARMAN NETWORKS LIMITED; LEF INTERACTIVE PTY LTD., Defendants. JERRY LEIBER, individually d/b/a Jerry Leiber Music; MIKE STOLLER, individually and d/b/a Mike Stoller Music; PEER INTERNATIONAL CORPORATION, PEER MUSIC LTD., SONGS OF PEER LTD.; CRITERION MUSIC CORPORATION; FAMOUS MUSIC CORPORATION, BRUIN MUSIC COMPANY; ENSIGN MUSIC CORPORATION; AND LET'S TALK SHOP, INC., d/b/a Beau-DI-O-DO Music, on behalf of themselves and all other similarly situated, Plaintiffs-Appellants, v. CONSUMER EMPOWERMENT BV, aka Fasttrack; SHARMAN NETWORKS LIMITED; LEF INTERACTIVE PTY LTD., Defendants, and GROKSTER LTD.; STREAMCAST NETWORKS, INC., f/k/a Musiccity.Com, Inc., Defendants-Appellees. METRO-GOLDWYN-MAYER STUDIOS, INC.; COLUMBIA PICTURES INDUSTRIES, INC.; DISNEY ENTERPRISES, INC.; PARAMOUNT PICTURES CORPORATION; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL CITY STUDIOS LLP, f/k/a Universal City Studios, Inc.; NEW LINE CINEMA CORPORATION; TIME WARNER ENTERTAINMENT COMPANY, LP; ATLANTIC RECORDING CORPORATION; ATLANTIC RHINO VENTURES, INC., d/b/a Rhino Entertainment, Inc.; ELEKTRA ENTERTAINMENT GROUP, INC.; LONDON-SIRE RECORDS, INC., LP; WARNER BROTHERS RECORDS, INC.; WEA INTERNATIONAL INC.; WARNER MUSIC LATINA, INC., f/k/a WEA Latina, Inc.; ARISTA RECORDS, INC.; BAD BOY RECORDS; CAPITOL RECORDS, INC.; HOLLYWOOD RECORDS, INC.; INTERSCOPE RECORDS; LAFACE RECORDS; MOTOWN RECORD COMPANY; RCA RECORDS LABEL, a unit of BMG Music d/b/a BMG Entertainment; SONY MUSIC ENTERTAINMENT, INC.; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; WALT DISNEY RECORDS, a division of ABC, Inc.; ZOMBA RECORDING CORP., Plaintiffs-Appellants, v. GROKSTER LTD.; STREAMCAST NETWORKS, INC., f/k/a Musiccity.Com, Inc., Defendants-Appellees.

Legal Precedents 2004-2005

- ***MGM Studios, Inc v Grokster Ltd.*, 380 F.3d 1154 (9th Cir. Cal. August 19, 2004)(cert. granted by *MGM Studios v. Grokster, Ltd.*, 160 L. Ed. 2d 518, 125 S. Ct. 686, (Dec. 10, 2004))**
 - **United States Court of Appeals for the Ninth Circuit Decision**
 - **Judgment Vacated by U.S. Supreme Court in *MGM Studios, Inc., v. Grokster, Ltd.*, 2005 U.S. LEXIS 5212 (U.S. June 27, 2005)**

Legal Precedents 2004-2005

- ***MGM Studios, Inc., v. Grokster, Ltd.*, 2005 U.S. LEXIS 5212 (U.S. June 27, 2005)**
 - **Sony didn't mean ignore evidence of intent**
 - **One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses**

Legal Precedents 2004-2005

- ***United States v. Councilman*, 245 F. Supp. 2d 319 (D. Mass. February 12, 2003) affirmed in *United States v. Councilman* 373 F.3d 197 (1st Cir. Mass. June 29, 2004) Opinion vacated and withdrawn in *United States v. Councilman* 385 F.3d 793, 2004 U.S. App. LEXIS 20756 (1st Cir. Mass. October 5, 2004) (Oral arguments held December 8, 2004)**
- **Strict Statutory Construction**

Legal Precedents 2004-2005

- ***Charter Communs., Inc., Subpoena Enforcement Matter v. Charter Communs., Inc*, 393 F.3d 771 (8th Cir. Missouri January 4, 2005) *Rehearing denied by, Rehearing, en banc, denied by Recording Indus. Ass'n of Am. v. Charter Communs., Inc.*, 2005 U.S. App. LEXIS 5599 (8th Cir., Apr. 6, 2005).**

Legal Precedents 2004-2005

■ *Charter Communications*

- Four safe harbors created by the statute to protect ISPs
- 1. § 512(a), limits the liability of ISPs when they do nothing more than transmit, route, or provide connections for copyrighted material
- 2. ISPs protected for "system caching," that is, instances when they provide intermediate and temporary storage of material on a system or network under certain conditions.
- 3. Limits the liability of an ISP for infringing material "residing on [the ISP's] system or network at the direction of its users."
- 4. Protects an ISP when it merely links users to online locations containing infringing material.

Legal Issues - Web Bugs/Beacons

- 18 U.S.C. § 3121
- 18 U.S.C.S. § 3121(b)
 - 1 ISP
 - 2 ISP
 - 3 Consent
- *Smith v. Maryland*, 442 U.S. 735, 743-744 (1979)
- *Island Online, Inc., v. Network Solutions, Inc.*, 119 F. Supp. 2d 289 (E.D.N.Y. November 6, 2000)
- *United States v. Hambrick*, 2000 U.S. App. LEXIS 18665 (4th Cir. Va. August 3, 2000)

Legal Issues - Web Bugs/Beacons

- ***In Re Toys R Us Inc., Privacy Litigation*, 2001 U.S. Dist. LEXIS 16947 (N.D. Cal. 2001)**
- ***In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 501-02 (S.D.N.Y. March 29, 2001)**
- ***In re Pharmatrak, Inc. Privacy Litigation*, 292 F. Supp. 2d 263 (D. Mass. November 6, 2003)**
- ***In re Pharmatrak, Inc. Privacy Litigation*, 329 F.3d 9 (1st Cir. Mass. May 9 2003)**
- ***United States v. Jones*, 31 F.3d 1304 (4th Cir. 1994)**
- ***United States v. Petersen*, 98 F.3d 502 (9th Cir. Cal. October 22, 1996)**

Year in review 2004-2005

House Proposed Legislation

- **HR 29 SPYACT**
- **HR 285 Dept of Homeland Security Cybersecurity Enhancement Act of 2005**
- **HR 744 Internet Spyware (I-SPY) Prevention Act of 2005**
- **HR 1069 Notification of risk to personal data act**
- **HR 1099 Anti-phishing Act of 2005**
- **H. R. 1189, Personal Pictures Protection Act of 2005, 2005 H.R. 1189; 109 H.R. 1189**
- **HR 1263 Consumer Privacy Protection Act of 2005**

HR 1558 Computer-Assisted Remote Hunting Act



Year in review 2004-2005

Senate Proposed Legislation

- **S 115 (Jan 24, 2005) Notification of Risk to Personal Data Act**
- **S 116 Privacy Act of 2005**
- **S 318 Computer Trespass Clarification Act of 2005**
- **S 472 Anti-phishing Act of 2005**
- **S 687 Software Principles Yielding Better Levels of Consumer Knowledge Act or SPY BLOCK Act**
- **S 737 Security and Freedom Enhancement Act of 2005 or SAFE Act**
- **S 751 Apr 14, 2005 Notification of Risk to Personal Data Act Same as S 115**
- **S 768 Comprehensive Identity Theft Prevention Act**
- **S 849 Internet Tax Nondiscrimination Act**

Legal Issues - Active Response



Legal Issues - Active Response

- *Katko v Briney*, 183 N.W. 2d 657 (1971)
- Self defense of personal property one must prove that he was in a place he had a right to be, that he acted without fault and that he used **reasonable force** which he reasonably believed was **necessary to immediately prevent or terminate** the other person's **trespass** or interference with property lawfully in his possession

Legal Issues - Active Response

- ***Gross v. Taylor*, 1997 U.S. Dist LEXIS 11657 (E.D. Pa. August 5, 1997)(mere possession of interception equipment fails to show that defendant actually received or intercepted plaintiff's communication)**
- **Targeting**
- ***Island Online, Inc., v. Network Solutions, Inc.*, 119 F. Supp. 2d 289 (E.D.N.Y. November 6, 2000)**
- ***United States v. Petersen*, 98 F. 3d 502 (9th Cir. Cal. October 22, 1996)**

Legal Issues - Active Response

- **Law of Necessity**
 - **Target**
 - **Proportionality**
 - **Necessity**

Year in review 2004-2005

Statutory Law Update

- **National Security Information**
- **18 U.S.C. § 1030 (a) (1) access/exceed authorization; obtain information; injury of the United States/advantage foreign nation, and communicates, delivers, transmits, or cause same or attempt same; or willfully retains**
 - **18 U.S.C. § 1030(c)(1)(A) Punishment**
 - **1st Offense Fine and/or 10 years**
 - **2nd Offense Fine and/or 20 years**

Year in review 2004-2005

Statutory Law Update

- 18 U.S.C. § 1030 (a)(2) **accesses/exceeds to obtains:**
 - (A) **information in financial institution/card issuer;**
 - (B) **information of the United States;** or
 - (C) **information from protected computer**
- 18 U.S.C. § 1030(c)(2)(A) **Punishment**
 - **1st Offense Fine and/or 1 years**
 - **2nd Offense Fine and/or 10 years**
 - 18 U.S.C. § 1030(c)(2)(B) if
 - (i) **done for commercial advantage or financial gain;**
 - (ii) **done in furtherance of criminal or tortious act;**
 - or
 - (iii) **value of the information obtained exceeds \$ 5,000**
 - **1st Offense Fine and/or 5 Years**
 - **2nd Offense Fine and/or 10 Years**

Year in review 2004-2005

Statutory Law Update

- **Trespass of Government Systems**
- **18 U.S.C. § 1030 (a)(3) access nonpublic computer of United States or computer exclusively for the use of the Government of the United States**
- **18 U.S.C. § 1030(c)(2)(A) Punishment**
 - **1st Offense Fine and/or 1 years**
 - **2nd Offense Fine and/or 10 years**

Year in review 2004-2005

Statutory Law Update

- **Fraud**
- **18 U.S.C. § 1030 (a)(4) exceeds/accesses a protected computer to further an intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$ 5,000 in any 1-year period**
- **18 U.S.C. § 1030(c)(3)(A) Punishment**
 - **1st Offense Fine and/or 5 years**
 - **2nd Offense Fine and/or 10 years**

Year in review 2004-2005

Statutory Law Update

- **Intrusion**
- **18 U.S.C. § 1030 (a)(5) (A) (i) causes the transmission of a program, information, code, or command, result of such conduct, intentionally causes damage to a protected computer**
 - **18 U.S.C. § 1030(c)(4)(A) Punishment**
 - **1st Offense Fine and/or 10 years**
 - **18 U.S.C. § 1030(c)(5)(A) Punishment**
 - **If causes serious bodily injury Fine and/or 20 years**
 - **18 U.S.C. § 1030(c)(5)(B) Punishment**
 - **If causes death Fine and/or any terms of years/life**

Year in review 2004-2005

Statutory Law Update

- **Intrusion**

- **18 U.S.C. § 1030 (a)(5)(A)(ii) accesses a protected computer and as a result of such conduct, **recklessly causes damage****

- **18 U.S.C. § 1030(c)(4)(B) Punishment**
 - **1st Offense Fine and/or 5 years**

- **18 U.S.C. § 1030(c)(4)(C) Punishment**
 - **2nd Offense Fine and/or 20 years**

Year in review 2004-2005

Statutory Law Update

- **Intrusion**
- **18 U.S.C. § 1030 (a)(5)(A)(iii) accesses a protected computer and as a result of such conduct, **causes damage****
- **18 U.S.C. § 1030(c)(2)(A) Punishment**
 - **1st Offense Fine and/or 1 years**
- **18 U.S.C. § 1030(c)(3)(B) Punishment**
 - **2nd Offense Fine and/or 10 years**

Year in review 2004-2005

Statutory Law Update

- **18 U.S.C. § 1030 (a)(5)(A)(ii) and (iii) required recklessly cause damage or causes damage is:**
- **18 U.S.C. § 1030(a)(5)(B):by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused**
 - (i) loss to 1 or more persons during 1-year period aggregating at least \$ **5,000** in value;
 - (ii) **modification/impairment of medical examination, diagnosis, treatment**, or care of 1 or more individuals;
 - (iii) **physical injury** to any person;
 - (iv) a **threat to public health or safety**; or
 - (v) damage computer used in justice, defense, security

Year in review 2004-2005

Statutory Law Update

- **Password Trafficking**
- **18 U.S.C. § 1030 (a)(6) traffics in any password or similar information through which a computer may be accessed without authorization**
- **18 U.S.C. § 1030(c)(2)(A) Punishment**
 - **1st Offense Fine and/or 1 years**
- **18 U.S.C. § 1030(c)(3)(B) Punishment**
 - **2nd Offense Fine and/or 10 years**

Year in review 2004-2005

Statutory Law Update

- **Extortion**

- **18 U.S.C. § 1030 (a)(7) intent to extort from any person any money or other thing of value, transmits any communication containing any threat to cause damage to a protected computer**

- **18 U.S.C. § 1030(c)(3)(A) Punishment**
 - **1st Offense Fine and/or 5 years**

- **18 U.S.C. § 1030(c)(3)(B) Punishment**
 - **2nd Offense Fine and/or 10 years**

Year in review 2004-2005

Statutory Law Update

■ Attempts

- 18 U.S.C. § 1030 (b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.**

Final Thoughts Regarding Active Response

- **Katko v Briney, 183 N.W. 2d 657 (1971)**
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