

1997

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Recommended Citation

Philip Tortorich *E-mail Stories Detailing the Rape and Murder of a Young Woman Do Not Constitute a "True Threat"*, 9 Loy. Consumer L. Rev. 227 (1997).

Available at: <http://lawcommons.luc.edu/lclr/vol9/iss3/12>

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materially mislead anyone and dismissed the claim. The court of appeals affirmed.

Athletic games are not original works of authorship and, therefore, are not protected under the Copyright Act. Furthermore, the Copyright Act preempted the NBA's misappropriation claim. To survive preemption, a claim must satisfy a five-prong test: (1) costs are

associated with the generation of information; (2) information is time sensitive; (3) defendant "free-rides" from plaintiff's effort; (4) direct competition exists between plaintiff and defendant; (5) "free-ride" reduces incentive to produce information. Accordingly, the NBA cause of action failed because state law did not apply and federal law did not allow it to proceed. • • •

E-mail stories detailing the rape and murder of a young woman do not constitute a "true threat"

by Philip Tortorich

Intimidation, fear — these are common responses to threats disseminated on electronic mail. In order to protect individuals from badgering and torment, the United States Congress passed 18 U.S.C. § 875(c) ("§ 875(c)") prohibiting the transmission of any communication containing a threat. Although the First Amendment protects free speech, language containing a "true threat" is not protected, and, thus, is criminal under § 875(c). In *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997), *reh'g en banc denied* (Apr. 14, 1997), the United States Court of Appeals for the Sixth Circuit clarified the requisite elements of § 875(c) and defined what constitutes a "threat."

Internet used for sexual fantasies

Between November 1994 and January 1995, the defendant, Abraham Jacob Alkhabaz, a.k.a. Jake Baker, ("Alkhabaz"), commu-

nicated via the Internet with Arthur Gonda ("Gonda"). The two communicated sexual stories and fantasies using electronic messages ("E-mail"). Alkhabaz used his computer in Michigan; Gonda was connected online in Ontario, Canada. The messages typically consisted of sexual descriptions involving violence against women and children. Alkhabaz was active on a Usenet news group, "alt.sex.stories," where he posted fictional stories concerning the "abduction, rape, torture, mutilation, and murder of women and young girls." Since these stories were posted on the Usenet, they could be accessed by anyone with a computer and modem.

In January, 1995, Alkhabaz posted a story concerning one of his classmates at the University of Michigan. This story gave the name of the classmate and portrayed her being tortured. The story detailed the multiple rape of this young woman, culminating in her murder

by igniting gasoline poured over her body. The E-mail messages also indicated a willingness to carry out the actions. On February 9, 1995, Alkhabaz was arrested and criminally charged with violating 18 U.S.C. § 875(c) by engaging in an interstate commerce communication involving a threat to kidnap or injure another person.

Government must satisfy three elements under § 875(c)

Title 18, United States Code, Section 875(c) states: "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." 18 U.S.C. § 875(c). In the present case, the court concluded that the Government must meet three elements: (1) a transmission in interstate [or

foreign] commerce; (2) a communication containing a threat; and (3) the threat involves the injury [or kidnapping] of a person. At issue before this court was only the second element, whether the communication constituted a threat. The first element is satisfied because the communications crossed international borders. The third element is met because the E-mail contained a number of specific references to actual injury to a specific person.

Threats: Serious expressions to inflict harm which are designed to intimidate

The court held that a communication is a "threat" if a "reasonable person would take the statement as a serious expression of an intention to inflict bodily harm and would perceive such expressions as being communicated to effect some change or achieve some goal through intimidation." The court held that only general intent is required in order to satisfy the mens rea for § 875(c). Therefore, the Government must show that "a reasonable person would take the defendant's statements as a serious expression of an intention to inflict bodily harm."

Further, the court held that a specific actus reus must be met. Although the statute provides that "any" communication containing a threat suffices, the court reasoned that a literal application would lead to absurd results (i.e., one who takes notes about this case and sends them to a newspaper would be in violation of § 875(c)).

In order to define which acts

constitute a violation of § 875(c), the court inquired into the type of communication Congress intended to prohibit. According to the court, threats are "tools that are employed when one wished to have some effect, or achieve some goal, through intimidation." The goal need not be serious or reprehensible. For example, a goal may be extortionate, coercive, or for the advancement of political objectives. Also, the court held that the goal may be communicated for a "seemingly innocuous purpose." As an example, the court explained that a person who falsely makes a bomb threat is considered to have communicated a threat, even if the only purpose of the communication is to create a prank.

Recipient's sense of well-being must be endangered

After determining what constitutes the actus reus, the court held that violation of § 875(c) must be viewed objectively from the perspective of the receiver. Therefore, the court held that an otherwise threatening communication may not constitute a threat if it is not sent to the person[s] who would be intimidated by the communication, because in this situation it is "unlikely that the recipient will be intimidated or her peace of mind disturbed." Thus, the court must determine whether the sender intended to intimidate the recipient through the use of the communication. Only when an intent to intimidate is present does the communication constitute a threat. Referring to the aforementioned hypothetical, a person who mails notes about this trial to a newspaper

cannot be in violation of § 875(c), since that individual did not intend to intimidate; the newspaper would not believe its safety to be compromised.

Communication by way of E-mail does not constitute "threat"

The court held that E-mail communications in this case are not "threats." First, the court held that the requirement of actus reus is not met because Alkhabaz did not attempt, or intend, to achieve some goal through the use of intimidation. Therefore, the communication, no matter how sadistic and misdirected, cannot constitute a threat. Further, the court held that the communications between Alkhabaz and Gonda do not constitute "true threats" since, the recipient's sense of personal well-being was not disturbed. The court held that even if a reasonable person could conclude that the communication threatened the well-being of another, the communication still fails to become a threat where there is no indication of the goal or that intimidation will be used.

In summary, the court declared that any communication that threatens another will be considered a "threat" only if the communication is in furtherance of some goal through the use of intimidation. Also, a reasonable person in the recipient's position must perceive the communication to be a reasonable threat to injure recipient.

Court declines to address First Amendment issue

E-mail communications are not

exempt from the statute. To the contrary, E-mail messages are subject to the three-part test developed by the court. However, the conclusion reached by the majority is subject to skepticism; the dissent argued that Congress intended to criminalize all communications containing a threat. The stories and the E-mail messages involved in this case contained threats; accordingly, the court declined to address any First Amendment issues raised by the parties.

Dissent opines intent as irrelevant

Judge Krupansky dissented,

believing the words of § 875(c) to be simple and clear, requiring only that the alleged communication contain any threat to injure any person, made for any reason. The dissent noted that prior precedent “compels the conclusion that ‘threats’ include all reasonably credible communications which express the speaker’s objective intent to injure another person.” Specifically, the dissent believed the intent to intimidate is irrelevant, since Congress could have included it as a factor.

The dissent reprinted the actual communication between Alkhabaz and Gonda, as well as a number of the E-mail messages between Alkhabaz and Gonda concerning

their sexual fantasies. The dissent criticized the court for added “extra legislative” elements to the law. The plain language of the statute, according to the dissent, would indicate that this communication is a threat. The dissent further stated that it is irrelevant whether the “originator of the message intended to intimidate or coerce anyone.” Rather, the proper inquiry should be whether a reasonable recipient would objectively “believe that the speaker was serious about his stated intention.”•