Cyber Torts – Something Virtually New?

Bernhard A. Koch

Cyber What?
- Malware
- Other fraudulent activities
  - Vishing
  - Denial-of-service
  - Phishing
  - Identity Theft
  - Clickjacking
  - Backscatter
  - Cryptojacking
  - IP Spoofing
  - Cryptomining
  - Domain Hijacking
  - Botnets
  - Trojans
  - Page Hijacking
  - Happy Slapping
  - Smurf Attack
  - Smishing
  - Warviewing
  - Keystroke Logging
  - Clickjacking
  - Smashing
  - Stealware
  - Ping Of Death
  - SYN Flooding
- 419 Scams
- Warviewing
- Keystroke Logging
- VoIP
- Web Engineering
- Clickjacking
- Clickjacking
- 419 Scams
- Phishing
- Smashing
- Stealware
- SYN Flooding

Vienna, 26 April 2014

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Cyber Torts – Something Virtually New?

Cyber What?

Blocking websites of another
- Denial-of-service Attacks
- Smurf Attack
- Ping Of Death

Annoying communications
- Automated bounce messages
- Backscatter Crapflooding

Countermeasures

<table>
<thead>
<tr>
<th>Target</th>
<th>ISP</th>
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<tbody>
<tr>
<td>Offender</td>
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</tbody>
</table>

Self-help

Preventing continuation of conduct
- directly
- indirectly (by blocking access)

Restoration/restitution/compensation
- for unauthorized use of information or online access
- for harm done

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Cyber Torts

Harmful conduct committed via or affecting the use of the Internet or performed by computers

But: Is it really something new?

Classification According to the Harm Done

Vishing
Denial-of-service Attacks
Identity Theft
Phishing
Backscatter
Crapflooding
IP Spoofing
Cyberstalking
Trojans
Page Hijacking
Clickjacking
419 Scams
Joe Jobs
Facebook Rape
Domain Hijacking
Cyberbullying
Nuking
Smurf Attack
Piggybacking
Smishing
Botnets
Rootkits
Keystroke Logging
Hacking
Warviewing
Happy Slapping
Viruses
Spyware
Flaming
Phishing
Smishing
Ping Of Death
Spyware
Flaming
Teardrop Attacks
Spamming
Snarling
Stealware
SYN Flooding

Specific Problems of Cyber Torts

• Cross-border issues
• Jurisdiction

CJEU 25 October 2011 – Joined Cases C-509/09, eDate Advertising GmbH v X, and C-161/10, Martinez, Martínez v MGN Ltd

Specific Problems of Cyber Torts

• Cross-border issues
• Jurisdiction
• Applicable law

Art 1 Rome II. (2) The following shall be excluded from the scope of this Regulation: ...
(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

Art 4 Rome II. (1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

Specific Problems of Cyber Torts

• Types of losses
• Personal injury
• Physical harm
• Immaterial harm

Specific Problems of Cyber Torts

• Types of losses
• Personal injury
• Physical harm
• Immaterial harm
• Violations of personality rights
  • Reputation of an enterprise?
  • Property damage

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Specific Problems of Cyber Torts

- Types of losses
  - Personal injury
  - Physical harm
  - Immaterial harm
  - Violations of personality rights
  - Reputation of an enterprise?
  - Property damage
  - Are data property?
  - Pure economic loss

Art. 2:102 PETL [Protected interests]. (4) Protection of pure economic interests ... may be more limited in scope. ...

Specific Problems of Cyber Torts

The special case of data breaches

Average total organizational cost of data breach

<table>
<thead>
<tr>
<th>Country</th>
<th>US</th>
<th>DE</th>
<th>FR</th>
<th>UK</th>
<th>IT</th>
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</table>


Specific Problems of Cyber Torts

The special case of data breaches

Average costs by type

<table>
<thead>
<tr>
<th>Country</th>
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<th>UK</th>
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</table>


Specific Problems of Cyber Torts

The special case of data breaches

Per capita cost by industry

<table>
<thead>
<tr>
<th>Industry</th>
<th>US</th>
<th>DE</th>
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<th>UK</th>
<th>IT</th>
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<td>$78</td>
<td>$78</td>
<td>$78</td>
<td>$78</td>
</tr>
</tbody>
</table>


Specific Problems of Cyber Torts

- Assessment of the damage

CJEU 8 April 2014 – Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd
Specific Problems of Cyber Torts

- **Addresses of claims**
  - Anonymity of the actual wrongdoer

- **Addressees of claims**
  - Victim
  - Cyberbully
  - Virus author
  - Hacker
  - Bot master

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### Art 14 E-commerce Directive [Hosting]
(1) Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

### Art 15 E-commerce Directive [No general obligation to monitor]
(1) Member States shall not impose a general obligation on providers, when providing the services covered by Art 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

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### 18 USC § 1030 (g)
Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves one of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subs (c)(4)(A)(i). Damages for a violation involving only conduct described in subs (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.
Specific Problems of Cyber Torts

- Addressess of claims
  - Secondary/tertiary/... defendants

  - Victim
  - School/Employer
  - Access provider
  - Hardware producers
  - Software producers
  - Virus author
  - Hacker
  - Fraud
  - Bot master
  - Zombie
  - Access provider
  - Hosting provider
  - Seller/Bank/MSP/...
  - IT Company
  - Parents
  - Access provider
  - School/Employer
  - Virus author
  - Hacker
  - Fraud
  - Bot master
  - Zombie
  - Access provider
  - Hosting provider
  - Seller/Bank/MSP/...
  - IT Company
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  - Parents

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Specific Problems of Cyber Torts

- Establishing liability
  - Intentional wrongdoing
  - Defences
    - Internet vigilantism
  - Negligence
- Strict liability

Art. 7:101 PETL [Defences based on justifications]
(1) Liability can be excluded if and to the extent that the actor acted legitimately
a) in defence of his own protected interest against an unlawful attack (self-defence),
b) under necessity,
c) because the help of the authorities could not be obtained in time (self-help), ...

Specific Problems of Cyber Torts

- Establishing liability
  - Intentional wrongdoing
  - Defences
    - Internet vigilantism
  - Negligence
-Strict liability

Specific Problems of Cyber Torts

- Contributory conduct

Enforcing awards

CJEU 15 March 2012 – C-292/10, G v de Visser

Thank you for your attention!

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