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Opinion No. 01-074

Constitutionality of Proposed Identity Theft Legislation

QUESTIONS

Senate Bill 1109/House Bill 1884 propose changes to existing Identify Theft Laws in order to make "cypersquatting" a crime. Are the current amendment and subsequent amendment to Senate Bill 1109/House Bill 1884, as drafted, constitutionally defensible?

OPINIONS

No. The current amendment and subsequently proposed amendment to Senate Bill 1109/House Bill 1884 are not constitutional. There is no definition of the term "public figure" and the proposed legislation is therefore unconstitutionally vague.

ANALYSIS

The current amendment and the proposed amendments would revise the bill as follows:

> (b) It is unlawful for any person to knowingly use a public figure's name as a website address for the purpose of selling access to such website, or such website for profit. Violation of this subsection is considered identity theft for the purposes of this part.

The two issues of immediate concern are the definition of "public figure" and the potential application of the statute.

Due process requires that criminal statutes be set out in terms that an ordinary person exercising ordinary common sense can sufficiently understand and comply with. *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed.2d 15 (1974)*; Nelson v. United States,* 796 F. 2d 164 (6th Cir. 1986). A statute is unconstitutionally vague where men of common intelligence must necessarily guess at its meaning and differ as to its application. (*e.g., Aiello v. City of Wilmington,* 623 F. 2d 845 3rd Cir. 1980). The

fact that the application of the proposed statute may infringe upon the First Amendment right to free speech only heightens the scrutiny.

Although the proposed amendments clearly intend to address the vagueness issue by deleting the words "famous person" and "public official" and replacing them with "public figure," that term is not defined for the purpose of this act. The definition of "public figure" for civil liability purposes has been addressed in defamation cases and is imprecise, to be determined as a question of law in each case depending upon the particular facts and circumstances. *See Ferguson v. Union City Daily Messenger, Inc.*, 845 S.W.2d 166 (Tenn. 1992). For example, the Tennessee Supreme Court has held that any government official whose duties affect the lives or peace and tranquility of citizens or their families is a "public figure." The lack of definition of "public figure" creates a vagueness that may leave the statute constitutionally vulnerable.

"[V]agueness may invalidate a criminal law [because] it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L.Ed. 2d 67 (1999). The lack of definition not only leaves in doubt who may receive protection under the statute. It also fails to give appropriate notice to those who may violate the statute. Unless the issue of exactly who is a "public figure" for the purpose of this statute is defined with precision, persons involved in legitimate business enterprises, especially those involved in e-commerce, may be found to have violated the statute without knowledge or intent.

It is assumed that the purpose of the proposed statute is to provide a remedy for those situations in which (1) a person's name is registered as a website domain name by a third party and then offered to the person for a price ("cybersquatting") or (2) a person's name is used, without the person's knowledge or approval, in a website domain name in a profitable commercial transaction. This is a legitimate legislative purpose in today's society with the increased use of the Internet in commercial transactions.[1] The statute, as drafted, however, would go beyond addressing these legitimate goals and may have a chilling effect on First Amendment rights.

Corpus Juris Secondum offers the following with regards to the overbreadth doctrine:

> The doctrine of constitutional overbreadth applies to statutes or regulations that sweep unnecessarily broadly and thereby substantially impinge on constitutionally protected conduct as well as conduct subject to government regulations. So, a law is overbroad when its language, given its normal meaning, is so sweeping that sanctions may be applied to conduct which the state is not permitted to regulate, and although the ultimate purpose

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[1]It should be noted that there are already civil statutes in place which would address some of these concerns. The Federal Anti-cybersquatting Consumer Protection Act of 1999, 15 U.S.C.A. § 1125(d), and the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-104(b), provide civil redress for injuries of the sort described, depending upon the circumstances.

> of the enactment may be acceptable and even laudatory, it will not be safe from a finding of unconstitutionality if it is otherwise facially overbroad.
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> 16 C.J.S. Constitutional Law, § 975 (1986).

In the proposed statute, although there is a scienter requirement of "knowingly," there is not a stated exception for the situation in which the person has permission to use the "public figure's" name. The statute, as amended, would also prohibit and potentially chill already protected free speech. For example, it is clear that a parody page might violate the statute although parodies have a long tradition of protection under federal and state constitutional guarantees.

For these reasons, we believe that Senate Bill 1009/House Bill 1884 is constitutionally vulnerable as amended.

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