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PERSPECTIVE

Striking back against online impersonation

By Yakub Hazzard and Dan Stone

You know that your online identity is an important asset. You've been cautioned that what you post online effects your personal reputation, your business' reputation, and your clients' reputation. But sometimes, you have no control over the statements attributed to you online. For years, celebrities, public figures, and even private individuals have been plagued by online impersonators (or "e-personators"). While the ICANN arbitration procedures and the federal Anticybersquatting Consumer Protection Act provide some recourse where an impersonator registers an individual's or entity's name or trademark as a second-level domain name (e.g., dailyjournal.com), there has traditionally been little recourse for impersonation over social media, online postings, or by email. Up until now, for example, there has generally been little recourse if someone were to set up a Twitter account in your celebrity or high profile client's name only to announce to the world that her largest endorser makes awful products that she would never use.

In response to such problems, the state Senate recently enacted a statute that provides some protection against online impersonation. California Penal Code Section 528.5, which took effect on Jan. 1, makes it a crime for someone to knowingly and credibly impersonate an individual online in order to harm, threaten, intimidate or defraud him or her. But the statute does more than that. Section 528.5 establishes the right to bring a civil suit where someone has suffered damage or loss as a result of such "e-personation."

Section 528.5 provides that "any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense." This misdemeanor offense is punishable by either by a fine of up to \$1,000 or by imprisonment of not more than one year. The statute defines "electronic means" as including "opening an e-mail account or an account or profile on a social networking Internet Web site." The

statute also sets forth that an impersonation is "credible" when "another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated." Furthermore, Section 528.5(e) explicitly allows for a private civil action whereby "a person who suffers damage or loss" by way of such e-personation may sue the "violator" for compensatory damages and injunctive relief or other equitable relief.

The legislative history of Section 528.5 makes clear that the statute was enacted to provide redress for online impersonation, and frames the new statute as "expanding the current false impersonation statute to include impersonation done on an Internet Web site or through other electronic means such as email, Facebook, Twitter, and other social media websites." What the statute and legislative history arguably leave unclear are the categories of conduct that constitute "harming another person," and whether the inclusion of the term "other electronic means" was meant to include technologies that extend beyond the Web. For example, a court may soon be asked to decide whether this law applies to impersonation by way of text messaging and other cellular technologies, including instances of cellular hacking.

As the statute's extensive legislative history also makes clear, Section 528.5 raises First Amendment and other concerns. In order to allay those concerns, the drafters of the bill attempted to prospectively address potential challenges to the constitutionality of Section 528.5, including whether it creates an impermissible form of criminal defamation or is impermissibly vague. In doing so, the statute was revised several times before being passed, and, as a result, its substantial legislative history sheds additional light on how the state Senate drafted the statute in order to insulate it from potential constitutional challenges.

Ultimately, case law will establish which technologies are subject to the statute, the type of conduct that will give rise to liability under the statute, and how damages will be assessed in a resulting civil action. In the interim, Section 528.5 provides a valuable tool for protecting one's online identity. For a public figure, detrimental Twitter, Facebook

or other social media impersonation could cause substantial damages, particularly where his or her social media presence is tied to their work. And the ability to obtain police or other law enforcement involvement and seek monetary and injunctive relief under the statute may prove very useful in approaching a social media provider in order to claim or reclaim a social media account held in your client's name. There will almost certainly be a case brought under this statute that will pique the national interest, and spark debate as to what online conduct crosses the line. Additionally, parents of young adults and teenagers may want to keep this statute in mind when talking to their children about their online conduct.

For the celebrity or other public figure, Section 528.5 provides a substantial tool in protecting his or her online presence. Section 528.5 provides an avenue for public figures to combat online impersonators, to clear their names of online statements falsely attributed to them, and potentially provides leverage in attempting to reclaim one's identity across various online and social media platforms. In providing for both criminal and civil causes of action, and allowing for compensatory damages and injunctive or other equitable relief, the drafters of Section 528.5 gave the victims new ways to redress e-personation. For those whose online presence is part of their business, Section 528.5 provides a valuable tool for protecting one's "brand" online.



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