

## All.Net Analyst Report and Newsletter

### Welcome to our Analyst Report and Newsletter

#### Why do they think they can just break the law?

I suppose it's because they get away with it. Take for example:

- **Burger King:** Did they just violate the Computer Fraud and Abuse Act, and/or the Industrial Espionage Act possibly millions of times? They intentionally and knowingly accessed, perhaps millions of, Federal Interest Computers (connected to the Internet among other things) without authorization by devising and putting on air a commercial that caused the voice input of Google voice controlled devices to use the Internet to provide advertising content to the people present.
- **Security “researchers”:** Do they regularly violate the computer fraud and abuse act and are some are paid by the US government to do it? I see one after another “security researchers” who “hack back” or otherwise access, without authorization, Federal Interest Computers (see above) and publish the results – or worse – sell their attacks under threat of disclosure unless purchased (extortion) to vendors, who buy them by paying “bug bounties”.
- **Digital forensics companies:** Do they day after day sell products that violate the digital millennium copyright act? They sell products to those not in law enforcement or another exception, those products providing access to otherwise inaccessible and protected information, and not under one of the defined exceptions (computer security is an exception, but not digital forensics).
- **I am not a lawyer:** To be clear, I don't even play one on TV, and I didn't stay at a Holiday Inn Express last night. I am speaking only as a lay person trying to make sense of the world I live in.

#### Chris and Don

Chris Matthews when interviewing Donald Trump about abortion laws asked Don a really good question, which Don answered sensibly. Chris asked whether, if abortion is illegal, the pregnant woman getting an abortion would have to be punished. Don said yes, applying what appears to be completely reasonable logic. If you commit a crime there should be a punishment. This goes to another issue that I think was Chris's point. If you are not willing to punish those who do the act, you should not make the act illegal.

This then goes to the question of “equal justice under law”. If two people commit the same act in the same jurisdiction, assuming the technicalities are equivalent, and one is arrested and convicted of a crime, shouldn't the other one also be? Under the doctrine of equal justice the answer would appear to be “yes”, but the reality is “no”! Somehow, the notion of “justice”, while intertwined with the law, is not the same thing. And our system of justice is also not apparently so much about justice as it is about order.

Our system is about people making judgments. The concept is that rules only go so far, and tempering laws with justice requires introspection and empathy. But the volume and resourcing result in lots of shortcuts that leave many of us feeling poorly served.

### **It was advertising / for a good cause / how could I have known?**

Ignorance of the law is no excuse. Or so the tradition (and the laws) say. Most/many laws talk about “knowingly” or similar terms with respect to “acts”, and set thresholds. For example, many computer crime laws identify a threshold of criminality (e.g., \$5000 of damage to trigger a federal crime under some of the statutes). For example, if the damages associated with the access to the Google devices listening to a commercial are less than \$5,000 per device, it may not reach the threshold of a crime even though it happened to millions of devices. I’m not opining as to the actual illegality here. I’m only pointing out that the same intentional act may or may not be illegal depending on the harm, and this may be cut in different ways, depending on what the law says and how it is interpreted by prosecutors and courts over time.

Mens Rea (guilty mind) is one of the things I hear about with respect to intent. Many people seem to think that, even though you may have intended to swing the bat at someone’s head, that doesn’t mean you had the intent of harming them. If they had a helmet on, for example, this would seem reasonable (to some). Of course you may be liable for being “reasonable and prudent” (whatever that means – something to do with due care that would be taken by a hypothetical reasonable person – the so called reasonable person principal). But in most of the phrases I have seen in laws, the intent has to do with performing the act, and not with the outcome. They say things like “whoever intentionally accesses a Federal Interest Computer without authorization”. Note at least two interpretations here:

- Intent goes to “access” and “without authorization”.
- Intent goes to “access”.

Even if I reasonably believe I am authorized (no intent to access without authorization), if I don’t in fact have authorization, my intent to access (the act) may be enough to send me to jail. The other part - “without authorization” may be even trickier. Who is authorized to authorize me? If I give you permission to break into the Pentagon will that keep you out of jail when you get caught? Will I be prosecuted as a co-conspirator under the RICO act? If your answer is “How would I know?” or some such thing, be warned:

*Ignorance of the law is no excuse.*

### **Why do some people go to jail and others walk free?**

There are at least a few substantial points to be made here and I will try to make a few.

A first point worthy of making is that crimes are often contemplated in a generic and simplified way by the public. We see something that looks like a crime (e.g., a policeman shooting an unarmed suspect in the back of the head and killing them) as a crime, even though the actual law (e.g., something having to do with fear of immediate harm to an innocent bystander and a reasonable belief that the suspect had a weapon) might not really say that shooting people in these circumstances by police is illegal.

A second point is something called prosecutorial discretion. The prosecutor has discretion over what to prosecute. While this is sometimes apparently used to political ends, and has some apparently obvious biases involved (e.g., race, age, sex-based, religion, wealth, stature, etc.), a lot of the time – hopefully most of the time – it is used to prosecute people who are seen as more harmful and intentionally criminals and allow people who appear to have made a one-time mistake without substantial harm or intent go free.

A third point is limited resources. Most police officers I know would prefer to arrest everyone committing any substantial crime and have them all treated the same way. But they pay more attention to homicides than pickpockets. That's because resources are limited and things that are considered more damaging to society (e.g., killing people) are prioritized over things that are less harmful (e.g., picking pockets).

There is also policy. Political leaders set policies that law enforcement doesn't always like, but it follows these policies most of the time because civilian control over justice is fundamental to the form of government. So in California and many other states, the "undocumented" (people who are here in violation of Federal immigration law in most cases) are not pursued by state and local law enforcement, and allowed to enter and leave the court system unassailed, even though they have and continue to commit the crime of being here illegally. The policy decision is that it is better for the society to have them come and testify about some other matter than to enforce the immigration laws.

### **What does this mean to me?**

Translated into my perspective, all of this means that the rich get richer and the poor get babies (screwed). That's another way of saying that no regular person can tell what's legal and not legal in terms of actually going to jail. Some people appear to cheat the law, some seem to do wildly illegal things and get away with it in huge volume and publicly, while others who seem to try to be careful and avoid breaking laws end up in jail. If I see you doing something in front of a policeman and the policeman does nothing, I generally think that I could do the same thing with the same outcome. But you and I never really know. Smoke pot in front of the wrong officer and you could be arrested even though their partner just let someone else buy and smoke a joint right in front of them. That's how it seems to many/most of us when it comes to computer crimes, and more generally, the system of justice.

The concept of notice (fair warning) seems to not apply here. Unless these folks get arrested and tried. And I doubt they will.

I think the folks at Burger King should be arrested and prosecuted.

- It's not because I am jealous of them thinking of it first. They did not. It has been published as a method of attack for many years.
- It's not because I think they did anything so horrible. They did not. The harm per person was likely negligible, although I haven't analyzed it yet.
- It's not because of some notion about criminality or because I hate advertisers or any such thing. I think it was obnoxious, unnecessary, and foolish. But that's not a crime.

It's because I think we need to be far clearer about what is and is not a crime so the rest of us are on notice about how far we can go and where the line is. Right now it all seems arbitrary to me, and I spend a lot of time and effort trying to make sense of it.

### **Conclusion**

Don't piss off the people in power, the people with money, or your competitors, even to get even for what you think they did (or they actually did) to you. Or alternatively, demand equal justice under the law by putting your freedom at risk and pushing the courts to fix what the other branches of government have apparently screwed up. But don't bet on getting justice today in the USA. The worst form of government ever... except for every other one?