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Technology, social media and the penal code

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While working on the annual update for the West criminal law treatise that I co-author, "Criminal Law in New York," I noted with interest the effect of the increasing use of social media and technology on New York's penal code and interpretive case law.

Not surprisingly, the crime of Aggravated Harassment, which prohibits certain forms of harassing or annoying communication, soon will be amended to keep pace with the concepts of "communication" and "data storage," which always are evolving as a result of technological advancements.

Effective Dec. 3, Penal Law §240.30(1) will be amended to prohibit a person from communicating or causing communication to be initiated, whether anonymously or otherwise, "by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm." Also effective Dec. 3, a new subdivision will be added to Penal Law §240.30, to clarify the meaning of subdivision one, providing that "[f]or the purposes of subdivision one of this section, 'Form of written communication' shall include, but not be limited to, a recording as defined in subdivision 6 of section 275.00 of this part."

Penal Law §275.00 defines "recording" as "an original phonograph record, disc, tape, audio or video cassette, wire, film, or any other medium on such sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original."

Rapid technological changes and the increasing use of social media, likewise, have required New York courts to grapple with issues of whether the use of new forms of communication violate the crime of Aggravated Harassment.

In *People v. Rodriguez*, 19 Misc.3d 830, 860 N.Y.S.2d 859 (Crim.Ct. 2008), the court noted that messages transmitted through MySpace, an online social networking site, can constitute Aggravated Harassment, as long as there is evidence that the communications were unwelcome.



Similarly, in *M.G. v. C.G.*, 19 Misc.3d 1125(A), 862 N.Y.S.2d 815, (Fam.Ct. 2008), the court concluded that e-mails also are a form of communication and, thus, can constitute Aggravated Harassment. In another case, text messages sent using a cellular telephone were held to violate this statute. *People v. Limage*, 19 Misc.3d 395, 851 N.Y.S.2d 852 (Crim.Ct. 2008).

Not surprisingly, another area of the Penal Law affected by technological change is Article 275, which sets forth offenses related to unauthorized recordings.

One recent case of interest is *People v. Colon*, 46 A.D.3d 260, 847 N.Y.S.2d 44 (First Dept. 2007). In *Colon*, the defendant was accused of selling pirated music and, subsequently, was convicted of failing to disclose the origin of a recording in the second degree.

On appeal, the defendant argued his inclusion of the manufacturer's Web site address on the allegedly pirated music satisfied the address requirement of Penal Law §275.35, precluding his conviction. The First Department disagreed, concluding the term "address" refers to a physical location, as opposed to an Internet address.

The holding surprised me. Arguably, the legislative intent of the statute is to ensure credit where credit is due, and it seems the defendant in this case did just that. A Web site provides far more information about the manufacturer than the physical address does, and the physical address most likely can be found on the Web site, in any event.

I suspect that, with the passage of time, ideas that were once universally understood, such as that of an address, will become more malleable as technology alters the landscape of our lives. Clearly, such adaptation occurs more easily with the concept of communication as opposed to that of location.

While the courts, initially, may resist the rapidly changing conceptual framework of our culture, eventually, as in the case of the Aggravated Harassment statutes, change will occur.

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