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Tuesday, October 4, 2011

## The rise of cell phone hacking: Oh, to be young, pretty and a Hollywood superstar

By Peter J. Toren and Micah Ascano

The entertainment press has been abuzz in recent weeks about the hacking of Hollywood superstar Scarlett Johanson's cell phone and the posting of nude photographs of her on the Internet, which she apparently had on her phone (don't ask why). A street artist has also created "art" from the photographs and has posted them in a variety of locations around Los Angeles. The artist claims he has received cease and desist letters from Johanson's attorney and apparently the FBI is investigating the hacking.

While there have been a lot of articles describing the events in a sensational manner, very little has been written about whether potential criminal charges could be levied against the person who hacked Johanson's cell phone and published the photographs on the Internet, and what potential civil claims may exist against the street artist for creating posters from the photos. The answers to these questions are important because they involve a number of issues that are sure to come up as more and more people store valuable information on their phones and the bad guys start targeting these devices.

Before turning to potential criminal charges and civil claims, it is important to understand how much critical information is now being stored on cell phones. The capability and functions of cell phones mean that they now contain potentially sensitive e-mails, credit card and bank information, and records of our locations. It may be far easier for hackers to access a person's cell phone than their home computer, and cell phones often contain more valuable information. Are our laws equipped to deal with this or has technology simply gotten too far ahead?

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The federal government could likely, at a minimum, bring criminal charges under the Computer Fraud and Abuse Act (CFAA). The Act, first adopted in 1986 and amended many times since, seeks to protect the confidentiality, integrity and availability of data and systems. While the CFAA contains seven subsections covering a variety of computer related offenses, it generally makes criminal the unauthorized access of a "protected computer" without authorization or in excess of authorization and thereby obtaining something of value. The term "protected computer" simply means any computer used in in-state or foreign communication. In essence, any computer that is connected to the Internet should meet the definition of a protected computer. Thus, whether hacking into a cell phone could be charged as CFAA violation depends on whether a cell phone meets the definition of a computer.

A recent 8th U.S. Circuit Court of Appeals decision answered this question in the affirmative, stating that while a "cellular phone might not easily fit within the colloquial

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definition of a computer, [the court is bound], however, not by the common understanding of the word, but by the specific - if broad definition set forth" in the CFAA. *United States v. Kramer*, 631 F.3d 900, 903-04 (8th Cir. 2011).

Based on this understanding, commentators have noted that many common household items containing a microchip and electronic storage devices, such as microwave ovens, watches, children's toys and refrigerators, would also meet the definition of computer under the CFAA. Regardless, it appears that the hacking of a cell phone is a potential violation. It would also likely be a violation of California Penal Code Section 512, which generally prohibits the unauthorized access to a computer to copy data.

On the issue of civil claims, Johanson could potentially sue the artist or any other individual who disseminated the photos, for invasion of privacy and copyright infringement, but neither of them is a sure winner.

First, invasion of privacy involves the interference with another's seclusion by subjecting him or her to unwarranted and undesired publicity. Johanson's claim for this tort is weakened because of her status as a famous person. A person who, by his or her fame, gives the public a legitimate interest in his or her doings, affairs or character, is said to become a public person, thereby relinquishing their right to privacy. As a public person, Johanson may have difficulty in prevailing on this claim.

Second, with regard to copyright infringement, the Copyright Act prohibits the unauthorized reproduction or distribution of a copyrighted work. There is little doubt that the nude photographs are entitled to copyright protection. The Copyright Act protects original works of authorship fixed in a tangible medium of expression. Since there is no requirement that the work be registered before copyright protection attaches, the photos in question are likely entitled to copyright protection if she can show that they were fixed in a tangible medium of expression. Accordingly, the street artist committed copyright infringement by reproducing the photographs and posting them in public spaces.

However, the artist may also have a defense under the fair use doctrine pursuant to Section 107 of the Copyright Act, which generally excepts the otherwise infringing use of a work when it is used for purposes such as criticisms, comment, news, reporting, teaching, scholarship, or research. Because the photographs were apparently transformed into something new by the artist, which would likely have no impact on the potential market or value of the photographs, the artist would probably have a strong defense of fair use.

Moreover, it is hard to imagine that Johanson would be able to establish actual damages. Because the photographs were almost certainly not registered prior to the infringing act, she would not be entitled to statutory damages, although she would need to obtain a copyright registration before bringing an action against the street artist for copyright infringement.

These claims must also be balanced against the additional publicity that such an action would generate. Ultimately, Johanson may decide that it is simply better to ignore it and wait for the unwanted publicity to die down. Despite the availability of potential federal criminal charges against the hacker, it is unlikely that the government will pursue them, even if the hacker was identified. The bottom line is that the easy availability of potentially valuable information on cell phones makes them increasingly attractive targets for computer hackers. The public must do more to protect themselves.

