

BRIDGING THE GAP BETWEEN TECHNOLOGY AND THE LAW

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A LOOK AHEAD

- ▶ Fundamental differences
- ▶ Perceptions and adoption
- ▶ Trial Issues
- ▶ AACCS v. The World

INTRODUCTION

- ▶ jur1st
- ▶ Attorney
- ▶ Professor
- ▶ See me afterwards for more details

TECHNOLOGY V. THE LAW

TECHNOLOGY

- ▶ Becomes more advanced
- ▶ Changes day to day
- ▶ Thrives on growth and development

THE LAW

- ▶ Rare sweeping changes
- ▶ Slow to react
- ▶ Hates all that is new and different

WHY CAN'T THE LAW BE DIFFERENT?

- ▶ Through the Common Law system laws are
 - ▶ Stable
 - ▶ Predictable
 - ▶ Methodical

CAUSE AND EFFECT

- ▶ Unpredictable viewpoint
 - ▶ Cases have yet to reach appellate levels
 - ▶ Cases haven't been brought at all

Adoption and Perception of Technology

WHO ARE WE TALKING ABOUT?

- ▶ Most attorneys don't have a deep understanding of technology
- ▶ Judges are even worse
- ▶ Attorneys come from diverse backgrounds

RECENT GRADUATES

- ▶ Most students used laptops
- ▶ Most use Windows XP
- ▶ Most use Internet Explorer
- ▶ Most don't pay attention to sending their passwords in the clear

ADOPTION

- ▶ Attorneys love email and Blackberries
- ▶ All Federal Courts have electronic filing
- ▶ Attorneys have a strong obligation to keep communications secret

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ENCRYPTION

- ▶ Easy to use
- ▶ Easy to implement
- ▶ Especially for a small practice

UNDERSTANDING

- ▶ Ok, John. Nice to know you have encrypted your message to our little "Family"
- ▶ BTW: Like we need to worry that "Homeland Security" will now be watching because you posted to this little "House"?

TRIAL ATTORNEYS

- ▶ Operate on the front lines
- ▶ Require excellent advocacy skills
- ▶ Working understanding of facts

THE AMERO TRIAL

- ▶ Substitute teacher
- ▶ Risk of injury to a minor
- ▶ Exposure to pornography

THE STATUTE

- ▶ Willfully or unlawfully causes
- ▶ A child under 16
- ▶ To be placed in a situation where the morals of that child are likely to be impaired
- ▶ Shall be punished

ELEMENTS

- ▶ Willful means deliberately or intentionally
- ▶ Not a standard of negligence
- ▶ If she was negligent, she would not be convicted

PROSECUTION HIGHLIGHTS

- ▶ “Were there any other images that had been placed on your hard drive on the day before that you saw at least in the file format?”
- ▶ "Did she log onto any programs?"
- ▶ Specifically to what I am pointing at here, my understanding is this <http://www.vaginalcumshots.com>, specifically this website, again, was accessed to that PC in Mr. Napp’s classroom, correct?

DEFENSE HIGHLIGHTS

- ▶ “Were any of the adware, spyware, parasite and viruses updated on or before October 19th?”
- ▶ “I’m computer illiterate.”

EVIDENTIARY PITFALLS

- ▶ Before checking firewall logs checked after the computer was accessed by IT
- ▶ Computer not taken out of service for a week

EVIDENTIARY PITFALLS

- ▶ Police investigator
- ▶ Q: "Did you examine the hard drive for spyware, viruses or parasites?"
- ▶ A: No

FAILINGS OF THE DISTRICT

- ▶ District still runs Windows 95 and 98
- ▶ Antivirus protection only
- ▶ Filtering software wasn't updated

FAILINGS OF THE DISTRICT

- ▶ Q: “Does spyware and adware generate pornography?”
- ▶ A: “I'm not aware that they do”

WHY WAS SOME EVIDENCE EXCLUDED?

- ▶ Procedure
- ▶ Not to be taken lightly
- ▶ Prosecution not given the material prepared by the defense expert

DID IT MAKE A DIFFERENCE?

- ▶ Probably not
- ▶ Expert gave his conclusions
- ▶ Mentioned Adware & Spyware numerous times in testimony

ACTIONS OF THE EXPERT

- ▶ Rude to the court
- ▶ Clearly angering the judge and prosecutor

WHO DO WE BLAME

- ▶ Everyone
- ▶ District
- ▶ The State
- ▶ The Defense Attorney
- ▶ The Expert

WAS THE RESPONSE WARRANTED?

- ▶ Misdirected
- ▶ Blind rage against the judicial system is ineffective
- ▶ Work together
- ▶ Ensure this doesn't happen again

AACS V. THE WORLD

- ▶ HD-DVD Processing Key cracked weeks ago
- ▶ Finally appears on Digg
- ▶ Takedown notices sent
- ▶ Hilarity ensues

COLD FACTS

- ▶ Dissemination is a violation of the DMCA
- ▶ Takedown requests were valid
- ▶ Not a First Amendment issue
- ▶ Private companies may do as they choose

THE REALITY

- ▶ Landscape significantly different than it was when DeCSS was released
- ▶ Copyright holders must find more effective ways of rights protection
- ▶ User driven sites must be ready to respond

CONCLUSION

- ▶ The fundamental issues separating law and technology aren't going away
- ▶ Attorneys need to have a better relationship with technology
- ▶ Need for stronger advocates to prevent poor judicial decisions

