YAHOO! accused of stalking

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In a class action suit lodged in Dallas, Texas on 18 January 2000, internet portal and search engine, Yahoo! Inc, was accused of breaching Texas' anti-stalking laws through the use of cookies. The plaintiff's petition in *Stewart v Yahoo! Inc*[1] seeks $US50 billion damages as use of the cookies is "a surveillance-like scheme that monitors and stalks users without their consent or full knowledge".[2]

The suit appears to be a tactic in a larger dispute between Chalkboardtalk.com and Yahoo! Inc over information gleaned from Chalkboardtalk's website. That suit seeks damages of $1 billion and punitive damages of $3 billion from Yahoo! Inc, Broadcast.com and several Yahoo! directors for breach of contract and conversion.

WHAT IS A COOKIE?

A cookie is a small text file that is sent by a webserver to a personal computer when a person views that website on their computer. The text file usually contains a series of letters and numbers that act as a unique identifier for that visitor's computer and enables the webserver to detect whenever a particular computer accesses pages from the server. This means that a webserver can serve information and advertising that is customised to the recorded preferences of that identifier whenever that computer logs onto the website (or an affiliated website).[3]

Most internet browsers are configured to automatically receive all cookies without notifying the user that those cookies are being received.[4] Whilst a website may post a privacy policy notifying users of its cookie usage, if a user followed a link to that site, cookies will already have been stored on the user's computer before the page (and notice of the site's privacy policy) has loaded.

If a user enters personal information onto a website (perhaps to use a free email service, to find out the weather in a particular city or to find out what movies are on at their local cinema), then the unique identifier sent by the webserver to that person's computer could contain information that could enable a website owner to match the online activities of that computer to those of a particular person.

HOW DOES YAHOO! USE COOKIES?

To enable Yahoo!'s website to offer visitors the opportunity to customise the content that they receive from the site and to access personal online email accounts, Yahoo! stores cookies on its visitor's computers.

Yahoo!'s privacy policy[5] informs visitors to Yahoo!'s website that Yahoo! stores its own and its advertisers' cookies and web beacons (single pixel graphic files used to monitor page views[6]) on visitor's computers to be able to, "...enable Yahoo! to provide customised services and advertising, ... to monitor visits to particular pages within its network and to ... increase security during use of personal email accounts". Yahoo! will share personalised information with its advertisers and business associates. Those advertisers and business associates are not necessarily bound by Yahoo!'s privacy policy.

THE ALLEGED OFFENCE

Section 42.072 of the Texas Penal Code makes it an offence for a person to knowingly engage on more than one occasion in a course of conduct that:

- is known by that person to be, or

- would be regarded by the other person as, or

- a reasonable person in the other person's position would regard such conduct as;

threatening bodily injury or death to the other person or a member of their family or household, or would cause an offence to be committed against that other person's property.

The maximum penalty for a breach of section 42.072 is $US 4000 or one year's imprisonment, unless the perpetrator has a previous conviction in which case the maximum penalty is 2-10 years jail and up to $US 10 000 fine.[7]

IS YAHOO! LIKELY TO BE IN BREACH OF TEXAS' ANTI-STALKING LAWS?

Yahoo!'s use of cookies is a course of conduct which occurs on more than one occasion (every time a user visits a page on the Yahoo! site, a cookie is either stored onto or read from that user's computer). However, it is highly debatable whether that course of conduct would be regarded by a reasonable person as threatening bodily harm or death. Therefore, the only remaining potential breach of section 42.072 could be that Yahoo! is engaging in a course of conduct which threatens an offence against a user's property.

HAS YAHOO! THREATENED AN OFFENCE AGAINST A USER'S PROPERTY?

Unless a user has provided Yahoo! with their personal information, Yahoo!'s cookies only records that a computer visited the site, not the identity of the user sitting behind that computer. However, the databases that record which sites a particular computer visits can develop a highly accurate description of that user's online behaviour. If a user gives their personal information to Yahoo! which may be then linked to that

behavioural modelling, a record of a particular person's online behaviour and interests is created.[8]

Whether the right to anonymously surf the web is a personal right or a property right (or even a right for that matter) is an argument beyond the scope of this article. Yahoo! is not threatening or actually committing arson, fraud, robbery or criminal trespass on visitors to its sites.[9] However, the Texan Penal Code includes computer crimes as offences against property. The use of processing power or storage of information on a computer without the effective consent of the owner of that computer is a breach of computer security which is an offence.[10]

The penalty for breaching section 33.02 is a fine of up to $US 10 000 if the offender was not intending to benefit from the breach. In Yahoo!'s case, the storing of cookies on a visitor's computer is essential for tracking that computer. This tracking enables Yahoo! to sell targeted advertising and hence earn revenue (ie: benefit from the breach).[11]

Yahoo! has a defence to this offence if it can prove that it received effective consent from the owners of computers that visit its site to store cookies on those computers. The link to Yahoo!'s privacy policy is contained in a link in small type at the very bottom of its webpages. It is unlikely that the majority of visitors to Yahoo!'s website would read this policy.

Parking garages and traditional stores that place restrictions upon the right to access their facilities are required to post large notices at the point of entry to inform visitors of those restrictions and to ensure that the store has the customer's consent to enforce those restrictions.[12] Arguably, Yahoo! has not provided an equivalent level of disclosure. A small link buried at the bottom of a page containing over 230 hyperlinks[13] is not the same as a large font sign in the entryway to a store.

CONCLUSION

It is arguable that Yahoo! Inc has technically breached Texas' anti-stalking laws. However, whether a court would impose a penalty in this situation is questionable. Texan juries have a reputation as being plaintiff-friendly which could mean that significant damages may be handed down[14] against Yahoo!. The intention of the Texas legislature in passing the Penal Code appears to have been to protect people from physical stalking and computer cracking. It is unlikely that that legislature intended to pass a law declaring that the business model used by 95% of e-commerce websites (ie: cookie driven advertising) is illegal. It is more likely that this is just another example of how developments on the internet can outpace the foresight of the legislature, leading to unintended consequences. This case is not scheduled to be heard for at least

another 12 months. If in the meantime, Chalkboardtalk.com and Yahoo! settle their ongoing contractual dispute, this action is likely to be settled.

1   Case No. 00010451, 162nd Civil District Court, Dallas, Texas before Rhea J. At the time of writing this article, no date has been set for the hearing.
2   Ingram, M., (2000), "Growing Concern over Internet Privacy", http://www.wswsw.org/articles/2000/feb2000/web-f25.shtml.
3   Yahoo!'s Privacy Policy says that it passes its cookie information onto its business associates.
4   A user can alter their browser settings to reject all cookies or to notify the user when a cookie is being sent. The first option renders some sites inoperable (free email sites, online shopping malls, etc) whilst the second option makes browsing a frustrating experience - almost every time a user clicks on a link, several warnings pop up enquiring whether to accept or reject the cookies being received. Some sites place up to 20 cookies on a user's computer each time a new page is viewed. Fortunately, some third party programs can make managing cookies much easier, eg: Cookie Pal, http://www.kburra.com.
5   http://privacy. Yahoo!.com/privacy/us/
6   http://privacy. Yahoo!.com/privacy/us/pixels/
7   Sections 12.21 and 12.34 Texas Penal Code.
8   A common method to prevent this is for a user to fill out each online form with different nonsensical information and to regularly delete all cookies from the hard disc (eg: using Window Washer, http://www.webroot.com).
9   Title 7, Offences against Property, Texas Penal Code, Chapters 28-32.
10 Section 33.02 Texan Penal Code
11 Section 12.51 Texan Penal Code
12 For example, a store's right to search the bags of visitors to a store would be criminal trespass unless acceptance of that right was made a visible condition of access to the store and parking garages exclude liability for loss or theft – *Council of the City of Sydney v West (1965) 114 CLR 481; Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 642.*
13 http://www.yahoo.com (as at 31/7/00)
14 http://www.nytimes.com/library/tech/00/02/cyber/cyberlaw/18law.html