COLLEGES AND UNIVERSITIES

Can publishers compel universities to install spyware on university library computers to harvest students' and researchers' biometric data without their consent?

This proposed approach to "defending against piracy" through indiscriminate surveillance was detailed by Corey Roach of the University of Utah during an October 22, 2020, webinar hosted by the Scholarly Networks Security Initiative (SNSI).

SNSI is a joint venture of academic publishers, currently consisting of Elsevier; Springer Nature; Wiley; Taylor & Francis; Cambridge University Press; Thieme; Macmillan Learning; American Chemical Society Publications; American Institute of Physics; American Medical Association; American Physical Society; American Society of Mechanical Engineers; Institute of Electrical and Electronics Engineers; Institute of Physics; International Association of Scientific, Technical, and Medical Publishers; International Water Association Publishing; the Optical Society; and Brill.

Roach said that if universities' libraries install their browser plug-in, they would de-anonymize usage by collecting biometric data points on each user, such as "how quick did they type," and "how do they move their mouse." Additional information that would be harvested by the spyware includes usernames, passwords, IP addresses, URLs of requested material, timestamps, extensive browser information, account information, two-factor device information, and geographic location.

Roach championed this technology's ability to strip away any privacy protections the universities' proxy servers provided.

He also indicated that this approach would help "protect copyrights" of the academic publishers, who, according to *.coda*, rely on a "profit model, which critics charge is damaging to science and parasitic on the academic system." For the uninitiated, this model consists of publishers charging "exorbitant prices for subscriptions . . . while largely relying on publicly funded research for the content of their publications and the free labor of university-employed peer reviewers."

SNSI's justification for these extreme and invasive proposals is the existence of Sci-Hub, an open-access "shadow library" of academic articles founded in 2011 by Alexandra Elbakyan.

Björn Brembs, professor of neurobiology at the University of Regensburg and part of a collective of academics lobbying the European Union to restrict the ability of publishers to surveil users of their own platforms, noted that collecting identifiable information creates security concerns and privacy risks.

He views this threat as particularly acute for researchers tackling "a hot button issue or if you work with vulnerable individuals, [such as] if you're doing medical or sociological research." On Twitter, Sam Popowich characterized SNSI as working to convince everyone that "vendor profits should trump user privacy" and doing so under the false auspices that it would enhance "security."

Clearly, the security in question is not that of library users, as this proposal would eliminate proxy protections, de-anonymize their research, and compile troves of additional personal information about them.

Reported in: *.coda*, November 13, 2020; *Motley Marginalia*, November 16, 2020.

DISCRIMINATION

Do Title VII protections encompass sexual orientation and gender identity?

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against someone based on their "race, color, religion, sex, or national origin."

In *Bostock v. Clayton County, Georgia* (2020), the Supreme Court ruled 6-3 that it is impossible to discriminate against someone for being transgender or homosexual without that discrimination being based on their sex, therefore gender identity and sexuality are protected under Title VII. What's more, a case from the Sixth Circuit case that led to this landmark ruling has finally been settled.

In 2014, a Michigan funeral home fired Aimee Stephens, a funeral director, because she was transgender. RG & GR Harris Funeral Homes argued it had the right to fire Stephens because the president of the funeral home is a devout Christian and Stephens' existence was an affront to his religious beliefs. She sued.

Two years later, a federal judge dismissed the case holding that the funeral home was safeguarded from the lawsuit on religious grounds.

However, in 2018, the Sixth Circuit found that Stephens had been unlawfully terminated, that the funeral home failed to show how employing her would burden its president's religious practice, and furthermore that Title VII protected transgender workers against discrimination.

When the ruling regarding Title VII protections was contested, the Supreme Court consolidated the case with two lawsuits filed by gay workers who were terminated for their sexual orientation. Arguments were heard on October 8, 2019, and the Supreme

Court published its decision on June 15, 2020.

Tragically, Stephens passed away the month before the decision was made. In December 2020, Harris Funeral Homes agreed to pay $250,000 to her estate.

Reported in: *FindLaw*, June 15, 2020; *Westlaw Today*, December 1, 2020.

FIRST AMENDMENT
Albany, New York

Can sale of Nazi paraphernalia and Confederate flags be banned on government property?

On December 16, 2020, New York Governor Cuomo signed a bill into law banning the display or sale of Confederate flags, Nazi swastikas, and other symbols of hate on state property, including the fairgrounds.

The law includes exemptions for images in books, museum services, or materials used for educational or historical purposes.

While the law went into effect immediately, there are concerns the law may be challenged on First Amendment grounds. Attorney Floyd Abrams said, "A statute banning the sale of materials expressing those [hateful] views on state-owned land is highly likely to be held unconstitutional."

Professor Jonathan Turley of George Washington University called the law "flagrantly unconstitutional" and delineated some of the First Amendment issues with the legislation. He noted the law does not permit the display or sale of symbols of hate if they serve "social, ideological, political, or literary purposes," all of which are constitutionally protected.

Additionally, the law encompasses a "wide array of undefined 'symbols of hate,' [and] many people differ on what groups or symbols they deem 'hateful,'" Turley said.

The Anti-Defamation League has compiled a database of hate symbols for those wishing to learn more about the imagery this ban theoretically encompasses, though the law itself does not delineate which symbols it encompasses.

In *Matal v. Tam* (2017), Justice Anthony Kennedy wrote, "a law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all."

Put another way, the First Amendment doesn't exist to protect speech that's broadly agreed with and tolerated; rather, it's needed to protect speech with which the majority may not agree.

Reported in: jonathanturley.org, December 17, 2020; WLNY CBS, December 18, 2020.