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Blocking Former Sex Offenders from Online Social Networks: Is this a Violation of Free Speech?

by Nichole Hines

Social networking website MySpace.com announced in early December that it was developing technologies to help block convicted sex offenders from using its website. *MySpace to "Block Sex Offenders."* BBC NEWS, Dec. 7, 2006.

These technologies are MySpace's most recent response to widespread complaints regarding predatory sexual offenders presenting a danger to teenager users of the website. *Id.* In addition to MySpace's effort to remove former sex offenders from its social networking site, in late January 2007, Congressmen Charles E. Schumer and John McCain introduced a bill designed to provide computer network operators, such as MySpace, the information and ability to remove sexual predators from their websites.

Congress Targeting Online Sex Offenders, CNNMONEY.COM, Jan. 31, 2007.

The proposed legislation and MySpace's efforts to ban sexual offenders from its website indicate the growing concern that teenagers are physically meeting up with people that they meet online through MySpace, exposing themselves to potentially dangerous situations. According to Sen. Charles Schumer, D-N.Y., "Lately, online predation is the method of choice for too many sexual predators. We have to plug the online loophole." *Congress Mulls Legislation Requiring Sex Offenders to Register Online Information,* FOXNEWS.COM, Jan. 30, 2007. However, these recent efforts to block sex offenders from online networking communities present questions about whether such actions violate a former sex offender's freedom of speech, due process rights, or both.

The new technology created by MySpace, with assistance from Sentinel Tech Holding Corp., is MySpace's greatest effort to protect its teenage users.

MySpace Tool to Help Block Sex Offenders, USA TODAY, Dec. 5, 2006. The

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program will include the names and physical descriptions of convicted sex offenders in the United States. *MySpace to "Block Sex Offenders," supra*. MySpace's automated system will search for matches between the database and MySpace user profiles. *Congress Targeting Online Sex Offenders, supra*. Any MySpace profiles that match with a sex offender description will be deleted. *Id.* The problem is that a sex offender could easily create a profile that does not match any description in the sex offender database. For this reason, the proposed legislation is a necessary tool to enhance MySpace's efforts because the legislation would make it illegal for sexual predators to provide false e-mail accounts to social-networking websites.

Under the proposed bill, registered sex offenders would be required to give their e-mail addresses to their probation or parole officers. [Senators Propose to Track Sex Offenders, ABCNews, Dec. 7, 2006](#). It would be a parole violation for any offender to use an unregistered e-mail address and could result in a return to prison. *Id.* Additionally, "[a]dults who misrepresent their age to a minor with the intent of sexually abusing a child could be prosecuted and sentenced to up to 20 years in prison." [Lawmakers Take Aim at Online Predators, ABCNews, Jan. 30, 2007](#). The downside of the new law is that it may be difficult to enforce because a convicted sex offender "could easily use a computer at an Internet cafe to create an anonymous e-mail account and use it to register on a social networking site for example—but the bill would make doing so a crime." *Congress Targeting Online Sex Offenders, supra*. Therefore, MySpace's new technology and the proposed legislation will work in tandem. Although the initiative is certainly laudable, it raises two serious constitutional questions. First, is this a violation of the freedom of speech? Second, is this a due process violation? This post will only briefly investigate the former question, but a later post will research the validity of a potential due process claim.

The basis for asking if the proposed legislation and MySpace's actions are a violation of the First Amendment stems from the Supreme Court case *John Ashcroft v. Free Speech Coalition*. 535 U.S. 234 (2002). In that case, defendants argued that the Child Pornography Act of 1996 (CPAA), which made virtual child pornography (sexually explicit images depicting children but not actually produced with real children) illegal, was a violation of the First Amendment. *Id.* at 239. Freedom of speech "bars the government from dictating what we see or read or speak or hear." *Id.* at 245. However, there are limitations, "it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Id.* at 245-46. Therefore, the only way the CPAA could have been valid was if the Court ruled that virtual pornographic images were another category of unprotected speech. *Id.* at 246. The Supreme Court declined to make this conclusion, holding that unprotected speech must be a work that "taken as a whole . . . is patently offensive in light of community standards" and "pictures of what appear to be 17- year-olds engaging in sexually explicit activity" does not necessarily offend community standards. *Id.*

In light of *Free Speech Coalition*, it appears that Congress would have to make a solid argument that all written works from a former sex offender to a teenager are patently offensive in light of community standards and is

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therefore unprotected speech. The difficulty with this argument is that it depends on what the sexual offender is writing on the social networking website, whether he or she is trying to arrange a meeting with the teenager, and whether the former sex offender is still a danger to the community. If the community would not find all written messages from a former sex offender to a teenager patently offensive, then MySpace's technology and the proposed legislation may actually be a violation of the First Amendment because they would prohibit some protected speech.

In response, MySpace and advocates of the legislation will likely make similar arguments that the plaintiffs in *Free Speech Coalition* made. Those plaintiffs argued that the legislation was valid because pedophiles may look at the material and "whet their own sexual appetites," which would encourage them to later engage in illegal conduct. *Id.* at 253. In response, the Court stated, "Congress may pass valid laws to protect children from abuse." *Id.* at 245. However, "[t]he prospect of crime by itself does not justify laws suppressing protected speech." *Id.* Moreover, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Id.* at 253. The Court further stated:

“ The government may not prohibit speech because it increases the chances an unlawful act will be committed at some indefinite future time. The government may suppress speech for advocating the use of force or a violation of law only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. ”


Id. This notion that the harm must be imminent poses a great obstacle for the constitutional validity of the proposed legislation and MySpace's new technology.

The danger that the bill hopes to address does not appear to include an imminent lawless action likely to occur by a former sex offender. A sexual predator must actually convince a teenager to meet up with him or her at some later point. This means that the new MySpace technology and the proposed legislation are designed to prevent teenagers from physically meeting a sexual offender offline at some later time, making the danger less than imminent. Moreover, the speech that is in question is not harmful in itself; it is the later potentially unlawful actions that are potentially dangerous, indicating the legislation may be overly broad. The only way such speech can be differentiated from the speech in *Free Speech Coalition* is if a distinction is made between speech produced by non-former sex offenders and speech produced by sex offenders. If made, this distinction raises the question of whether this different treatment violates a sex offender's right to due process. Is it really just to ban all sex offenders from an online community without any determination of whether that person is still a danger to the community? Whatever the answer may be, it seems that to ban all former sex offenders from MySpace and then to make it a crime for sex offenders to violate such a rule presents a serious First Amendment issue.

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[Duke Law and Technology Review - iBlawg » Blog Archive » Blocking Former Sex Offenders from Online Social Networks: Is this a Due Process Violation?](#) :: 4/03/07 at 6:37 pm

[...] My previous iBlawg post analyzed whether recent legislation allowing the removal of sexual predators from social-networking websites such as MySpace.com constituted a violation of sex offenders' right to free speech. That post also brought up, but declined to analyze, whether such legislation and technology designed to help carry out the removal and blocking of sexual predators also constitutes a violation of the sex offenders' due process rights. This iBlawg post will address the due process issue left open in my previous post. [...]