

Internet Law
Spring 2020
Midterm Assignment

I graded, as I always do, using a checklist. (E.g., “Under Section 230, Twitter is not liable for defamatory tweets posted by its users.”) I generally give one point for each item on the checklist that your answer identified, and an additional point for a substantially correct analysis. A few particularly important or subtle issues (e.g. the application of the Wiretap Act) were worth three points, and in some cases where similar issues came up repeatedly, they were each worth one. A particularly good analysis of an item — either exactly and meticulously correct, or saying something interesting I hadn’t anticipated — was worth an extra bonus point. I reserved a final six points for writing and organization. The bullet points in the following outline do not correspond one-to-one to the items on my checklist, but they do reflect the overall weight I put on different parts of the analysis.

Your memos ranged from good to excellent and displayed a strong understanding of the course material. Overall scores ranged from 16.5 to 32 out of a theoretical maximum of 39 points. The better exams were generally the ones that spotted more issues and gave more precise answers; I was quite pleased with how few out-and-out mistakes you made.

I will of course be happy to discuss your essays with you if you have any questions.

Boseman’s Legal Risks

Boseman faces severe legal risks if he returns to Wakanda, but should be safe as long as he remains in the United States:

- The \$25 million Wakandan civil judgment and life sentence are enforceable against Boseman in Wakanda. Boseman should not travel to Wakanda.
- States do not enforce each others’ criminal laws. The United States will not enforce the Wakandan court’s life sentence against Boseman.

- Boseman faces minimal extradition risk. His conduct — criticizing the Wakandan government — would be protected under the First Amendment in the United States, so the offense does not satisfy the rule of dual criminality. Thus, a United States court would not extradite him to Wakanda. (In addition, the Wakandan criminal trial violated fundamental precepts of due process).
- The Wakandan civil judgment is not enforceable in the United States. The SPEECH Act specifically forbids recognition of foreign defamation judgments where the foreign law applied does not comport with the First Amendment. (In addition, the Wakandan criminal trial violated fundamental precepts of due process.)
- A defamation suit against Boseman in a United States court by Jordan or other Wakandan officials over Boseman’s “killmongers” tweet would fail. This is a statement of opinion, not capable of being proven false, and so it is protected under the First Amendment.
- A defamation suit against Boseman in a United States court by Jordan, Okoye Guriria, @KlawOfJustice, or Digital Serkis over Boseman’s posting of the DMS report would fail. Since his posting of it is on a matter of public interest, the actual malice test would likely apply. Thus, even if a statement in the report were untrue, Boseman would not have had a reckless disregard of the truth in posting it, as he has no reason to question DMS’s accuracy or truthfulness.
- Boseman has done nothing illegal under United States law, so he has little to fear from Jordan’s demands that the United States “bring an end” to Boseman’s activism.

Emails to and from “Wright”

The unknown sender of the emails purporting to be from Wright and Boseman has probably violated the Wiretap Act, committed intrusion on seclusion, and violated New York’s anti-impersonation statute. [The CFAA also applies, but we discussed this after the cutoff for the midterm.]

- The copying of the email is probably a Wiretap Act violation. Emails are typically electronic communications, and it appears that the un-

known sender is intercepting them by having them sent to an IP address of their choosing, thus acquiring the contents of the emails. Neither of the parties to those copied emails (Boseman and his correspondents) has given consent to the interception, and emails are not generally accessible to the public. This is a criminal violation of the Wiretap Act, which the United States could prosecute. Boseman could also bring a civil suit under 18 U.S.C. § 2520 (although we did not discuss this in class and I did not expect you to know it).

- The installation of the spyware and the observation of Boseman's emails probably constitutes intrusion on seclusion under the prong for "investigation or examination into his private concern, as by opening his private and personal mail" in Restatement (Second) of Torts § 652B cmt. b.
- The hacker impersonated Boseman and Wright by sending email pretending to be from them. This is probably enough to violate New York Penal Law § 190.24[1]. The hacker did so, it would appear, with the intent to "injure" Wright and Boseman by intercepting their emails. That is probably a concrete enough injury to distinguish this case from *Golb* and to make the impersonation not First Amendment protected speech.
- [Under the CFAA, installing spyware was an "access" to Boseman's computer, and the fake attachment and false From line show that it was deceptively installed without "authorization." Boseman's computer was a "protected" computer because it was connected to the Internet. And because the spyware copied emails, it "obtain[ed] information," completing a violation of § (a)(2)(C). This is a criminal violation, which the United States could prosecute. Boseman, however, will only be able to bring a civil suit if he can show \$5,000 in "loss" under § (e)(11). The best candidate for the loss is actually the DMS investigation of the spyware, which is plausibly "damage assessment."]
- Identifying the unknown sender may or may not be possible. We can subpoena Okoye Guriria for information on its network and the destination of the emails. This may or may not lead to information sufficient to identify the sender; if so, it may or may not implicate Okoye

Gurira itself. Perhaps more importantly, if federal and state law enforcement open investigations, they will have probable cause to obtain search warrants for Okoye Gurira's systems for evidence of Wiretap Act and impersonation violations.

- There is a *prima facie* case that Okoye Guriria is implicated in the hack since the emails are being sent to its network. Its liability ultimately depends on whether it conspired with the hacker or is another one of the hacker's victims.

Defamatory Tweets

Boseman probably has a viable defamation claim against the unknown Twitter users and possibly against Digital Serkis:

- The tweets make factual claims, and those claims are false. The claims are also sufficiently serious that they would be likely to harm Boseman's reputation. There are currently no facts that would indicate the absence of actual malice; it is likely that the unknown Twitter trolls know that the allegations are false and are simply trying to harm Boseman.
- It is less clear whether Digital Serkis can be held liable for publishing the tweets. DMS's network analysis indicates that these accounts are bots controlled by Digital Serkis, but it is impossible to prove this fact of control to a certainty without discovery. This matters because if Digital Serkis itself programmed the bots to post these claims, it is strictly liable as a publisher. If not, however, and third-party users are responsible for the tweets, Digital Serkis might be protected by Section 230.
- Under Section 230, Twitter is not liable for defamatory tweets posted by its users. UNDER SECTION 230, TWITTER IS NOT LIABLE FOR DEFAMATORY TWEETS POSTED BY ITS USERS.

@KlawOfJustice

Boseman probably has a civil suit against the unknown user behind @KlawOfJustice for publicity given to private life, a/k/a public disclosure of private facts.

- Revealing the details of one's medical treatment and overdoses would be highly offensive to a reasonable person. Indeed, medical privacy laws like HIPAA exist precisely to protect the privacy of records of this sort. It is also likely, although less certain, that @KlawOfJustice's posts are not of legitimate concern to the public. Boseman is a public figure, due to his past office and his current activism. But the information published by @KlawOfJustice is not directly relevant to the reasons that he is a public figure.
- It is possible that @KlawOfJustice could argue that they should be treated as a media defendant, but they do not seem to share many features traditionally associated with the press. There is also a question of whether the leak to @KlawOfJustice shows that they conspired with the unknown hacker, or whether they are an innocent downstream recipient of a leak, as in *Bartnicki*.
- Boseman will need to serve a subpoena on Twitter to learn @KlawOfJustice's identity.
- Under Section 230, Twitter is not liable for privacy-violating tweets posted by its users. UNDER SECTION 230, TWITTER IS NOT LIABLE FOR PRIVACY-VIOLATING TWEETS POSTED BY ITS USERS.

Jordan

There is no evidence linking Jordan to any of the activity described in the DMS report. It is true that Jordan deposed Boseman, that Jordan's spokesman issued a statement criticizing Boseman, and that Jordan stands to gain if Boseman is discredited. But none of these link Jordan to the attacks in any concrete way.

Jurisdiction

Boseman is subject to the jurisdiction of the courts in New York and will more likely than not be able to get jurisdiction over all of the defendants except for Jordan in a court in New York:

- As a New York resident, Boseman is subject to general jurisdiction here, regardless of where the conduct underlying the cause of action took place.

- Okoye Guriria is a New York company and is subject to general jurisdiction here.
- There is a strong argument that the unknown hacker targeted New York by deliberately wiretapping a New York resident in New York. The case is distinguishable from *Ketabaev* because here the victim (and not just the hacked computer) is in the forum jurisdiction.
- There is a good case that Digital Serkis has targeted New York through its extensive coordinated harassment. The tweets were more extensive and pervasive than the posts in *Burdick*. Digital Serkis might argue that it should be protected by the California anti-SLAPP statute, but as in *Ayyadurai* the choice of law analysis should favor a stay-at-home defamation plaintiff whose own law is more plaintiff-friendly, at least in a New York court.
- There is a similar argument that @KlawOfJustice targeted New York, but this argument is weaker. @KlawOfJustice can raise a slightly stronger argument that they are trying to inform the world (including people in Wakanda rather than New York) and there is less of what Facebook would call coordinated inauthentic activity.
- Jordan has not been linked to any conduct in or targeting the United States, except for the statement criticizing Boseman. Under *Burdick*, this is not enough to create personal jurisdiction in New York.