Virginia Code § 18.2-152.7:1: When "Facebook Beef" Becomes a Crime (and When It Doesn't)

by Erin W. Hapgood

The variety of comments and information people post about each other on public forums such as Facebook is quite staggering. Personal information, including mental or physical health, untrue gossip and comments about one's physical appearance or political views are all likely in what is commonly referred to as "Facebook beef." The short title for Virginia Code § 18.2-152.7:1, "harassment by computer," sometimes leads members of the public to assume it applies to someone who publicly airs one's dirty laundry, or makes statements that are critical, insulting, disgusting, untrue, or even defamatory. The statute states that it is a Class 1 misdemeanor to use a computer to "communicate obscene, vulgar, profane, lewd, lascivious, or indecent language[,]"[1] a definition that seems to cover the vast majority of this type of content. However, a review of the case law reveals that the statute is more limited than a plain reading indicates.

The problem is compounded because people are able to obtain a warrant for violation of § 18.2-152.7:1 from a magistrate; because those involved in Facebook beef rarely have clean hands, cross-warrants are not uncommon. The prosecution of these citizen complaints for computer harassment presents difficulties for a commonwealth's attorney. If she decides not to participate in the case, the victim can feel angry and frustrated and the harasser feel empowered by vindication.

It behooves attorneys in many areas of the law to be able to articulate the requirements of the crime when advising a client dealing with an online nemesis, especially as swearing out a warrant with no chance of a conviction can leave a person vulnerable to a civil claim. It is critical to understand that, although the language of the statute seems to criminalize "profane," "vulgar," and "indecent" comments, Virginia courts have limited its application so as to protect First Amendment speech.

The Virginia Court of Appeals ruled in 2004 that the definition of obscenity found in Virginia Code § 18.2-372 applied to an alleged violation of Virginia Code § 18.2-427 (harassment by telephone or public airwaves).[2] In order to be obscene, a comment must "appeal to the prurient interest in sex," going substantially beyond customary candor. It is common, even indispensable, for Facebook beef to include the use of explicit words, but when the explicit words are used to express anger or contempt rather than to appeal to the prurient interest in sex, they are not "obscene" for purposes of the crime.[3]

A conviction for a violation of § 18.2-152.7:1 also requires the intent to coerce, intimidate, or harass, which is almost universally present in these cases. But intent to harass and the resulting feeling of harassment are simply insufficient to obtain a conviction for "harassment by computer." People feel harassed by any number of actions, many of which are morally wrong or may even give rise to civil liability. When a client comes to talk with you about her options to stop or punish the harassment, remember that to be convicted of a crime, the perpetrator must have used language that is threatening or "obscene" as defined in the Virginia Code. Otherwise, it is just Facebook beef.

Endnotes:

1 The Code also criminalizes using a computer to "make any suggestion or proposal of an obscene nature" or (3) "threaten any illegal or immoral act[,]" but these disjunctive elements do not cause confusion like that associated with the first portion of statute and so are not discussed in detail here.

2 To be obscene, when "considered as a whole, [the statement] has as its dominant theme or purpose an appeal to the prurient interest in sex…and [2] which goes substantially beyond the customary limits of candor in description or representation of such matters and [3] which, taken as a whole, does not have serious literary, artistic, political or scientific value." Virginia Code § 18.2-372, quoted in *Allman v. Commonwealth*, 43 Va. App. 104 (Va. App. 2004). The Court of Appeals regularly applied this definition until *Barson v. Commonwealth*, 58 Va. App. 451, 461–64 (2011), when the court overruled *Allman* and applied a dictionary definition. The Virginia Supreme Court reinstated use of the statutory definition of obscenity in *Barson v. Commonwealth*, 284 Va. 67 (2012).

3 *Barson*, *supra* (citing *Lofgren v. Commonwealth*, 55 Va. App. 116 (2009); *Airhart v. Commonwealth*, Record No. 1219–05–2 (Va. App. Jan. 16, 2007) (unpublished); *Allman*, *supra*.

Erin W. Hapgood is the assistant commonwealth's attorney in Northumberland County, Virginia. The views and opinions expressed in this column are solely hers.