Defending Prisoner Rights in the Digital World: 2015 in Review

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From a cell in a South Carolina prison, seven inmates filmed a rap video on a cell phone and uploaded it to a popular hip-hop website. The track, "On Fire," caught fire online—but the viral clip also caught the attention of prison administrators. As Buzzfeed reported using records obtained by EFF under South Carolina's Freedom of Information Act, the inmates received obscene punishments for expressing themselves: a combined total of nearly 20 years in solitary confinement for accessing social media, using a contraband cell phone, and engaging in gang-related speech.

Although mass incarceration in the United States is an important issue that most reasonable people believe policymakers must address, prison and jails haven't historically gotten a lot of attention from digital rights advocates. After all, inmates don't have access to the Internet, right?

Wrong. That may have been true a decade ago, but now the digital world has extended beyond bars with the growth of social media as a political tool, the rise in availability of contraband smartphones, the introduction of digital communication technologies into detention facilities, and law enforcement's adoption of facial recognition using mugshots. This issue has come into sharp focus for the Internet freedom community with incarcerated whistleblower Chelsea Manning launching a Twitter feed and imprisoned journalist Barrett Brown publishing his writing online at various news sites.

This year, EFF found the opportunity to use our expertise in free speech, privacy, and intellectual property to defend the rights of 2.2 million people that The Sentencing Project estimates are currently incarcerated in the United States. Our work has also allowed us to reach a new audience with Prison Legal News and San Francisco Bay View republishing our stories and sending them to their incarcerated subscribers.

February: EFF published an explosive report on how the South Carolina Department of Corrections (SCDC) treats posting to social media as an offense on par with hostage-taking, rioting, rape, and escape. Hundreds of inmates received extended stints in solitary confinement over social network use, including two inmates who were sentenced to more than 30 years in solitary for accessing Facebook.

Through public-records requests, EFF learned that SCDC considered each day an inmate accessed social media as a separate offense. For example, if an inmate accessed Facebook once

every day in July, that would be 31 separate "Level 1" offenses, each individually earning the inmate a year in solitary confinement—plus additional penalties if the access was conducted with a contraband smartphone or the communication referenced gangs. Now, some form of punishment could arguably be appropriate for inmates possessing contraband phones or engaging in criminal activity, but the sentences for those charges were miniscule in comparison to the stacked charges for logging onto Facebook. In other words, sanctioning an inmate for possessing a smuggled smartphone is more reasonable than punishing the inmate for every communication he made with the contraband device, regardless of content.

However, it is crucial to note that inmates were punished severely even when they didn't possess a phone and were simply having their friends and families operate their accounts on their behalves and engaging in benign communications.

In the process of uncovering these abuses, we also discovered that Facebook had created a special "Inmate Account Takedown Request" system for corrections departments and was systematically suspending inmate accounts without first confirming that the inmates' activities violated its community standards.

The scandal spread across the news media, and SCDC subsequently announced it would stop piling up social media punishments. In response to unrelated litigation, SCDC also said it would cap solitary confinement at 60 days. While we believe that is still too harsh a punishment for social media offenses, we're happy to see that SCDC has begun to reform its practices.

April: After learning about SCDC's harsh treatment of prisoners, EFF, the ACLU's National Prison Project, and journalist and anti-solitary-confinement activist Sarah Shourd began looking at Alabama. A state law criminalized inmate access to social media (defined so broadly that it could apply to any website) and made it a misdemeanor to even access the Internet on an inmate's behalf. Among the most heinous cases we discovered was a mother on a work furlough who was punished for logging onto Facebook to view her children's Easter photos and an inmate who administered a "Free Alabama Movement" Facebook page.

In a blog post on the 52nd anniversary of Martin Luther King Jr.'s famous ""Letter from Birmingham Jail," we called out the state of Alabama for creating a law that, had King written it today, would have made it a crime for anyone to share King's influential words on Facebook.

May: Many prisons have adopted secure video and email systems that allow inmates to communicate digitally with their friends and family outside. One inmate in Indiana, however, was severely punished after his sister posted a video he had sent through the prison's "videogram" system to a Facebook page she created to promote his innocence campaign.

His offense: allegedly violating the vendor JPay's intellectual property rights. As it turned out, buried in the contractor's terms of service was a clause asserting that JPay "owns all of the content, including any text, data, information, images, or other material, that you transmit through the Service." By that standard, if an inmate sent a poem to his mother, or a child sent a drawing to his incarcerated parent, JPay could claim exclusive ownership of both.

Three days after EFF publicized this outrageous clause, JPay (which had recently been acquired by Securus) issued a statement that it would remove it from its Terms of Service.

June: Over the course of six months, EFF engaged in extensive negotiations with Facebook over its inmate takedown policy and obtained documents from the California Department of Corrections and Rehabilitation that contradicted how Facebook said it processed inmate takedown requests.

In June, EFF and The Daily Beast confirmed that Facebook would no longer suspend inmate pages no-questions-asked. Instead, it would require prison officials to either show that the law in their state explicitly forbids inmate access to social media or demonstrate how an inmate's behavior online presents a genuine "serious safety risk."

While that was a positive step, EFF had another problem with Facebook: it was not reporting requests from prisons as part of its annual "Government Request Report." Consequently, we gave Facebook a failing grade in the censorship portion of our annual "Who Has Your Back?" report.

September: EFF joined the ACLU of San Diego and Imperial Counties, the Cato Institute, the Brechner First Amendment Project, and the First Amendment Coalition in an amicus brief defending the free speech rights on people on supervised release from prison. In the case, an ex-offender's probation was revoked because he criticized a law enforcement officer in a blog post. The government claimed that he had violated the terms of his release, which instructed him not to "harass" anyone else, including "defaming a person's character on the internet."

In December, we received good news in the case. As EFF Senior Staff Attorney Adam Schwartz writes:

> [T]he government's response to the amicus brief made several significant concessions. First, the government acknowledged that a release condition against "harassment" must be limited to situations where the parolee actually intends to harass someone. Second, the government recognized that harassment does not occur when a parolee merely posts a complaint about police brutality on a message board, writes a negative Yelp review, or publishes an essay criticizing the criminal justice system. Third, the government conceded that the release condition against "defaming" someone else only applies to situations where there is harassment.

November: EFF awarded a Stupid Patent of the Month honoring prison-phone vendor Securus for its patented method of "proactively establishing a third-party payment account," i.e. robocalling a family member to ask if they are willing to set up a pre-paid phone account for a family member booked into a local jail. As EFF's Mark Cuban Chair to Eliminate Stupid Patents Daniel Nazer wrote:

> There are two serious problems with this patent. First, the claims are directed to a mind-numbingly mundane business practice and should have been rejected as obvious. Obvious uses or combinations of existing technology are not patentable. Second, the claims are ineligible for patent protection under the Supreme Court's 2014 decision in *Alice v. CLS Bank*—this is a recent Supreme Court decision that holds that an abstract idea (like contacting potential third-party payers) doesn't become eligible for a patent simply because it is implemented using generic technology. That the system failed to register either of these defects shows deep dysfunction.
>
> In a sane world, a patent examiner would apply common sense and reject Securus' application out of hand. It includes no technological innovation (it notes that all of the relevant phone

> technology already exists); instead, it simply describes a basic set of steps for contacting potential third-party payers. Unfortunately, the Federal Circuit has essentially beaten common sense out of the patent system.

Looking ahead

In the coming New Year, EFF will continue to examine issues related to incarceration and advocate for the rights of inmates. For one, we are currently working with MuckRock News to survey how local law enforcement agencies are using facial recognition and other biometric technologies in the field. One thing we've learned so far is that often the primary source of this biometric data is county jails, where inmates are photographed and fingerprinted during the booking process.

We are also keeping a close eye on the Federal Communications Commission, which is considering regulations for how prisons adopt digital communications technologies, such as video visitation and inmate email, to ensure that prisoners and their families aren't gouged by unfair pricing.

In April, a federal judge invalidated Pennsylvania's Revictimization Relief Act, which allows crime victims to sue inmates who engage in "conduct which perpetuates the continuing effect of the crime on the victim," including online speech. As Chief Judge Christopher Conner wrote in the opinion:

> A past criminal offense does not extinguish the offender's constitutional right to free expression. The First Amendment does not evanesce at the prison gate, and its enduring guarantee of freedom of speech subsumes the right to expressive conduct that some may find offensive.

We couldn't agree more.

This article is part of our Year In Review series; read other articles about the fight for digital rights in 2015. Like what you're reading? EFF is a member-supported nonprofit, powered by donations from individuals around the world. Join us today and defend free speech, privacy, and innovation.