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REPORT



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## Recent Lawsuit Shows Challenges in Applying Warrant Rule, SCA to Remotely Stored E-Mail

Courts have not been consistent in applying the Fourth Amendment's warrant requirement and the Stored Communications Act's 180-day protection for communications in ''electronic storage'' to e-mail messages stored remotely on service providers' networks, as several recent lawsuits illustrate.

This is a problem, many argue, because more than half of internet users store their e-mail remotely and the applicable standards for law enforcement access—a warrant supported by probable cause or something less—at this point may depend on the circuit where the access occurs.

Recent Colorado litigation involving a court order directing Yahoo! Inc. to disclose the contents of opened e-mail messages less than 180 days old highlights unresolved questions about how the Fourth Amendment and SCA apply to messages stored remotely.

The government withdrew its motion to compel Yahoo!'s compliance with the order April 16 (*In re Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(d),* D. Colo., No. 09-80, *motion to compel withdrawn* 4/16/10).

**''If there's one area where the statute seems clear, it is with regard to e-mail, yet the government and the provider community still do not agree on how to apply ECPA to opened or sent e-mail.''**

MARC J. ZWILLINGER, ZWILLINGER GENETSKI LLP

Consumer groups and companies including Microsoft Corp. and Google Inc. have called on Congress to re-work the 1986 Electronic Communications Privacy Act, which contains the SCA, to reflect changes in how individuals use electronic communications services today.

Changes might come soon: Lawmakers have pledged to hold hearings on potential ECPA reforms as early as this spring.

**Uncertainty for Service Providers.** ''Generally, ISPs and other companies who host content continue to face uncertainty with regard to how ECPA applies to material on the systems, especially with regard to the cloud computing and social networking services that did not exist in 1986 when ECPA was passed,'' Marc J. Zwillinger,

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Zwillinger Genetski LLP, Washington DC, who represented Yahoo!, told BNA.

''If there's one area where the statute seems clear, it is with regard to e-mail, yet the government and the provider community still do not agree on how to apply ECPA to opened or sent e-mail,'' he observed.

Difficulties applying the ECPA to e-mail is just the beginning of the uncertainty service providers face, Zwillinger remarked. ''The situation gets much more difficult when you try to apply ECPA to things like Friend Requests, Status Updates, and other forms of communication that are neither one-to-one communications, like e-mail, nor public forum posts,'' he said.

**''In the SCA context, 'electronic storage' has a narrow, statutorily defined meaning. It does *not* simply mean storage of information by electronic means.''**

GOVERNMENT MOTION TO COMPEL

''The law doesn't cleanly apply to material that's intended to be communicated to a group of online friends or contacts. This is one reason why it is time for ECPA reform.''

**Colorado Litigation Highlights Open Questions.** Briefs filed in a recent Colorado lawsuit highlight open questions about what law enforcement should have to show to obtain information from ISPs about the contents of communications in subscribers' accounts.

The litigation involved the government's effort to obtain information from Yahoo! under 18 U.S.C. § 2703(d). That section requires ''specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication'' are relevant and material to an ongoing criminal investigation.

The court issued an order requiring Yahoo! to produce the ''contents of electronic communications (not in electronic storage)'' stored during specified dates. The order stated that opened messages were not in ''electronic storage,'' as defined in the SCA 18U.S.C. § 2510(17), regardless of the date sent.

Yahoo! produced non-content information and the contents of messages more than 180 days old, but did not produce the content of opened communications less than 180 days old. Yahoo! asserted that, under *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), opened messages less than 180 days old are still considered to be in ''electronic storage'' and thus cannot be disclosed without a warrant under the Stored Communications Act.

**Government: Opened E-Mails No Longer in Storage.** In its motion to compel, the government maintained that opened messages are not protected by the SCA.

The scope of ''electronic storage'' is critical for law enforcement, the government asserted, because the government can only compel production of electronic communications in ''electronic storage'' for less than 181 days using a warrant supported by probable cause. The government can obtain other messages using merely a subpoena or a 2703(d) order, as the government did in this case.

The SCA's legislative history shows that messages are only in ''electronic storage'' when unopened, the government asserted. ''In the SCA context, 'electronic storage' has a narrow, statutorily defined meaning. It does *not* simply mean storage of information by electronic means.''

**''This liability is by no means hypothetical—in *Quon v. Arch Wireless*, the Court of Appeals for the Ninth Circuit held that an electronic communication service provider who turns over opened and stored text messages without a warrant or a viable exception is liable under the SCA as a matter of law.''**

YAHOO! BRIEF OPPOSING MOTION TO COMPEL

''Electronic storage'' means ''(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.'' 18 U.S.C. § 2510(17).

Storage of opened e-mail is not contemplated by subsection (A), the government argued, because it is no longer ''temporary'' or ''incident to transmission.'' Subsection (B) does not apply because it only reaches storage for backup protection, the government contended.

''Backups'' are limited to those required to maintain the integrity of the system, the government argued, citing decisions to that effect in *United States v. Weaver*, 636 F.Supp.2d 769 (C.D. Ill. 2009)(14 ECLR 1050, 7/29/09); *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, (D. Utah March 10, 2009); *In re Grand Jury Subpoena Issued Pursuant to 18 U.S.C. Section 2703(b)(1)(B)*, (M.D. Ga. April 29, 2005); and *Fraser v. Nationwide Mut. Ins. Co.*, 135 F.Supp.2d 623 (E.D. Pa. 2001)(6 ECLR 393, 4/11/01).

*Theofel*, which arose out of a discovery dispute in civil litigation, is inconsistent with the language and structure of the SCA, as well as other cases interpreting the statute, the government argued. ''The Ninth Circuit's holding is incorrect, and this court should reject it[,]'' government attorneys argued in the brief.

**Yahoo Sees No-Win Situation.** Yahoo! responded, again citing to *Theofel*. The government's effort to distinguish between opened and unopened communications under the SCA was grounded in ''a misguided and often rejected theory'' Yahoo! asserted.

The disclosure the government sought would force Yahoo! to endure contempt liability or become vulnerable to civil liability in the Ninth Circuit, the service provider complained.

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Court of Appeals for the Ninth Circuit held that an electronic communication service provider who turns over opened and stored text messages without a warrant or a viable exception is liable under the SCA as a matter of law.''

The Supreme Court heard arguments in the *Quon* case April 19. But the court only granted certiorari for Fourth Amendment questions: The SCA holding remained intact on appeal (14 ECLR 1774, 12/16/09).

According to Yahoo!, the contents of the communications should also not be disclosed because they were protected by the Fourth Amendment. ''[U]sers who store emails with Yahoo! have a reasonable expectation of privacy in their email, whether opened or not, and therefore the Fourth Amendment requires that the government obtain a warrant to access such material.''

**Amici Cite Both SCA, Fourth Amendment Protections.** Amici contended that Yahoo!'s interpretation of the SCA requiring a warrant for even opened e-mails less than 180 days old is correct, citing *Theofel*.

In the alternative, they asserted that the Fourth Amendment's warrant rule also covers e-mails stored remotely, analogizing them to the contents of sealed postal mail and contents of telephone calls, among other things. ''Based on society's extensive use of email for private, sensitive communications, it is plain that email plays at least as vital a role in private communication today that the public telephone played in 1967, and that society expects and relies on the privacy of email messages just as it relies on the privacy of the telephone system.'

**''The government respectfully disagrees with positions taken in those briefs, but because the need for the motion to compel has been vitiated by Yahoo's further production, the government declines to litigate this matter in the moot context.''**

GOVERNMENT MOTION TO WITHDRAW

The groups urged the court to ''interpret[ ] the SCA correctly'' and avoid the constitutional question.

**Government Dodges Issue, Withdraws Motion.** The government withdrew its motion to compel April 16.

In the motion, government attorneys said that the contents of opened e-mail messages less than 180 days old would not be helpful to its investigation.

In a footnote, attorneys acknowledged Yahoo! and amici's briefings on the Fourth Amendment and SCA issues.

''The undersigned counsel is aware that Yahoo and other various parties have now submitted briefs on various privacy issues in the context of the prior motion to compel. The government respectfully disagrees with positions taken in those briefs, but because the need for the motion to compel has been vitiated by Yahoo's further production, the government declines to litigate this matter in the moot context.''

**Split on Fourth Amendment Application to Webmail, Too.** The Fourth Amendment protects individuals' rights to be free from warrantless searches of areas where they have both an actual and objectively reasonable expectation of privacy.

The question the courts face is where remotely stored e-mail fits into the privacy expectation equation. Are the contents of stored e-mails more like dialed phone numbers or a sealed letter?

The Supreme Court has held that individuals do not have an expectation of privacy in information shared with third parties like bank transaction records, *United States v. Miller*, 425 U.S. 435 (1976); and dialed telephone numbers, *Smith v. Maryland*, 442 U.S. 735 (1979).

But individuals do have a Fourth Amendment-protected privacy interest in the contents of safe deposit boxes, *United States v. Thomas*, No. 88-6341 (6th Cir. July 5, 1989); the contents of sealed packages carried by the U.S. Postal Service, *Ex Parte Jackson*, 96 U.S. 727 (1978); and rented living spaces accessible by others, *Stoner v. California*, 376 U.S. 483 (1964).

The Eleventh Circuit held March 11 that individuals do not have a reasonable expectation of privacy in read e-mail messages stored with an ISP because they ''shared'' them with the service provider. *Rehberg v. Paulk*, No. 09-11897 (11th Cir. March 11, 2010) (15 ECLR 543, 4/7/10).

In reaching that holding, the court followed *United States v. Lifshiz*, 369 F.3d 173 (2d Cir. 2004) (9 ECLR 385, 4/21/04); *United States v. Perrine*, 518 F.3d 1196 (10th Cir. 2008) (13 ECLR 392, 3/19/08); and *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001) (6 ECLR 733, 7/18/01).

Other courts have found a Fourth Amendment-protected privacy expectation in the contents of electronic communications. *Warshak v. United States*, 490 F.3d 455 (6th Cir. 2007) (12 ECLR 583, 6/27/07), (*vacated under ripeness doctrine* (13 ECLR 962, 7/16/08) ); *Quon v. Arch Wireless Operating Co.*, 529 F.3d 893 (9th Cir. 2008) (13 ECLR 861, 6/25/08) (*petition for certiorari on Fourth Amendment issues granted 12/14/09* (14 ECLR 1774, 12/16/09) ); *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) (9 ECLR 190, 2/25/04).

**Push for SCA Reforms.** A coalition of leading internet industry companies and civil liberties groups March 30 called for reforms to the ECPA, 18 U.S.C. § 2701 (15 ECLR 529, 3/31/10).

Organizations who signed onto the proposal, including the Center for Democracy and Technology, Microsoft Corp., Google Inc., the American Civil Liberties Union, the Electronic Frontier Foundation, and the Computer & Communications Industry Association, recommended four ECPA changes, including what in practice would be an elimination of the ECPA's distinctions between communications stored remotely and that contained on an individual's personal computer.

It appears the ECPA is going to receive some attention in the House as well. House Judiciary Committee Chair Jon Conyers Jr. (D-Mich.), joined by Rep. Jerrold Nadler (D-N.Y.) and Rep. Robert C. ''Bobby'' Scott (D-Va.), announced plans to consider ECPA reforms in hearings this spring.

BY AMY E. BIVINS

*Documents related to the Colorado litigation available at the Electronic Frontier Foundation website, http://*

*www.eff.org/cases/re-application-united-states-america-order*

*Government's motion to withdraw the motion to compel at http://www.eff.org/files/motion%20to%20withdraw%20motion%20to%20compel%20Yahoo.pdf*



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