

Time to amend the ECPA

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In 1986, congress enacted the Electronic Communications Privacy Act (ECPA) to prohibit the unauthorized interception of electronic communications during their transmission and to provide limited protection to electronic communications that are in various forms of electronic storage. The name of the act might lead one to believe that it affords protection for e-mail communications similar to that given to first-class mail under federal law. Looks, however, can be deceiving. In fact, what appears to be a statute that protects the privacy of e-mails is, for the most part, an outdated morass of so-called protections that cancel each other out-leaving nothing protected.

Prior to the enactment of the ECPA, Congress' now defunct Office of Technology Assessment (OTA) offered three "policy options" for congressional consideration with respect to the protection of e-mail communications. The first option was for Congress to provide the same degree of protection to e-mail as is provided for conventional first-class mail under federal law-namely a prohibition on interception absent a court order. The second was for Congress to create a scheme that afforded greater protection to the e-mail outbox of the sender and the e-mail inbox of the recipient than to the actual transmission of the e-mail since the former are places that are considered to be inherently more private. The OTA's third option was that Congress defer action and revisit the issue after observing developments in technology and case law regarding e-mail privacy.

Congress, however, ignored all three of these proposed options. Instead, it passed a law that does not afford e-mail the same protections as first-class mail, and affords greater protection to e-mails during transmission than when they are in storage. Perhaps it would have been better had Congress done nothing.

Given the relatively early stage in the history of e-mail in which the ECPA was written, Congress was apparently unaware that e-mails are virtually always in some form of storage, except for the nanosecond during which they are being transferred from sender to recipient. For instance, e-mails can be placed in back-up storage after transmission has been completed, or in intermediate storage as they sit in a recipient's inbox after being opened, or as they sit in the recipient's trash after being deleted.

Courts have even held that e-mails are in storage, rather than in transmission, during the period in which they are sitting in a recipient's inbox unopened and waiting to be read by the recipient. See *Fraser v. Nationwide Mutual Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001). Given this narrow interpretation of when an e-mail is in transmission, the prohibition in the ECPA on intercepting e-mails contemporaneous with their transmission is meaningless. As the 3d U.S. Circuit Court of Appeals noted in *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3d. Cir. 2004), "While Congress's definition of 'intercept' does not appear to fit with its intent to extend protection to electronic communications, it is for Congress to cover the bases untouched."

Workplace issues

This legislative loophole has had a significant impact on the privacy of e-mail communications in the workplace because the ECPA exempts service providers, such as employers, from any liability for accessing stored e-mails. (By contrast, employers normally need to obtain the consent of their employees to intercept their e-mails during transmission.) Thus, to the extent that e-mails are virtually always in storage, employers as service providers have carte blanche to access their employees' e-mails. Indeed, given how the case law has developed regarding when an e-mail is in storage, it would seem that the only time an employer could be liable for reading an employee's e-mail would be if the employee's manager were peering over the employee as she sits at her computer and opens an e-mail she has just received.

Some would say employers should have this almost unlimited access to their employees' e-mails given that the employer provides the means for its employees to communicate in the workplace via e-mail, and generally only with the intent of fostering business-related communications. Thus, the employer should have a right to monitor and review those communications. Others would argue that the freedom currently enjoyed by employers to access

employee e-mails is an unintended and undeserved consequence of a law drafted by a Congress that apparently failed to understand the nature of the technology supporting the communications that the law was intended to protect.

Passing legislation regarding technology is dicey business. For the same reasons that Just as a consumer who buys a computer generally finds herself with an obsolete machine one year later, it is no surprise that the ECPA has become obsolete almost 20 years after its passage. It is time for Congress to amend the ECPA and clarify its intentions regarding the protection of e-mails in the workplace and elsewhere so employers and others fully understand their rights.

Most employers believe that they need their employees' consent to access any e-mails in the workplace, and a prudent employer will continue to have a policy that establishes its right to monitor and review employee e-mails. However, if Congress truly intended for employers and other service providers to have relatively free access to e-mails on systems provided by them, Congress should state this explicitly rather than leaving such important policy decisions to courts interpreting the ECPA.

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