ECPA and Online Computer Privacy

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CONTENTS

INTRODUCTION

During the ninety-ninth term of Congress, legislation was introduced which sought to provide federal statutory guidelines to protect the privacy of electronic communications, including electronic mail (e-mail), found on commercial computer-based services and on other remote computer systems. Ultimately, this legislation was enacted as the Electronic Communications Privacy Act of 1986 (ECPA). Before enactment of ECPA, federal law did not provide any guidelines for protecting technologically advanced forms of communication. Case law also failed to pro-

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vide adequate guidance in this area. The peculiarities of computers and computer storage were not addressed by previous wiretap laws. Moreover, electronic communications were not protected by the constitutional right to privacy as defined by the United States Supreme Court. In sum, existing law was "hopelessly out of date."[1]

When the old wiretap laws were first enacted, the possibility that computer-based electronic communications systems would be used to transmit messages across telephone lines had not been contemplated. Fortunately, with ECPA, e-mail and other private electronic communications are given federal statutory privacy protection. In particular, ECPA provides both criminal procedure guidelines and rules for obtaining civil remedies.

This discussion of ECPA and related areas is prompted by one of the first civil lawsuits which relies upon ECPA as a basis for some of its claims.[2] The lawsuit, *Thompson v. Predaina*, was filed in March of 1988 in the district court for the Southern District of Indiana.[3] While *Thompson* later was voluntarily dismissed by the plaintiff, it is an example of a fact situation which raises privacy concerns covered by ECPA. The facts of the case were as follows: Linda Thompson, a third-year law student, filed a *pro se* complaint against Bob Predaina, the systems operator (sysop) of the Professional's Choice Bulletin Board, a fee-based "hobbyist" electronic bulletin board system. The suit alleged that Predaina intruded, without any right or privilege, into Thompson's private e-mail. Thompson based her action on federal theories, including two under ECPA, as well as on common-law state claims. In this author's opinion, the *Thompson* case would have been an excellent ECPA test case. An opportunity to see how ECPA will operate to protect, or not protect, one's privacy in the electronic communications context has not yet arisen.

This Article will discuss the following issues: (1) the com-

1. S. REP. NO. 541, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3556 (quoting 132 CONG. REC. S7992 (daily ed. June 19, 1986) (statement of Sen. Leahy)).

2. The one published decision in which the privacy protections of ECPA are involved is Michigan Bell v. Drug Enforcement Admin., 693 F. Supp. 542 (E.D. Mich. 1988). This case involves telephone toll records, however, not user-generated communications as in *Thompson*.

3. Thompson v. Predaina, No. 88-93C (S.D. Ind. *dismissed* Aug. 10, 1988).

puter communications environment; (2) an example of the pre-ECPA criminal situation; (3) the law prior to the passage of ECPA; (4) a preliminary discussion of ECPA with emphasis on its criminal procedure aspects; (5) ECPA as applied in the civil context to the *Thompson* situation; and (6) ECPA as applied in the civil context to the corporate situation.

I. The Computer Communications Environment

The computer communications environment can be divided into three parts: (1) commercial systems and networks; (2) hobbyist systems and networks; and (3) corporate systems and networks.

The commercial systems and networks electronically provide private e-mail, public discussion conferences, real-time "chat" facilities, public domain software exchange, and access to news and various databases. Included within this category are the popular consumer computer online services of CompuServe, GEnie, the Source, BIX, the WELL, Portal, QuantumLink, AppleLink, and Prodigy. Also included in the commercial catagory are the more specialized computer databases such as LEXIS, WESTLAW, DIALOG, and the Dow Jones News Retrieval, in which some limited private e-mail and private user area facilities may be provided. Commercial data communications networks, such as Telenet and Tymnet, comprise a third component of this commercial category. In his report on the telephone industry, Peter Huber writes that there are "[h]undreds, perhaps thousands of [commercial] information service providers . . . offering immediate access to vast amounts of electronically stored information in an extremely broad range of fields."[4] Indeed, he notes, "[t]he industry has grown explosively since 1979."[5]

Hobbyist systems and networks include electronic bulletin boards (BBS's) and the various cooperative networks. The ECPA Senate Report contains one definition of electronic bulletin boards:

> Electronic "bulletin boards" are communications networks created by computer users for the transfer of information among computers.

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4. P. Huber, The Geodesic Network: 1987 Report on Competition in the Telephone Industry 7.1 (1987).

5. *Id.*

> These may take the form of proprietary systems or they may be noncommercial systems operating among computer users who share special interests. These noncommercial systems may [or may not] involve fees covering operating costs and may require special "passwords" which restrict entry to the system. These bulletin boards may be public or semi-public in nature, depending on the degree of privacy sought by users, operators or organizers of such systems.[6]

Users of hobbyist systems are generally "recreational" computer users who use computers and modem communications as a hobby.[7] Such users are akin to amateur ham radio and citizen band radio operators. In these hobbyist networks, BBS's are provided and maintained by computer hobbyists out of their own personal resources. These individuals, who typically provide the BBS on their own stand-alone personal computer, are specifically known as sysops (systems operators). While access to some BBS's may be free, some sysops require the payment of use fees. For instance, some sysops ask that users pay a charge for the system's phone line. In addition to providing public domain software and "shareware" exchange, these systems generally provide free public and private e-mail exchanges to computer/modem-equipped members of local communities.[8] Some sophisticated systems, such as the ProLine system written for Apple II computers, also provide users with personal user directory areas. Such systems allow users to maintain personal

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6. S. REP. NO. 541, 99th Cong., 2d Sess. 8-9, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3562-63. Congress may have made a poor choice of words by broadly describing BBS's as "communications networks." Individual BBS's may not be affiliated with an outside network system. They may merely take the form of individual stand-alone computers set up to take incoming modem telephone calls from users. However, by using the term "network," Congress may merely have been trying to indicate its knowledge that users can "network" together when calling a single BBS.

7. *See* S. Dick, Towards a Rational Private Policy For Recreational Telecomputing (Sept. 1, 1988) (unpublished Michigan State University Mass Media Ph.D. Program paper).

8. In the legal sense, public domain software is computer software in which its author does not claim a copyright. However, in the common jargon of computer users, "public domain" also means a free form of distribution of software which may or may not be copyrighted. For instance, some software copyright owners may retain a copyright to the software, but give free licenses to interested users to copy and distribute copies of the software. "Shareware" is the term used to denote the distribution of computer software according to a unique marketing concept: a user may freely download the software from the host BBS computer to his personal computer, try out the software, and if he likes the software or continues to use it, must pay a registration fee to the software author or publisher.

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