Gesmer Updegrove TLB Update

September 2005

Attorneys at Law

First Circuit Reconsiders Its Own Decision Regarding Scope of Wiretap Act

On September 1, 2005, the United States Court of Appeals for the First Circuit published a judicial opinion reversing its own prior decision on the same case. The first decision construed the federal Wiretap Act in a novel and narrow way that would have afforded virtually no protection to email and other Internet communications, and would have seriously undermined the Act's ability to protect the privacy of most telephone calls.

The case involves a criminal indictment against an executive whose company surreptitiously copied and read email messages sent to accounts that the company had established for its customers. According to the government, this constituted an "interception" of the customers' "electronic communications," which violated the Wiretap Act. The defendant, Bradford Councilman, asserted that the Act did not apply because the emails were copied while they were in "storage," and he claimed that the Act's definition of "electronic communications" was not broad enough to cover communications that were stored – either in computer memory or on a hard drive – at the time.

The Act's language defining "electronic communications" was silent on the issue of storage. But another definition – that of "wire communications" – expressly included stored communications (such as voicemail) in its scope. Since the "wire communications" and "electronic communications" definitions were otherwise quite similar, Councilman argued that the absence of this inclusionary language signified the legislature's intention to exclude stored communications from protected "electronic communications." In the original appellate decision, a three-judge panel of the First Circuit agreed with him.

The case was of such significance, however, that the court decided to rehear the case *en banc*. This means that, rather than merely presenting the case to a three-judge panel – as it had the first time – the entire court would weigh in. In the court's more recent review, seven judges participated in the deliberations.

The *en banc* decision reversed the three-judge panel decision, finding that "electronic communications" include stored communications, at least until an electronic message has reached its final destination. While the reasoning is both subtle and complex, the court essentially said that it was unnecessary to look to the defi-

(continued on next page)

nition of “wire communications,” since the definition of “electronic communications” by itself was sufficiently clear. Writing for the majority, Judge Lipez (who wrote a scathing dissent in the original decision) attacked the rule of statutory construction that permitted a comparison between the two definitions. First, he claimed that the definition of “electronic communication,” as embodied in the Act, was unambiguous, so resorting to other sections of the Act to divine its meaning was unnecessary and inappropriate. Second, he claimed that the definitional sections were enacted at separate times, and therefore comparing the two definitions had little jurisprudential value. Third, he referred to the legislative history of the statute which modified the Wiretap Act to include protection for electronic communications, and found support for the proposition that Congress had never envisioned, let alone intended, the statutory interpretation proffered by the original three-judge panel. Less explicit in the *en banc* decision, but boldly asserted in Judge Lipez‘ dissenting prior opinion, was the fact that excluding stored communications from electronic communications would have the effect of pushing virtually any interception of modern digital communications outside the scope of the Act.

Gesmer Updegrove’s Fall 2004 Technology Law Bulletin explored the original Councilman decision, and the facts underlying the case, in more detail. You can read that article at http://gesmer.com/newsletter/wiretap.php .

©2005 Gesmer Updegrove LLP. All rights reserved. This advisory is for informational purposes only, and is not legal advice.
It may be considered advertising under Mass. R. Prof. C., Rule 7.3(c).