Microsoft Email Privacy Case

In re Warrant to Search a Certain Email Account Controlled & Maintained by Microsoft Corp.

CASE HISTORY

Microsoft challenged a U.S. government search warrant seeking access to customer emails in a Dublin, Ireland data center. On Thursday, July 14, 2016, the U.S. Second Circuit Court of Appeals ruled 3-0 in favor of Microsoft's challenge, overturning an earlier decision from a lower court.

The Second Circuit decision is important for three reasons: it ensures that people's privacy rights are protected by the laws of their own countries; it helps ensure that digital information receives the same legal protections as physical information; and it paves the way for solutions to address both privacy and law enforcement needs.

28 technology and media companies, 23 trade associations and advocacy organizations, 35 computer scientists, the Republic of Ireland and a member of European parliament filed amicus briefs in the case. Additionally, numerous experts and groups have voiced their opinion on this issue.

Microsoft has called for a modern approach that allows governments to exchange information more efficiently while considering national borders and protecting timeless rights like privacy and public safety. In February 2015, Microsoft President and Chief Legal Officer Brad Smith urged Congress to consider new frameworks, such as the bilateral agreement being negotiated between the U.K and U.S., which could address the issues involved in this case and "better enable law enforcement – with appropriate safeguards – to obtain information needed for lawful investigations across borders." The Department of Justice recently introduced legislation to help advance the proposed U.S.-U.K. agreement.

Second Circuit Ruling

In its majority opinion, the Second Circuit acknowledged the outdated nature of ECPA and the risks posed by the government's arguments:

"We see no reason to believe that Congress intended to jettison the centuries of law requiring the issuance and performance of warrants in specified, domestic locations, or to replace the traditional warrant with a novel instrument of international application."

"Microsoft convincingly observes that our Court has never upheld the use of a subpoena to compel a recipient to produce an item under its

QUICK FACTS

- The Electronic Communications Privacy Act (ECPA), the law in question in this case, was enacted in 1986, and doesn't address the modern reality of cloud computing. The International Communications Privacy Act (ICPA), a proposed bipartisan solution, has been backed by Microsoft, Google, Apple, and Facebook.
- The U.S. has signed a Mutual Legal Assistance Treaty (MLAT) with Ireland, which enables the government to request the Irish government provide the emails in a way that is consistent with Irish law.
- The Supreme Court ruled in *Riley* that that mobile phones hold "the privacies of life" and ruled that search warrants couldn't be blindly applied to today's phones given the vast amount of personal data in the cloud now accessible through them.
- Legal experts have endorsed a proposed bilateral U.S.-U.K. data agreement that could address the underlying issues raised by this case, noting that the deal "sets a baseline privacy protections that apply to law enforcement access to data," which if implemented by other countries could lead to "significant enhancement of privacy protections globally."
- The Second Circuit decision is in line with the Supreme Court's recent ruling in *RJR Nabisco v. European Community* that unless Congress clearly states that a statute has extraterritorial reach, the U.S. must presume against extending the reach of U.S. law abroad.
- The issues at stake in this case have been the subject of writing by academics and legal experts: See this, this, this and this.

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control and located overseas when the recipient is merely a caretaker for another individual or entity and that individual, not the subpoena recipient, has a protectable privacy interest in the item"

"The warrant in this case may not lawfully be used to compel Microsoft to produce to the government the contents of a customer's email account stored exclusively in Ireland. Because Microsoft has otherwise complied with the warrant, it has no remaining lawful obligation to produce materials to the government."

"Our conclusion today also serves the interests of comity that, as the MLAT process reflects, ordinarily govern the conduct of cross-boundary criminal investigations."

U.S.-U.K. DATA AGREEMENT

The U.S. is currently engaged in negotiations with the U.K. government on a bilateral agreement enabling U.K. law enforcement to request data directly from U.S. cloud providers provided comparable privacy, due process, and human rights standards are met. The intent of such an agreement is to ensure law enforcement can obtain the digital information it needs to fight crime while protecting people's traditional rights.

The Reform Government Surveillance (RGS) coalition, an advocacy group which includes AOL, Apple, Dropbox, Evernote, Facebook, Google, LinkedIn, Microsoft, Twitter, and Yahoo, has said it is "encouraged by discussions between the US and UK." RGS companies support developing a modern process that "enables governments to protect their citizens, and provides a coherent legal framework that ensures human rights and individual privacy are protected."

THE ENVIRONMENT

Microsoft's search warrant is part of a constellation of issues facing technology during a period of increasing uncertainty and challenges to a global cloud.

Apple Legal Challenge

In early 2016, Apple was presented with an order under the All Writs Act of 1789 to assist law enforcement in unlocking a customer iPhone in San Bernardino, CA. The case is a reminder of the need to develop "21st-century laws that address 21st-century technology issues." Microsoft joined Amazon, Box, Cisco, Dropbox, Evernote, Facebook, Google, Mozilla, Nest Labs, Pinterest, Slack, Snapchat, WhatsApp and Yahoo in filing a join amicus brief in support of Apple in the case.

Security and Data Residency Regulations

Over the past few years, countries like Germany and Russia have begun enacting requirements that certain data be kept within its borders.

Microsoft Lawsuit Challenging Indefinite Non-Disclosure Orders

On April 14, 2016, Microsoft filed a lawsuit with the U.S. District Court for the Western District of Washington seeking to stop broad and indefinite secrecy orders under ECPA that block Microsoft from telling customers when the government requests their data or emails. The company seeks to have the courts clarify that the part of ECPA allowing these secrecy orders is unconstitutional and must be updated. The litigation underscores how provisions in ECPA are out of step with other U.S. laws. Microsoft believes secrecy orders should be the exception, and not the rule, and should be based on a sufficient showing of facts specific to the case.

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WHAT OTHERS HAVE SAID

"Congressional action is now key. And this isn't just me saying so. Judge Lynch wrote a powerful concurrence urging congressional action in response to the ruling."
– Jennifer Daskal, American University Law Professor, The Washington Post

"This ruling is a major affirmation that the rights we enjoy in the physical world continue to apply in the digital world. By declaring that a U.S. warrant cannot reach communications content stored abroad, the court ruled strongly in favour of privacy and national rule of law."
– Greg Nojeim, Senior Counsel and Director of the Freedom, Security and Technology Project, Center for Democracy and Technology

"The Second Circuit sent an important message to technology users today: privacy protections and the rule of law apply online just as they do in the physical world. BSA members believe in working with law enforcement to stop bad actors, but it has to be done in line with the rule of law. That's why governments need to create a framework for lawful access to data. Congress has started this process by working on legislation to modernize our laws on government access to data."
– Victoria Espinel, President and CEO, BSA| The Software Alliance

"Our current electronic communications laws fail to address the advancements in technology over the last 30 years. When ECPA was enacted, cloud storage wasn't even an idea. Today, U.S. companies work on a global scale and house information on servers all across the world. It is Congress' job to recognize these lapses and update our laws to reflect the issues of the day. Today's ruling clearly calls for Congress to act."
– Rep. Tom Marino (R-PA) statement on Second Circuit decision

"Our electronic communications laws never contemplated this era of cloud storage, where U.S. companies are maintaining servers abroad and providing web-based services to customers worldwide. It is the job of Congress to bring the law up to date where clear gaps exist. U.S. companies and consumers need clarity on when and how they are obligated to turn over electronic communications to U.S. law enforcement if that information is stored abroad."
– Rep. Suzan Delbene (D-WA) statement on Second Circuit decision

"Consumers demand access to data on their mobile devices from any location. They have come to expect that documents stored online receive the same protections as those in a physical form. Microsoft's interest in this case was no different than that of fledgling startups. Specifically, American companies need clarity around how and when law enforcement can access data stored overseas. This ruling clears the path for Congress to pass the International Communications Privacy Act (ICPA) and modernize our laws to meet consumers' expectation of privacy."
– Morgan Reed, Executive Director, APP | The App Association

"This is a significant decision and yet another reminder that the laws that protect our privacy online are dangerously out of date. As the concurring opinion points out, our online privacy laws are not the bulwarks of privacy that Congress thought they were when it enacted them in 1986."
– Alex Abdo, American Civil Liberties Union Staff Attorney, The New York Times

"After all, at the time of SCA's enactment in 1986, the Internet was in its infancy. Few, if any, could have imagined a world in which emails regularly transited territorial lines, personal data is regularly stored in the cloud, and US-based ISPs operate data centers all around the globe. The issue raised by the Microsoft case simply wasn't on the mind of the drafters — nor addressed by any subsequent amendment. As already stated, the court therefore needs to turn elsewhere to decide the case."
–Jennifer Daskal, American University Law Professor, Just Security

"This is a win for manufacturers, whose success is increasingly reliant on technology, including cloud computing. Simply because data is stored digitally does not mean that U.S. companies should be forced to produce their customers' private information, no matter where it is located in the world. The lower court holding was out of step with international law, and if allowed to stand, would have had a chilling effect on the ability of U.S. companies to compete internationally."
– Linda Kelly, Senior Vice President and General Counsel, National Association of Manufacturers

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