We've Got Mail, and You Can't Have It

By Judge Herbert B. Dixon Jr.

My earliest experience with the Internet and e-mail involved a (then-state-of-the art) 14.4 kbps telephone modem and a melodious voice announcing that e-mail had been delivered to my inbox. The e-mail voice announcement later inspired a 1998 movie by the same name, thus immortalizing the e-mail announcement "You've got mail!" Much has changed since those early days of exposure to the Internet and e-mail: America Online, whose predecessor company[1] is credited with creation of the famed e-mail announcement, was rebranded AOL; the number of choices for e-mail service has multiplied exponentially; and new media services such as those offered by Google, Facebook, and Twitter now compete with e-mail as I knew it in those early years.

Another change over those same years is the dominant form of the discovery process in litigation caused by the technological evolution from paper storage of information to electronic storage of information. E-discovery is becoming the dominant form of discovery, and that has resulted in special court rules and state and federal statutes to address unique issues brought about by the digital age. The purpose of this article is to note one such federal statute, the Stored Communications Act (Act), 18 U.S.C. § 2702 et seq. (2000), and its effect on the discovery process when a civil litigant attempts to subpoena copies of e-mail and other electronic information from an Internet or e-mail service provider.

Imagine that counsel in ongoing litigation seeks a subpoena *duces tecum* directed to a service provider to obtain e-mail of the opposing litigant over a discrete interval, or e-mail between the opposing litigant and a particular person. Imagine further that the judge approves the subpoena and that it is properly served upon the service provider. After following this process, the attorney that issued the subpoena does not expect a problem obtaining the discovery sought because similar subpoenas had been served and honored in the past. In this instance, however, the service provider or opposing litigant objects, or files a motion for protective order or a motion to quash the subpoena on the grounds that it violates the Stored Communications Act. At this point, counsel that issued the subpoena begins to wonder what is this Act and how can it possibly have any bearing on a civil discovery subpoena where the information sought is relevant to the ongoing litigation and is likely to have a big impact on the outcome of the litigation? Welcome to the limitations imposed by the Stored Communications Act on unfettered discovery access to relevant information that is created and stored by use of today's technology.

What Is the Stored Communications Act About

According to some cases that have discussed the history of the Stored Communications Act, its purpose was to create a zone of privacy to protect Internet subscribers from having their personal information wrongfully used and publicly disclosed by unauthorized private parties.[2] The Act became law in 1986. It prohibits two categories of services providers from divulging stored electronic communications or information without the consent of the sender, recipient, or subscriber, unless there is an exception in the Act. The two categories of service providers under the Act are those that provide electronic communication services (ECS) and those that provide remote computing services (RCS).

An ECS is defined as any service that provides to users thereof the ability to send or receive wire or electronic communications. Under the Stored Communications Act, wire communications generally refer

Judge Herbert B. Dixon Jr. is the technology columnist for *The Judges' Journal* and co-chair of *The Journal*'s Editorial Board. He sits on the Superior Court of the District of Columbia and is a former chair of the National Conference of State Trial Judges. He can be reached at Herbert.Dixon@dcsc.gov.

Judge Dixon wishes to thank his law clerk, Emile C. Thompson, Esq., for his help preparing this article and assistance researching the Stored Communications Act.

to voice communications, whereas electronic communications refer to digital information, such as e-mails and electronic files. The Act prohibits an ECS from knowingly divulging to any person or entity the contents of a communication while in electronic storage by that service, unless an addressee or intended recipient of the communication gives consent.

An RCS is defined as an entity that provides to the public computer storage or processing services by means of an electronic communications system. The Stored Communications Act defines an electronic communication system as any wire, radio, electromagnetic, photo optical, or photoelectronic facility for the transmission of wire or electronic communications, and any computer facility or related electronic equipment for the electronic storage of such communications. The Act prohibits an RCS from knowingly divulging to any person or entity the contents of any communication that is carried or maintained on that service. However, an RCS may release the contents of a communication with the lawful consent of a subscriber.

The line between an ECS and an RCS is not always clearly delineated because a service provider can often perform both roles. A provider can act as an ECS in some respects, an RCS in other respects, or neither an ECS nor an RCS in other respects. For instance, files held in intermediate electronic storage are safeguarded under the rules for an ECS. However, the same provider could be regarded as an RCS if these files are held for long-term storage. Additionally, a provider can act as an ECS with respect to one copy of communication, but as an RCS with a different copy of that same communication.

Consider this oversimplified example where the providers offer e-mail services to the general public. If I send an e-mail to someone, the addressee's service provider acts as an ECS when that e-mail first arrives. The e-mail is in electronic storage awaiting retrieval of the message by the addressee. Once the addressee retrieves the e-mail that I sent, he can either delete the message from the server or leave the message stored on the server for safekeeping or future access. If the addressee chooses to leave the e-mail on the server, the service provider now acts as an RCS (and not an ECS) with respect to that copy of the e-mail.[3]

The Limitation on Obtaining E-mail from the Service Provider

In re Subpoena Duces Tecum to AOL, LLC was not the first case to discuss the prohibitions of the Stored Communications Act, but it is one of the cases that opened the eyes of litigating attorneys that a civil discovery subpoena does not provide *carte blanche* access through a service provider to potentially relevant e-mail messages generated by a party or witness.

In this case, the Rigsbys were nonparty witnesses in a *Quin Tam* proceeding brought in the Southern District of Mississippi. The Rigsbys had alleged fraud by State Farm Insurance related to certain Hurricane Katrina damage claims. In the course of discovery litigation in that case, State Farm issued a subpoena through a judge in the Eastern District of Virginia to AOL, requesting production of various documents from the Rigsbys' e-mail accounts. Eventually, the Rigsbys moved to quash State Farm's subpoena. In granting the motion to quash, the judge concluded that under the clear and unambiguous language of the Act, AOL, a corporation that provides electronic communication services to the public, may not divulge the contents of the Rigsbys' electronic communications to State Farm because the statutory language of the Act does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas. In reaching this conclusion, the court relied on the case of *O'Grady v. Superior Court*,[4] a decision by the Court of Appeal of the State of California, Sixth Appellate District. *O'Grady* involved litigation in which Apple brought a civil action against several unknown defendants for wrongfully publishing on the World Wide Web Apple's secret plans to release a new product. To identify the unknown defendants, Apple issued civil discovery subpoenas to non-party Internet service providers, requesting copies of any e-mail that contained certain keywords from the published secret plans. When considering whether the trial court should have quashed the subpoenas, the appellate court found the Stored Communications Act to be clear and unambiguous and concluded that any disclosure by an Internet service provider of stored e-mail violates the Act unless it falls within an enumerated exception to the general prohibition.

The Stored Communications Act and New Technology—Square Peg and Round Hole

The case of *Crispin v. Christian Audigier, Inc.*[5] demonstrates both the applicability of the Stored Communications Act's prohibitions against a service provider divulging stored electronic information without the requisite consent (or exception provided in the Act) and the complexities of applying the Act to technologies that did not exist at the time the law was adopted. *Crispin* involved a claim by an artist that the defendant, a garment manufacturer, violated the terms of a license granted to it by failing to include the artist's logo on manufactured garments and also displaying art on some garments and attributing that art to others. The manufacturer attempted to subpoena communications from the artist's accounts with Facebook, MySpace, and Media Temple (a company providing web hosting and webmail services) to demonstrate the nature and terms of any agreement that may have existed with the artist. On an appeal from a magistrate judge's ruling denying all relief, the district court judge held that private messages sent using Facebook and MySpace fall under the protections of the Stored Communications Act and quashed the subpoenas to the extent they sought private messages. The court concluded that the magistrate judge erred in finding that none of the companies operated as an ECS under the Act. The court alternatively concluded that each of the companies operated as an RCS under the Act in relation to wall postings and comments.

The court stated that ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not

a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought. As a result, the court concluded that an individual has a personal right in information in his or her profile and inbox in the same way that an individual has a personal right in employment and bank records, and as such the plaintiff in the case had standing to bring a motion to quash. The net effect of the court's holding was that the account web pages and communications that were not publicly available were protected from disclosure by the Stored Communications Act.

Final Comments

Generally, the opinions discussed above interpreting the Stored Communications Act are understood to provide that, while the court may not enforce a civil discovery subpoena directed to Internet and e-mail service providers themselves to produce a user's private communications, the court may order the litigant to turn over the information. Accordingly, when a party seeks e-mail and other electronic information, the direct route of first seeking the discovery from the party or witness should be considered. When one party seeks to obtain electronic information and communications from an Internet or e-mail service provider by use of a civil discovery subpoena, be aware of the limitation imposed by the Stored Communications Act. The limitation? The antithesis of the famed e-mail announcement that we grew to know and love in the early days of the Internet, namely, a response by Internet and e-mail service providers to any subpoena that translates roughly to "We've got mail, and you can't have it!" ■

Endnotes

1. Quantum Computer Service, located in Vienna, VA, came into being in 1985. In 1991, Quantum was renamed "America Online."

2. *In re Subpoena Duces Tecum to AOL*, 550 F. Supp. 2d 606, 610 (E.D. Va. 2008).

3. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1216–17 (2004).

4. 44 Cal. Rptr. 3d 72, 76–77 (Cal. Ct. App. 2006).

5. 717 F. Supp. 2d 965 (C.D. Calif. 2010).