

9: Statutory Privacy: Prospective, Real-Time Surveillance

Administrative

- Next Time: 428-456
Skim statutory sections: 2702 and 2703
- News: Boarding Pass Website
- Plan for Today's Class

Last Time

- Fourth Amendment Online
- Important Themes / Fact Patterns

Kerr tends to conflate two separate, different questions.

1. Does this person have an REP in this communication at this point in space/time?
2. Does a third party share (at least) dominion and control over the item such that they could consensually give the material to the police?

Scenario to highlight the difference

- Technology Overview**
- Prospective vs. Retrospective Surveillance?**
 - Different privacy expectations for messages while in transit versus the content of your (stored) inbox messages? → Which is more private?
 - What about opened/unopened e-mail
- Human Appreciation / Automation changes**
 - Inspired by Smith v. Maryland talk about operators.
 - Telegraph → Human
 - Operators on Phone → Automatic switching?
 - Virus checkers / Spam filters / Google's inbox advertising?
- The Web**
 - "Private" communications (e-mail, IM, etc) to third parties
 - Less expectation of privacy for basic subscriber information?
- Difference between content and non-content?**
 - Orin's dichotomy on 364.
 - Todd: Makes perfect sense to make this distinction.
- The Internet**
 - If line isn't content/non-content or prospective/retrospective, what better way to draw line between private and not-so-private information?
 - Banners eliminate your Expectation of Privacy?
 - Do you have an REP in the content of your e-mail messages?
 - Todd: FBI Director (and AG) have recently called for ISPs to retain more information.
 - Additional Hypotheticals
 - Can Encryption create (by itself) an REP?

All information is NOT protected by Fourth unless you use Encryption. But if Encryption is used, content is protected, header info is not.

Statutory Scheme Generally

- Table on 383
 - Prospective
 - Content → Wiretap Act
 - Non-Content → Pen Register Statute
 - Retrospective (Stored)
 - Stored Communications Act of ECPA (for content and non-content, although protections vary depending on which).
- Governs BOTH private conduct and government conduct
 - Different standards and exceptions apply.
- All of these statutes define parallel CRIMES for violations.
 - Title III: Five-year felony.
 - Pen/Trap: Misdemeanor.
 - SCA: Misdemeanor but felony with certain motives.

Wiretap Act

- When does it apply?
- Stakes
- How to define line between prospective and retrospective?
 - O'Brien: Basic Facts: Wife installs spyware on computer to catch husband communicating with other woman via IM and e-mail. Case doesn't tell us how often the screen is saved. → Would not suppress in criminal case.
 - Councilman: ISP sysadmin copied e-mail of users by copying messages after arrival on the mail server, but before (or simultaneous to) final delivery to user.
 - How frequent is frequent enough to turn something into wiretap?
- What is "interception"?
 - Defined: Acquisition of the contents.
 - Human/Computer Line matters?
 - Filter looks at packets and throws 99% away. Saves last 1% for further review.
 - Filter looks at packets and throws 100% away.
- What are "contents"?
 - URLs? (390)
 - Subject lines?
 - Date/Time?
 - Phillip: A phone number is content (reverse lookup directories) and the parts of a URL are as well.
 - Phillip: And Pen register has "no privacy afforded" to it.
- Consent Exception
 - Implied Consent
 - Network Banners
 - Who is a "party" to the communication?
 - All-party consent states: CA, CT, FL, IL, MD, MA, MI, MT, NV, NH, PA, WA
 - Revisit IRC examples from above.
- Provider-Protection Exception

Pen-Register / Trap and Trace