

The Need For Increased Privacy Protections In The Digital Age

The lack of privacy protections for email stored by third parties has recently come to light and added to the ongoing tension between rapidly advancing technology and the struggle for lawmakers to keep up. The lack of Fourth Amendment privacy protections for data held by third parties (also known as the “third-party records doctrine”) derives from two Supreme Court rulings from the 1970s and the Electronic Communications Privacy Act of 1986 (“ECPA”).

In *United States v. Miller*¹, the Supreme Court held that police did not need a warrant to obtain bank deposit slips and checks because there is no reasonable expectation of privacy when records are circulated freely within a third-party institution. In *Smith v. Maryland*², the Court held that when the defendant conveyed information to a third party, he assumed the risk that the third party may reveal the information to the police. These courts obviously did not foresee a “Digital Age” that has put much greater amounts of more sensitive data in the hands of third parties such as Internet Service Providers (“ISPs”).

The ECPA allows authorities to obtain without a warrant emails and other electronic communications stored by third parties that have been opened or are older than 180 days. To obtain the communications, they only need a subpoena, which can be issued without a judge’s approval. When the ECPA was enacted, it was hard to imagine a world where a large percentage of email subscribers would use high-capacity storage options offered by major service providers such as Google. Back then, it was thought that emails that had not been opened after six months or more could legitimately be deemed abandoned and, therefore, did not require strict privacy protection. In addition, once emails were opened, users would typically download wanted emails to their hard drive because ISPs would delete opened emails quickly to conserve scarce storage space. Thus, if an email was opened and somehow remained on the ISP server, it was considered to be “abandoned,” even if it was not 180 days old.

These days, email is viewed as a necessity for effective communication, but most users do not think about or understand that those communications are transmitted by a third party. To the extent the issue is considered at all, users think of their emails as *stored* by a third party, not *in the possession of* a third party, and, therefore, they arguably do not knowingly disclose or abandon their personal communications. In addition, the current availability of free and inexpensive storage options and advancements in technology such as the recent innovation of the cloud allow users to retain emails much longer than 180 days. For example, Google currently offers 10 gigabytes of free storage space³, allowing users to retain massive amounts of emails, opened and unopened, for decades.

Senators Patrick Leahy (D - Vermont) and Mike Lee (R – Utah) recently recognized the drastic change in technology and user behavior and introduced an amendment to the ECPA aimed at strengthening privacy protection for emails stored by third parties. Leahy, one of the original

¹ 425 U.S. 435 (1976).

² 442 U.S. 735 (1979).

³ ³ See *Your Storage Limit*, Google, <https://support.google.com/mail/answer/6558?hl=en>.

authors of the ECPA in 1986, said in a statement, “No one could have imagined just how the Internet and mobile technologies would transform how we communicate and exchange information today. Three decades later, we must update this law to reflect new privacy concerns and new technological realities.⁴”

Opponents of the amendment have voiced concerns about the effects on time-sensitive investigations such as child kidnapping cases. If key information is contained within email accounts, the time consumed to obtain a warrant could be crucial. Still, supporters argue that exemptions could be crafted to address these situations.

The undeniable truth is that the world we live in has changed drastically over the last 30 years. Many of our communications and personal and professional business transactions that were previously conducted in person are now conducted via electronic transmissions. All of these electronic interactions create massive amounts of data that is stored with third parties. Privacy protections should be expanded in response to the developing digital world.

⁴ Matt Sledge, Email Warrants Proposed in Senators’ Bipartisan Reforms To ECPA Legislation, Huffington Post (Mar. 19, 2013, 4:43 PM), http://www.huffingtonpost.com/2013/03/19/email-warrant-ecpa-reform_n_2909325.html.

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