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South Carolina *Jennings* Decision Deepens Divide Over Scope of Stored Communications Act

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In a decision with potentially important privacy and law enforcement implications, the South Carolina Supreme Court held last week that emails that have already been opened by the recipient, but have not been deleted from the recipient's email account, are not in "electronic storage" for purposes of the federal Stored Communications Act ("SCA") and thus may be accessed by unauthorized third parties without violating the SCA.[1] The South Carolina Supreme Court's decision conflicts with decisions by a number of federal courts and increases the likelihood that the U.S. Supreme Court will resolve the question, which has implications both for criminal investigations and for the many kinds of civil suits in which access to, and disclosure of, the contents of emails and other electronic communications are contested.

Background

Plaintiff Jennings confessed to his wife that he had been involved in an extra-marital affair. His wife mentioned the confession to her daughter-in-law, and the daughter-in-law hacked into Jennings' Yahoo! email account. The daughter-in-law read emails between Jennings and his lover, printed out the emails, and gave them to the wife's attorney and her private investigator.

Jennings filed suit against his wife, the attorney, and the daughter-in-law under a variety of state tort theories, and later amended the complaint to include a claim that the defendants had violated the SCA. Under the SCA, an individual can be sued for "intentionally access[ing] without authorization" or "intentionally exceed[ing] an authorization to access" a "facility through which an electronic communication service is provided," when the individual "thereby obtains . . . access to a wire or electronic communication while it is in electronic storage in such system." 18 U.S.C. §§ 2701(a), 2707. "Electronic storage," for these purposes, is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17).

The state trial court granted the defendants' motion for summary judgment on all claims. The court

of appeals reversed on the SCA claim as to the hacker, holding that the emails at issue were in "electronic storage" as defined in the SCA because they were for "purposes of backup protection."

South Carolina Supreme Court's Decision

The supreme court reversed, but the members of the court could not agree on a single rationale. Justices Hearn and Kittredge reasoned that the emails could not be said to be in electronic storage "for purposes of backup protection" because they were "single copies . . . on the Yahoo! Server" that Jennings had taken no affirmative action to create, whereas "backup protection" connotes creation of a second copy "as a substitute or support." Slip Op. at 5-6. Chief Justice Toal, joined by Justice Beatty, took the position that a communication could be considered in "electronic storage" only if it were in temporary, intermediate storage in the course of transmission or if it were an ISP-created backup of such an intermediate communication. *Id.* at 11. Thus, "if an e-mail has been received by a recipient's service provider but has not yet been opened by the recipient, it is in electronic storage. . . . When the recipient opens the e-mail, however, the communication reaches its final destination. If the recipient chooses to retain a copy of the e-mail on the service provider's system, the retained copy is no longer in electronic storage because it is no longer in temporary, intermediate storage . . . incidental to . . . electronic communication." *Id.* (internal quotations and citations omitted).[2] Justice Pleicones concluded that the types of electronic storage described in subsections (A) and (B) of § 2510(17) are "necessarily distinct from one another: one is temporary and incidental to transmission; the other is a secondary copy created for backup purposes by the service provider . . . to back up its own servers." *Id.* at 15 & n.4. Because the copies of the emails at issue had not been created either incidental to transmission or by Yahoo! for its own purposes, they did not qualify as being in electronic storage.

Implications

1. Restricting the SCA? The SCA creates both civil and criminal liability for unauthorized access to and unauthorized disclosure of communications that are in electronic storage by a provider of an electronic communication service. See generally 18 U.S.C. §§ 2701, 2702. If the Jennings court's relatively narrow view of "electronic storage" were to prevail, the SCA could be available less frequently as a means of targeting unauthorized access or disclosure of this kind.

2. U.S. Supreme Court Review? The *Jennings* decision increases the odds that the U.S. Supreme Court will weigh in on the scope of the SCA. The federal courts have disagreed over the interpretation of "electronic storage" in § 2510(17). *Compare, e.g., Theofel v. Farey-Jones*, 359 F.3d 1066, 1075-77 (9th Cir. 2004) (copies remaining on ISP server after emails received and opened are in "electronic storage"); *Fraser v. Nationwide Mutual Ins. Co.,* 352 F.3d 107, 114-15 (3d Cir. 2004) (suggesting same in brief dictum); *Shefts v. Petrakis*, 2011 WL 5930469, at *6 (C.D. Ill. Nov. 29, 2011) (holding same); *Strategic Wealth Group v. Canno*, 2011 WL 346592, at *3-*4 (E.D. Pa. Feb. 4, 2011) (same); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp.2d 548, 555 (S.D.N.Y. 2008) (same), and *United States v. Warshak*, 631 F.3d 266, 291-92 (6th Cir. 2010) (questioning Theofel); *United States v. Weaver*, 636 F. Supp.2d 769, 770-74 (C.D. Ill. 2009) (copies

remaining on ISP server after emails received and opened are not in "electronic storage"); *In re DoubleClick, Inc. Privacy Litig*., 154 F. Supp.2d 497, 512 (S.D.N.Y. 2001) (only unopened emails can be in "electronic storage"). The entry of a state supreme court into the debate and the fragmented character of the court's reasoning improves the odds that the U.S. Supreme Court will weigh in.

3. Cloud Computing and Mobile Devices. The growing reliance of individuals and companies on cloud computing and the proliferation of mobile devices such as smartphones has elevated the importance of the debate in the courts over the distinction between communications held in "electronic storage" by an "electronic communications service" ("ECS") and those stored by a "remote computing service" ("RCS") under the SCA.[3] *See, e.g., Crispin v. Audigier*, Inc., 717 F. Supp.2d 965, 987 (C.D. Cal. 2010) (opened, but retained, messages on a web-based email service and private messaging services of Facebook and MySpace are communications on RCS, not ECS); *Weaver*, 636 F. Supp.2d at 770-73 (opened, but retained, messages on a web-based email service are communications on RCS); see also *Quon v. Arch Wireless Operating Co*., 529 F.3d 892, 900-903 (9th Cir. 2008) (wireless pager service provider of ECS rather than of RCS); *Flagg v. City of Detroit*, 252 F.R.D. 346, 362-63 (E.D. Mich. 2008) (archiving of text messages constitutes RCS). The distinction between ECS and RCS is significant in part because the SCA establishes different standards for the disclosure of information by those two categories of service providers. *See, e.g*., 18 U.S.C. § 2703(a) (requiring warrant for disclosure to the government of contents of communications held in electronic storage by ECS for less than 180 days); *id.* § 2703(b) (permitting disclosure of contents by RCS in response to a governmental subpoena regardless of age of message)." *Cf. Quon*, 529 F.3d at 900 (discussing distinction); *Crispin*, 717 F. Supp.2d at 977-979 (same). The Supreme Court ducked the SCA issue in the *Quon* case last year. *See City of Ontario v. Quon*, 130 S.Ct. 2619, 2627 (2011) (noting denial of cert. on SCA issue).

4. Congressional Action? As some of the Justices in *Jennings* pointed out, *see Jennings* at 12-13 (Toal, C.J. and Beatty, J., concurring), this case highlights again the need for legislative action to ensure that the law catches up to modern technologies. Until that updating takes place, courts will continue to struggle with interpreting statutes such as the SCA, enacted in the 1980s, to fit much more recent technological developments.

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[1] The decision can be found here. It is also available on Westlaw at 2012 WL 4808545.

[2] These justices asserted that their view was the one advanced by the U.S. Department of Justice and by Professor Orin Kerr in *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It,* 72 Geo. Wash. L. Rev. 1208 (2004).

[3] The SCA defines "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). It defines "remote computing service" as "the provision to the public of computer storage or processing services by means of an electronic communications system." *Id*. § 2711(2).

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