The New Era of Electronic Eavesdropping and Divorce: An Analysis of the Federal Law Relating to Eavesdropping and Privacy in the Internet Age

by
Cary J. Mogerman and Stephanie L. Jones[1]

I. Introduction

In the pages of this very journal, a 1994 article comprehensively addressed the federal and state laws relating to electronic eavesdropping in divorce cases.[2] The article analyzed the legislative history of the federal wiretap statute,[3] (herein the "Wiretap Act") as well as its interpretation in various federal circuits. The article surveyed the wiretap and privacy statutes in every state in the union and compared their interpretation in state courts to the federal interpretations of 18 U.S.C. §§ 2520-2521.

The 1994 article analyzed the debate over whether the civil remedies and criminal penalties of the Wiretap Act applied to interspousal electronic surveillance in the domestic relations context.[4] The article identified a national trend away from the notion that an "interspousal exception" existed to the application of

---

[1] Cary J. Mogerman and Stephanie L. Jones practice law in St. Louis, Missouri, in the firm of Zerman & Mogerman, LLC. Their practice is limited to domestic law.

[2] *See* Allan H. Zerman & Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating to Electronic Eavesdropping and Their Application in Matrimonial Cases*, 12 J. AM. ACAD. MATRIM. LAW. 227 (1994).

[3] 18 U.S.C. §§ 2510-2521(1994).

[4] The two leading early cases reflecting this debate are *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied,* 419 U.S. 897 (1974) (court found no explicit congressional intent to include interspousal wiretaps among the prohibitions of the Act) and *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (court found Congress intended a blanket prohibition on *all* electronic surveillance, including that occurring in the home between spouses).

the Wiretap Act.[5] The article further noted that the Wiretap Act was intended to represent the minimum standard for constitutionality of state privacy acts which would follow. According to its legislative history, the Act envisioned "that states would be free to adopt more restrictive legislation, or no legislation at all, but not *less* restrictive legislation" than the federal act.[6]

At the time of the 1994 article, electronic eavesdropping in divorce cases consisted primarily of tape recordings of telephone conversations between the parties, between a party and third parties, a child and a parent, or a paramour and a party. Since 1994, the technology available for use in divorce cases has expanded dramatically, while the law regulating its use has also expanded. However, legislation has not kept pace with the communications revolution, and although the Wiretap Act has been substantially re-written and expanded in the past fourteen years, questions remain about its scope in light of newer technologies.

This article will analyze the federal statute in its present form, its legislative history and interpretation by the federal courts. The article will also address those fact patterns that seem to arise with some frequency in divorce cases and the application of this expanded law to these circumstances.

II. Statutory History and Analysis: The Wiretap Act and the Stored Communications Act

The "Wiretap Act"[7] and the "Stored Communications Act"[8] are the two most utilized statutory schemes that provide protection to communications in this country. Put simply and in plain terms, the Wiretap Act regulates communications that take place in real-time (such as face-to face conversations, conversations over the telephone, conversations through cell phones, text messaging, received e-mails). The Stored Communications Act regulates communications that have been communicated by a sender but have not been received by the intended recipient (such as

---

5 Zerman & Mogerman, *supra* note 2, at 248.

6 S. Rep. N. 1097, 90th Cong., 2d Sess. 2 (1968), reprinted in *1968 U.S.C.C.A.N.* 2112, 2183, at 2181 (emphasis added).

7 18 U.S.C. §§ 2510-2521.

8 18 U.S.C. §§ 2701-2712.

voicemail messages waiting to be listened to by the recipient or unread e-mails in an inbox).

The intersection of these two statutory schemes has become the subject of great debate as forms of communication increasingly take place in the electronic arena. One court noted "the intersection of [the Wiretap Act and the Stored Communications Act] is a complex, often convoluted, area of the law."[9] These two statutory schemes are very technical and precise. As communications travel in and out of various mediums, they are protected by different statutes depending on the particular medium they pass through and the stage of their transmission. Therefore, technical understanding of the Wiretap Act and the Stored Communications Act is required.

A. *The Wiretap Act*

The Wiretap Act is codified in 18 U.S.C. §§ 2510-2521. These statutory sections make the following conduct unlawful:

(a) Intentional interception of any wire,[10] oral[11] or electronic communication;[12]

---

9 United States v. Smith, 155 F.3d 1051, 1055 (9th Cir. 1998).

10 "Wire communications" are defined as:

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

18 U.S.C. § 2510(1).

11 "Oral communications" are defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C. § 2510(2).

12 "Electronic communications" are defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in who or in part by a wire, radio, electromagnetic, photo electronic or photo optical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12).

(b) Intentional use of any electronic, mechanical, or other device to intercept[13] any oral communication;
(c) Intentional disclosure to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
(d) Intentional use of the contents of any wire, oral, or electronic communication, known or having reason to know that the information was obtained through the interception of a wire, oral, electronic communication in violation of this subsection.[14]

Section 2511(4) describes the criminal penalties associated with violations of the Wiretap Act.[15] Violations shall be punished by a fine, imprisonment for not more than five years, or both.[16] Further, Section 2520 allows an individual whose communications have been unlawfully intercepted by another to bring a civil action against the interceptor.[17] Available damages include actual damages, profits made by the interceptor, statutory damages of $100 per day up to $10,000, punitive damages, and attorney's fees and costs.[18] Evidence obtained as a result of a wrongful interception of a wire or oral communication is expressly prohibited from being admitted at any trial, hearing or other proceeding in any court.[19] Noticeably absent from the suppression statute are electronic communications, which can be used in evidence even if obtained in violation of the Wiretap Act.[20]

B. *The Stored Communications Act*

The Stored Communications Act is codified in 18 U.S.C. §§ 2701-2711. These sections make it unlawful to obtain, alter, or

---

13 "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device." 18 U.S.C. § 2510(4).

14 18 U.S.C. § 2511(1)(a)-(d).

15 18 U.S.C. § 2511(4).

16 18 U.S.C. § 2511(4)(a).

17 18 U.S.C. § 2520.

18 18 U.S.C. § 2520(b)-(c).

19 18 U.S.C. § 2515.

20 *E.g.*, United States v. Steiger, 318 F.3d 1039, 1050 (11th Cir. 2003).

prevent authorized access to a wire or electric communication while it is in electronic storage[21] through one of two means:

(a) The intentional accessing of a facility[22] through which an electronic communication service[23] is provided without authorization; or

(b) The intentional exceeding of an authorization to access that facility.[24]

Section 2701(b) describes the criminal penalties associated with violations of the Stored Communications Act.[25] Violations for first time offenses shall be punished by a fine, imprisonment not exceeding one year, or both.[26] For subsequent offenses, the possibility of imprisonment increases to five years.[27] Section 2707 allows individuals to recover damages through a civil action as well.[28] Available damages include actual damages, any profits made by the violator, punitive damages if the violation was willful or intentional and attorney's fees and costs.[29]

Unlike the Wiretap Act, the Stored Communications Act contains no prohibition against using evidence obtained in violation of its provisions. In fact, Section 2708 makes clear that the remedies described in Section 2701(b) are the only judicial reme-

---

21 "Electronic storage" 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 back up protection of such communication." 18 U.S.C. § 2510(17).

22 A "facility" is not statutorily defined; however, cases analyzing the statute have implied that computers, cell phones, and voicemail are facilities within which an unlawful interception or unlawful assessing of information can take place.

23 "Electronic communication service" is defined as any service that "provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C § 2510(15).

24 18 U.S.C. § 2701(a).

25 18 U.S.C. § 2701(b).

26 18 U.S.C. § 2701(b)(2)(A). If the violation is committed for purposes of commercial advantage, malicious destruction or damages, or private commercial gain, or in furtherance of any criminal or tortious act, imprisonment can result in a five-year sentence in addition to a fine for the first offense or a ten-year sentence for subsequent offences. 18 U.S.C. § 2701(b)(1).

27 18 U.S.C. § 2701(b)(2)(B).

28 18 U.S.C. § 2707(a).

29 18 U.S.C. § 2707(b)-(c).

dies and sanctions available.[30] Additionally, the Stored Communications Act has no prohibition against the disclosure or use of the unlawfully accessed evidence or information as the Wiretap Act does for unlawfully intercepted evidence or information.[31]

Both the Wiretap Act and the Stored Communications Act require the element of intent on the part of the interceptor for an unlawful interception or unlawful access of a communication to occur. Intent is not defined within either statutory scheme. One court has suggested that intent be defined as acting deliberately and purposefully and the product of the interceptor's "conscious objective rather than the produce of a mistake or an accident."[32] The interceptor's motive for intercepting or accessing a communication is irrelevant.[33] In analyzing the Stored Communications Act and whether the defendant had unlawfully accessed a computer system, one federal district court noted that if a person has authority to access a computer system, even if that person acts with malicious or larcenous intent, this does not violate the Stored Communications Act.[34] Thus, the only analysis to be made by the factfinder is whether the interception or accessing of a communication was purposeful and deliberate. The reason for the unlawful conduct is left out of the analysis altogether.

The terms and definitions of both statutory schemes are crucial to the understanding of the intersections of the Wiretap Act and the Stored Communications Act. Judges and commentators have devoted significant attention to the definitions and terms. To thoroughly understand how these definitions and terms have evolved into their current form, a brief review of the history of the federal wiretapping statutes is required.

C. *History of the Federal Wiretapping Statutes*

In 1986, the Electronic Communications Privacy Act (ECPA) completely overhauled the federal wiretapping statutes,

---

30 18 U.S.C. § 2708.

31 Wesley Coll. v. Pitts, 974 F. Supp. 375, 389 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3rd Cir. 1998).

32 United States v. Townsend, 987 F.2d 927, 930 (2d Cir. 1993). *See also* Thompson v. Dulaney, 838 F. Supp. 1535, 1542 (D. Utah 2003).

33 *Id.*

34 Sherman & Co. v. Salton Maxim Housewares, Inc., 94 F. Supp. 2d 817, 820 (E.D. Mich. 2000).

which were originally enacted in 1968 in response to growing privacy concerns.[35] Previously, the federal wiretapping statutes, described as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), protected only wire and oral communications from unlawful interception by others.[36] Wire communications included communications by telephone and cable.[37] Oral communications included actual conversations that took place face-to-face.[38] A component of Congress's intent in enacting Title III was to protect private citizens from wiretapping in domestic disputes.[39] At the time of Title III's enactment, cell phones, the Internet and e-mail were not yet widely used.

With the advent of the electronic age, Congress sought to protect the newest form of communication, electronic communication, in the same manner as wire and oral communications.[40] This protection was provided in the form of the ECPA.

The ECPA made many important revisions to Title III by including a definition for electronic communications, revising the definition of wire communications, and adding new protections for communications held in electronic storage.[41] The ECPA divided Title III into three statutory schemes: Title I (the Wiretap Act); Title II (the Stored Communications Act), and Title III,[42] which addresses pen registers and trap and trace devices.[43]

The Wiretap Act and the Stored Communications Act became the primary protection against unlawful interceptions of

---

35 *See* Richard C. Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Stored Communications Acts and the Common Law Privacy Intrusion Tort*, 82 NEB. L. REV. 693 (2004).

36 *Id*. at 703.

37 *Id.* at 702.

38 *Id.*

39 *Id.* Congress's other intentions when enacting Title III included protecting private citizens from organized crime and to develop standards for the government's use and application for wiretaps on private citizens. *Id*. at 702.

40 *Id*. at 703.

41 *See* Katherine A. Oyama, Note, *E-Mail Privacy after United States v. Councilman: Legislative Options for Amending ECPA*, 21 BERKELEY TECH. L.J. 499 (2006).

42 *Id*. at 499.

43 Title III is codified in 18 U.S.C. §§3121-27. A detailed analysis of Title III is beyond the scope of this article and will only be referenced as necessary.

wire, oral and electronic communications. However, analysis of the case law following the ECPA's amendments to Title III demonstrates that both statutes pose challenging issues of interpretation and practical application. At the heart of the challenge is the interpretation of two statutory terms; electronic communication and interception.

III. Intercepted Communications—Problems of Statutory Interpretation

A. *The Electronic Communication Problem: What is an Electronic Communication?*

To be unlawfully intercepted, a communication must fall within one of the statutory definitions of a "communication."

When Congress amended the Wiretap Act in 1986, the definition of an electronic communication was added to the forms of communications protected by the statute.[44] Additionally, Congress amended the prior statutory definition of a wire communication in one respect; it included the former definition and then appended the language "including the electronic storage of such communication."[45] Noticeably absent from the new statutory definition of electronic communications was the electronic storage of such electronic communications. Most courts have interpreted this difference in statutory definitions as reflecting a legislative intent to provide no protection under the Wiretap Act to the electronic storage of electronic communications.[46] Because Congress enacted the Stored Communications Act at the same time as it revised the Wiretap Act, and the Stored Communications Act provided protection to electronic communications in storage, many courts thought this demonstrated a clear intention on the part of Congress to limit the level of protection to certain electronic communications if they were in storage.[47]

---

44 18 U.S.C. §§ 2510(1).

45 *Id.*

46 *See, e.g.,*Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004); Frasier v. Nationwide Mut. Ins., 352 F.3d 107 (3d Cir. 2003); United States v. Steiger, 318 F.3d 1039 (11th Cir. 2003); Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002); Steve Jackson Games, Inc. v. United States Secret Serv., 36 F.3d 457 (5th Cir. 1994).

47 *Id.*

Thus, under this reading of the statute, an e-mail[48] might not fall within the definition of an electronic communication when it is being stored.

This interpretation is significant because of how electronic communications are transmitted. Most, if not all, electronic communications are transmitted within some form of electronic storage.[49] Once e-mail is typed by a sender and sent to the intended recipient, the e-mail is broken down into small packets of information while traveling in and out of various e-mail servers before reaching its final destination to the recipient's mailbox.[50] Even after an e-mail reaches the intended recipient's mailbox, the e-mail remains in electronic storage until it is read by the recipient.

If the interpretation of an electronic communication described above is applied, an e-mail is only an electronic communication when it is not in electronic storage. Throughout the transmission process, an e-mail can float in and out of the definition several times. Given the speed within which the transmission process occurs, there is very little protection for electronic communications.

B. *The Interception Problem: When Can Communications be Intercepted?*

Further complicating the analysis is how courts have defined the term "interception." The statutory definition of interception is "the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device."[51] Several cases, recognizing the poor drafting of this definition, have followed the definition announced in *Steve Jackson Games, Inc. v. United States Secret*

---

48 While there are many forms of electronic communications besides e-mail; for clarity and simplicity's sake, only e-mail will be discussed in this section as it relates to the transmission of an electronic communication.

49 United States v. Councilman, 418 F.3d 67, 69-70 (1st Cir. 2005).

50 For a detailed, technical understanding on how e-mail and other electronic communications are transmitted, see *In re Doubleclick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 500-503 (S.D.N.Y. 2001), and Casey Holland, Note, *Neither Big Brother Nor Dead Brother: The Need for a New Fourth Amendment Standard Applying to Emerging Technologies*, 94 KY. L.J. 393 (2005-06); Samantha L. Martin, Note, *Interpreting the Wiretap Act: Applying Ordinary Rules of "Transit" to the Internet Context*, 28 CARDOZO L. REV. 441 (2006).

51 18 U.S.C. § 2510(4).

Service.[52] In this case, interception is defined as the "contemporaneous acquisition" of a wire, oral and electronic communication.[53] In fact, the *Steve Jackson Games* Court held that because the term interception was not substantially revised when the Wiretap Act was revised in 1986, Congress intended that the definition of interception be interpreted according to the pre-amendment definition which included a contemporaneous acquisition requirement.[54]

The *Steve Jackson Games* interpretation simplifies the analysis of what does and does not constitute an electronic communication. If e-mail is in electronic storage, it cannot be contemporaneously intercepted because it has already arrived at its destination; therefore the contemporaneous acquisition requirement cannot be met. Therefore, once an e-mail is no longer being transmitted, it is no longer an electronic communication and incapable of being intercepted.

Many cases have followed and adopted the *Steve Jackson Games* definition of interception.[55] One court went so far as to claim that the definition of interception was different depending on whether a wire communication or an electronic communication was involved.[56] The lack of electronic storage in the definition of an electronic communication was interpreted as supporting a narrow, pre-amendment understanding of interception.[57] Because wire communications included the electronic storage of such communications in its definition, the interception of wire communications should be construed broadly and not under the pre-ECPA amendment understanding of the term.[58] After Congress amended the ECPA in the Uniting and Strengthening America by Providing Appropriate Tools Required to In-

---

52 36 F.3d 457 (5th Cir. 1994).

53 *Id.* at 460, 462.

54 *Id*, at 462.

55 *See e.g.,* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 113-14 (3rd Cir. 2004); Theofel v. Farey-Jones, 359 F.3d 1066, 1077-78 (9th Cir. 2004); Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 877-878 (9th Cir. 2002); United States v. Steiger, 318 F.3d 1039, 1048 (11th Cir. 2003); Wesley Coll. v. Pitts, 974 F. Supp. 375, 385-86 (D. Del. 1997).

56 *Theofel*, 359 F.3d at 877-78.

57 *Id.* at 877-78.

58 *Id.*

tercept and Obstruct Terrorism (USA PATRIOT) Act of 2001,[59] it removed the electronic storage language from the definition of wire communications. With this amendment, both wire and electronic communications have the same narrow definition of interception.

C. *The Councilman "Solution"*

The First Circuit turned the prior case law regarding the interpretation of what constituted an electronic communication upside down in *United States v. Councilman*.[60] In *Councilman*, the defendant was vice-president of Interloc, an online company which listed rare and out-of-print books.[61] As part of the service, Interloc gave its customers an e-mail address.[62] The defendant Councilman managed the e-mail service.[63] Councilman directed Interloc employees to intercept and copy all incoming e-mails to its customers from Amazon.com.[64] Interloc, at Councilman's direction, intercepted and copied all e-mails from Amazon.com before they were delivered to each customer's inbox.[65] Interloc's customers were unable to read their e-mails from Amazon.com before Interloc intercepted the e-mails.[66] Interloc intercepted thousands of emails from its customers in hopes of gaining some commercial advantage.[67] The issue in the case was whether Councilman intercepted the e-mails. Councilman argued that the e-mails could not have been intercepted because they were in each customer's inbox when they were copied and therefore the

---

59 Pub.L. No. 107-56, 115 Stat. 272, 283 (2001).

60 418 F.3d 67 (1st Cir. 2005). A divided panel of the First Circuit first addressed these issues in United States v. Councilman, 373 F.3d 197 (1st Cir. 2004). The panel held that the Wiretap Act does not apply to electronic communications that are even briefly in electronic storage. The government petitioned for a rehearing en banc, which was granted. United States v. Councilman, 418 F.3d 67 (1st Cir. 2005), is the resulting opinion from the rehearing en banc.

61 *Councilman*, 418 F.3d at 70.

62 *Id*. at 70.

63 *Id*.

64 *Id*.

65 *Id*.

66 *Id*.

67 *Id*.

e-mails were already in electronic storage at the time of interception.[68]

The First Circuit held that electronic communications can be intercepted under the provisions of the Wiretap Act even if they are in electronic storage so long the communications are in *transient* electronic storage that is intrinsic to the communication process.[69] *Councilman* extends the Wiretap Act to electronic communications that are in the process of being transmitted, regardless of whether the communications are in and out of electronic storage during that process.[70] The Court reasoned that its holding was consistent with original Congressional intent in enacting the ECPA.[71]

The *Councilman* court relied on legislative history to arrive at its holding. *Councilman* claims that when the ECPA amended the definition of wire communications, the term electronic storage was added to provide protection for voicemail and was not meant to affect e-mail at all.[72] Also relevant to the analysis by the Court was the fact that the definition of electronic communications was drafted from scratch while the definition of wire communications was only minimally revised.[73]

The *Councilman* interpretation of congressional intent flies in the face of prior case law that interprets congressional intent in a completely opposite way. Other courts interpret the difference in the statutory definitions as an intentional act of Congress to exclude electronic communications that are in electronic storage from the Wiretap Act's protections.

Further, the *Councilman* court believed its interpretation of congressional intent was bolstered by Congress when it amended the Wiretap Act again with the enactment of the USA PATRIOT ACT of 2001 by removing from the definition of wire communications the electronic storage of such communications.[74]

---

68 *Id*. at 71.

69 *Councilman*, 418 F.3d at 79.

70 *Id*. at 79.

71 *Id.* at 76-79.

72 *Id.* at 76.

73 *Id.* at 75.

74 *See Councilman*,418 F.3d 67. While *Councilman* was decided in 2005, the criminal conduct occurred prior to the USA PATRIOT Act's enactment and prior to the amended definition of wire communications. However, the

Councilman clouds the already muddy waters in its failure to address several key points. First, under *Councilman*, electronic communications that have been transmitted but not read by the intended recipient are still unprotected under the Wiretap Act. Instead, *Councilman* holds that these electronic communications are protected by the Stored Communications Act.[75]

As the *Councilman* court itself points out, in enacting the ECPA, Congress emphasized that the interception of electronic mail at any stage of transmission, including while in the electronic mailbox of the recipient, involves a high level of intrusiveness and a significant threat to civil liberties.[76] Surely electronic communications that have not yet been read by the intended recipient would demand the same level of protection as electronic communications that have been typed and sent to the intended recipient by the sender. The practical distinction between these two electronic communications is minimal. The fact that both remain unread by the intended recipient is of no consequence under the statute but the interception of them still evokes the same level of intrusion and privacy concerns. This argument also applies to voicemail messages that are not yet received by the intended recipient, which are, according to *Councilman*, only protected by the Stored Communications Act.[77]

Second, *Councilman* avoids bridging the gap between the definition of interception in prior case law and its underlying holding regarding electronic communications. The court fails to discuss when an interception of an electronic communication takes place under the contemporaneous requirement for interceptions. The *Councilman* court *suggests* that interceptions occur while communications are in the process of being transmitted but it stops short of adopting it as law. Councilman even acknowledges the gap issue but avoids it by stating "the facts of this case and the arguments before us do not invite consideration of either the existence or the applicability of a contemporaneous or real-

---

Councilman court still saw fit to use the USA PATRIOT Act in its analysis of congressional intent.

75 *Councilman*, 418 F.3d at 81.

76 *Id.* at 76.

77 *Councilman*, 418 F.3d at 78-79.

time requirement, we need not and do not plunge into that morass."[78]

Prior holdings from the Third, Fifth, Ninth, and Eleventh Circuits all hold that communications held in electronic storage, regardless of the stage of transmission, cannot be intercepted under the Wiretap Act and are instead protected by the Stored Communications Act.[79] As the *Councilman* dissent points out, it is not coincidental that every prior court that has passed on this issue has reached an opposite conclusion to that of the majority in *Councilman*.[80]

D. *Exceptions to Prohibited Acts: Consent by a Party or the Guardian of a Party*

Once it is established that the communication in question falls within the application of the statute and that an interception has occurred, the next question is whether a statutory exception applies. There are several exceptions to the prohibited acts of the Wiretap Act and the Stored Communications Act. The most relevant exception encountered by family law practitioners is the "consent exception." Under the Wiretap Act, individuals who are parties to a wire, oral or electronic communication can consent to the interception of that communication.[81] Under the Stored Communications Act, a user can authorize access to a wire or electronic communication so long as the wire or electronic communication is communicated by the user or intended for that user.[82] Congress intended the consent exception to be interpreted broadly.[83]

Some courts have extended the consent exception to the issue of wiretapping conversations between a child and a parent.[84]

---

78 *Id.* at 80.

79 Theofel v. Farey-Jones, 359 F. 3d 1066 (9th Cir. 2004); Frasier v. Nationwide Mut. Ins., 352 F.3d 107 (3d Cir. 2003); United States v. Steiger, 318 F.3d 1039 (11th Cir. 2003); Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002); Steve Jackson Games, Inc. v. United States Secret Serv., 36 F.3d 457 (5th Cir. 1994).

80 *Councilman*, 418 F.3d at 87 (Torruella, J., dissenting).

81 18 U.S.C. § 2511(2)(d).

82 18 U.S.C. § 2701(c)(2).

83 *Thompson*, 838 F. Supp. at 1543.

84 *See, e.g.,* Campbell v. Price, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998)

This extension has been denominated in case law as the vicarious consent exception.[85]

Occasionally in custody disputes, one parent may attempt to obtain evidence of the other parent's misdeeds by tape recording conversations between the parent and the child. In light of the heavy use of electronic devices by parents and children as a means to communicate, additional forms of evidence could surface in custody disputes as parents utilize their child's password to intercept e-mails and voicemails from the other parent.

One of the first cases to address parental interception of a communication with a child was *Anonymous v. Anonymous*.[86] In *Anonymous*, one parent tape-recorded conversations between the children and the other parent.[87] The other parent sued for violations of the Wiretap Act.[88] The court dismissed the claim stating that the specific conduct in this case did not rise to the level of a violation and that the matter should clearly have been handled by the state courts because it was a purely domestic dispute.[89]

The *Anonymous* decision illustrates the federal court's reluctance to apply the Wiretap Act to domestic cases. More than ten years later, the Second Circuit cited *Anonymous* as precedent in *Janecka v. Franklin*,[90] a similar case involving parental consent to taping conversations of children. In *Janecka*, the husband tape-recorded conversations between the children and their mother after he noticed the children would become upset after speaking with their mother.[91] The *Janecka* court found that husband's actions did not fall within the prohibitions of the Wiretap Act and affirmed the holding in *Anonymous* that custody disputes belong to the state courts, not federal courts.[92]

---

85 *See, e.g.,* Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955 (2005).

86 558 F.2d 677 (2d Cir. 1977).

87 *Id.* at 678.

88 *Id.*

89 *Id.* at 679.

90 684 F. Supp. 24 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 110 (2d Cir. 1988).

91 *Id.* at 25-26.

92 *Id.* at 26.

It was not until the case of *Newcomb v. Ingle*[93] that courts began to analyze parental consent in terms of the Wiretap Act. In *Newcomb*, the custodial mother tape-recorded conversations between her son and his father.[94] Upon reaching the age of majority, the child brought suit against his mother for violations of the Wiretap Act.[95] The *Newcomb* court acknowledged that no other case had addressed the issue before it.[96]

The *Newcomb* court ultimately held that the custodial parent's tape recording of the conversations did not violate the Wiretap Act.[97] In reaching this conclusion, the court first examined prior case law analyzing the interspousal exception announced by the Fifth Circuit in *Simpson* and its progeny.[98] However, the court found these cases unpersuasive and stated that it is "qualitatively different" when a custodial parent intercepts the communications of a minor child within the family home as opposed to when one spouse intercepts the communications of the other spouse.[99]

The court looked to another exception within the Wiretap Act, the extension telephone.[100] The extension telephone exception is a broadly interpreted exception to the prohibitions of the Wiretap Act whereby family members are permitted to intercept each other's communications by listening on another phone extension in the family home because it is within the family's ordinary course of business.[101] While the term "ordinary course of business" might lead one to conclude that business extension telephones were intended by Congress to be the only protected extension telephones, *Newcomb* states that "there is no permissi-

---

93 944 F.2d 1534 (10th Cir. 1991).

94 *Id.* at 1535.

95 *Id.*

96 *Id.*

97 *Id*. at 1536.

98 *Id.* at 1535.

99 *Id.* at 1535-1536.

100 18 U.S.C. § 2510(5)(a). An electronic, mechanical or other device used to intercept a communication does not include "any telephone or telephone instrument . . . furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business."

101 *See* Shana K. Rahavay, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. L. 87, 88 (2003).

ble reason why Congress would exempt a business extension and not one in the home."[102]

The Seventh Circuit followed suit and also found that a parent can tape record conversations between their child and another parent if an extension telephone in the home is used to record the conversations. In *Scheib v. Grant*,[103] the non-custodial parent tape-recorded conversations between the child and the custodial parent while the child was visiting the non-custodial parent. The custodial parent sued the non-custodial parent's attorneys and the guardian ad litem for violations of the Wiretap Act after the attorneys used the tape recordings against the custodial parent at trial.[104] The custodial parent claimed that the attorneys and guardian ad litem used or disclosed communications that were illegally intercepted.[105] At issue was whether the non-custodial parent had consented on behalf of the child, therefore removing the illegality of the use and disclosure of the communications by the attorneys and guardian ad litem.[106]

The court first determined that a parent's custodial status is not a factor in whether a parent can vicariously consent on behalf of a child.[107] The court then determined that the extension telephone exemption applied and that the communications were not illegally intercepted.[108] In support of its holding, the court stated that the "business" as described in the statute included the business of raising children and that Congress did not intend to subject parents to criminal and civil penalties for recording their minor child's telephone conversations out of concern for their well-being.[109]

The use of the extension phone exception to justify parental consent required a broad reading of the statute and a broad interpretation of the "ordinary course of business" language. Courts soon began to shy away from the extension telephone ex-

---

102 944 F.2d at 1536.

103 22 F.3d 149, 151 (7th Cir. 1994).

104 *Id.*

105 *Id.* at 152-53.

106 *Id.* at 153-54.

107 *Id.* at 153.

108 *Id.* at 154.

109 *Id.*

ception and instead focus on whether a parent could vicariously consent on behalf of the child under the consent exception.

The concept was first addressed in these terms in *Thompson v. Dulaney*.[110] In *Thompson*, the custodial mother of two young children, aged three and five, tape-recorded conversations they shared with their father during the parents' divorce proceedings.[111] After custody was awarded to the mother, the father sued the mother, her attorneys and her expert witnesses who testified regarding custody at trial, for violations of the Wiretap Act.[112]

The court held that a parent can vicariously consent on behalf of his or her children so long as the parent has a good faith basis that is objectionably reasonable to believe that it is necessary to consent on behalf of the minor children to the taping of their phone conversations.[113] The court stated that vicarious consent is permissible for parents or guardians to carry out their statutory mandate to act in the best interests of the children.[114]

Thompson was the first case to squarely address the issue of parental wiretapping of their children's conversations under an analysis that did not include invoking the extension telephone exception to the Wiretap Act. However, *Thompson* limited its holding to the facts of the case.[115] The court declined to establish a sweeping precedent regarding vicarious consent to any and all circumstances.[116]

The Sixth Circuit continued the trend towards the use of vicarious consent in *Pollack v. Pollack*.[117] In *Pollack*, the court expressly rejected the extension telephone exemption as a basis for parental consent.[118] The court found the *Newcomb* and *Scheib* rationale of child rearing being within the ordinary course of bus-

---

110 Thompson v. Dulaney, 838 F. Supp. 1535 (D. Utah 1993).

111 *Id.* at 1537.

112 *Id.* at 1538.

113 *Id.* at 1544.

114 *Id.*

115 *Id*. at 1544, n.8.

116 *Id.* Another district court adopted the vicarious consent doctrine by relying on the *Thompson* holding. In Campbell v. Price, 2 F. Supp. 2d 1186 (E.D. Ark 1998), the court adopted the vicarious consent doctrine under similar facts and circumstances.

117 Pollack v. Pollack, 154 F.3d 601 (6th Cir. 1998).

118 *Id.* at 607.

iness unpersuasive.[119] The court adopted the rationale and good-faith basis test of *Thompson*; however, the court remanded the case to determine whether the parent indeed had a good faith basis for her concern for the welfare of the child.[120]

The holdings and rationale of *Thompson* and *Pollack* have been followed in several subsequent federal and state courts.[121] To date, no case has extended vicarious consent to the Stored Communications Act regarding whether a parent can vicariously consent to the accessing of a minor child's stored communications.

E. *The Interspousal Exception: An Update*

The issue of a whether an interspousal exception exists to the Wiretap Act continues to divide the federal circuits, although much less so since 1994. To date, only the Fifth Circuit definitively holds that there is an interspousal exception to the Wiretap Act in the decision of *Simpson v. Simpson*.[122] Thus, in the Fifth Circuit, an individual whose wire, oral or electronic communications were intercepted by a spouse has no remedy under the Wiretap Act.

The Fourth, Sixth, Eighth, Tenth and Eleventh Circuits all hold that no interspousal exception to the Wiretap Act exists.[123] The First, Third, Seventh and Ninth[124] Circuits have not explicitly held either way on whether an interspousal exception exists.

---

119 *Id.*

120 *Id.* at 610-11.

121 *E.g.,* March v. Levine, 136 F. Supp. 2d 831 (M.D. Tenn. 2000); Wagner v. Wagner, 64 F. Supp. 2d 895 (D. Minn. 1999); State v. Morrison, 56 P.3d 63 (Ariz. Ct. App. 2003); Commonwealth v. Barboza, 763 N.E.2d 547 (Mass. App. Ct. 2002); Silas v. Silas, 581 N.W.2d 777 (Mich. Ct. App. 1998); Cacciarelli v. Cacciarelli, 737 A.2d 1170 (N.J. Sup. Ct. Ch. Div. 1999).

122 490 F.2d 803 (5th Cir. 1974).

123 Glazner v. Glazner, 347 F.3d 1212 (11th Cir. 2003); Heggy v. Heggy, 944 F.2d 1537 (10th Cir. 1991); Kempf v. Kempf, 868 F.2d 970 (8th Cir. 1989); Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984); United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

124 A district court in the Ninth Circuit held that an interspousal exception existed in Perfit v. Perfit, 693 F. Supp. 851, 855 (C.D. Cal. 1988). However, the California Supreme Court held that no interspousal exception existed in People v. Otto, 831 P.2d 1178, 1190 (Cal. 1992).

Some commentators have stated that the Second Circuit also holds that an interspousal exception to the Wiretap Act exists due to the decision of *Anonymous v. Anonymous*.[125] *Anonymous* stated that it does not suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute.[126] However, the *Anonymous* court avoided the analysis altogether by finding no interception took place under the facts of the case.[127] To date, no case has extended or denied extension of an interspousal exception to the prohibited actions of the Stored Communications Act.

IV. Conclusion

Since 1994, there have been several amendments to the Wiretap Act and the Stored Communications Act. Both statutes have been the subject of numerous appellate decisions and scholarly writings. Until Congress revises the Wiretap Act and the Stored Communications Act to resolve problems of statutory construction in light of the ever-expanding electronic media for communication, practitioners, judges and commentators will continue to have confusing and conflicting authority on the reach and scope of and the protections provided by both statutes.

125 558 F.2d 677 (2d. Cir. 1977).

126 *Id.*

127 *Id.* at 679.