



## Diverting Email Messages Can Violate the Wiretap Act:

**First Circuit Rules that Prohibition Against Intercepting Emails Includes Messages in Transient Storage**

By Melanie L. Glickson

In *United States v. Councilman*, a case closely watched because of its potential to affect the privacy of millions of email users, the First Circuit reinstated a Wiretap Act indictment against a former executive who allegedly copied users' email messages from a competitor before they reached their recipients. On August 11, 2005, the divided court reversed its own 2-1 panel decision from earlier this year, holding that emails in temporary storage during transmission are "electronic" communications under the Wiretap Act, and that unauthorized access to the messages constitutes illegal interception of an electronic communication.

Bradford C. Councilman was the Vice President of Interloc, Inc., an online literary clearinghouse that sought to pair its book dealer subscribers with book buyers. As part of its service, Interloc provided its subscribers with an "@interloc.com" email account and acted as an Internet service provider for those accounts. Councilman allegedly directed Interloc employees to write a computer program that would work with Interloc's software to copy every message from online bookseller Amazon.com to any Interloc email user, before the message reached its intended recipient. The copies of the Amazon.com emails were then siphoned into a separate mailbox for Councilman to access. As a result, Councilman and other Interloc employees regularly read thousands of emails from Amazon.com to Interloc subscribers, ostensibly in an effort to gain a commercial advantage over a competitor.

Councilman was indicted for conspiring to violate the Wiretap Act, as amended by the Electronic Communications Privacy Act, for intercepting and misusing the emails. In a decision that raised alarms and sparked a flurry of efforts in Congress to rewrite wiretapping laws, the U.S. District Court for the District of Massachusetts dismissed the indictment. The district court reasoned that the emails were not subject to the Wiretap Act's prohibition on intercepting electronic communications because they were suspended in "electronic storage" and thus could not have been "intercepted" as a matter of law. Under this reasoning, the legal protection that applies to an email as it traverses the Internet would switch between the Wiretap Act and the Stored Communications Act, de-



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pending on whether it is in transit between servers, or stopped temporarily—often for less than a second—on one of those servers. The decision was widely criticized for creating significant uncertainty surrounding the level of protection that applies to an email. The government appealed, and a panel of the First Circuit affirmed. The full Appeals Court then agreed to rehear the case.

The First Circuit majority explained that the Electronic Communications Privacy Act includes two elements: the Wiretap Act, which regulates wire and electronic communications in transit, and the Stored Communications Act, which regulates communications in "electronic storage." The Wiretap Act, in turn, is divided into two sections, covering 1) wire communications, like telephone calls, and 2) "electronic communications," including emails. The section covering wire communications includes protection for communications that are in tem-

porary storage. The section covering electronic communications, however, does not. Councilman argued that this distinction showed that Congress intended to give less protection to electronic communications such as emails.

The full court disagreed, however, maintaining that this interpretation would create an "existential oddity"—emails would cease to be "electronic communications" for the milliseconds during which they are in temporary storage, and then suddenly become electronic communications once again. The court further reasoned that the legislative history of the Wiretap Act shows that the electronic storage provision was added to the section governing wire communications to ensure adequate protection for voicemail, and Congress never intended to provide lesser protection for email. The majority also rejected Councilman's argument that the court should treat him with leniency because the Electronic Communications Privacy Act is so convoluted that he did not have fair warning that his actions would violate the law.

The court's decision makes clear that even though emails are stored in computer memory during transmission, it is still a crime to intercept those messages without the user's permission or a court-issued wiretap order. The decision may signal the court's willingness to take an expansive view of email privacy protection under the Wiretap Act.

Councilman may file a petition for writ of certiorari with the United States Supreme Court, which has discretion to accept or reject the case. Though the Supreme Court hears few cases, arguably there is a circuit split with respect to the *Councilman* holding. On August 23, 2002, the Ninth Circuit Court of Appeals issued its opinion in *Konop v. Hawaiian Airlines*, in which the Court held that the Wiretap Act does not apply to acquisition of stored communications.