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Second Circuit Limits Use of U.S. Warrants Seeking Data Stored Overseas

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Data Privacy and Cybersecurity

Search warrants served on U.S. Internet companies and cloud service providers cannot obtain customer data stored overseas, the U.S. Court of Appeals for the Second Circuit ruled on July 14. The federal appellate decision focuses on warrants issued under the federal Electronic Communications Privacy Act ("ECPA") and formally applies only in the Second Circuit, but will be important precedent nationwide as courts, law enforcement, and industry grapple with the extraterritorial reach of U.S. legal process. The decision affects not only providers of cloud-based services that are subject to compulsory process under ECPA, but also individuals and companies that store data with U.S. technology companies. The decision, which the government may seek to appeal, could also spur congressional action addressing the extraterritorial reach of U.S. legal process and law enforcement's access to data in cross-border investigations.

Second Circuit Decision

The Second Circuit decision arises from Microsoft Corporation's challenge to a warrant issued in December 2013 by a magistrate judge in the U.S. District Court for the Southern District of New York.[1] The warrant was issued pursuant to ECPA and sought the contents of a specific Microsoft customer's email account. Microsoft moved to vacate the warrant on the ground that the emails it sought were stored in a Microsoft datacenter in Ireland. Both the magistrate judge and the district court denied Microsoft's motion.

The Second Circuit unanimously reversed, holding that warrants issued under ECPA cannot compel U.S. providers to disclose the contents of customer communications stored on servers outside the United States. The decision hinged on the presumption against extraterritoriality, under which U.S. laws are presumed to apply only inside the United States unless the statutory text expressly provides otherwise. Applying recent Supreme Court case law, the appeals court analyzed the extraterritorial application of ECPA in two steps. First, it found that ECPA was not intended to apply extraterritorially because the language of the statute does not clearly indicate that it reaches outside the U.S. Second, the court found that allowing law enforcement to use warrants issued under ECPA to seize data stored overseas would constitute an impermissible extraterritorial application of the statute. The court held that ECPA's "focus" is protecting customer privacy, and that the invasion of privacy occasioned by the execution of a warrant takes place "where the customer's protected content is accessed"—in this case, Ireland.

[1] Covington served as counsel to Microsoft in the litigation.

In reaching this holding, the Second Circuit rejected two arguments advanced by the government:

- *First*, the court declined the government's invitation to apply rules that govern subpoenas—which courts have found can reach evidence located overseas—to warrants. Instead, the Second Circuit recognized that warrants and subpoenas "are, and have long been, distinct legal instruments," and that when Congress enacted ECPA it did not intend to "replace the traditional warrant with a novel instrument of international application."
- *Second*, the court rejected the government's argument that the private electronic communications of Microsoft's customers constitute the company's own business records, such that they could be obtained by subpoena. Rather, the court said it has never upheld use of a subpoena to compel production from a "caretaker" of an item in which another has a protectable privacy interest.

In a separate concurrence, Judge Gerard Lynch called for Congress to amend ECPA, which he characterized as "badly outdated." Judge Lynch urged Congress to revisit ECPA "with a view to maintaining and strengthening the Act's privacy protections, rationalizing and modernizing the provisions permitting law enforcement access to stored electronic communications and other data where compelling interests warrant it, and clarifying the international reach of those provisions after carefully balancing the needs of law enforcement…against the needs of other sovereign nations."

The government has not indicated whether it will appeal the Second Circuit's ruling. In a July 15 letter to Congress, however, the Department of Justice stated that it "intends to promptly submit legislation to Congress" to address implications of the decision.

Impact of Second Circuit Decision

While the *Microsoft* decision is formally binding only in the Second Circuit, it will have significant nationwide implications for U.S. technology companies that receive ECPA process, and for all consumers and enterprises that store data with U.S.-based providers. These implications include:

- *Reasoning that may apply to other forms of legal process, beyond warrants issued under ECPA.* While the decision addresses only criminal search warrants, its reasoning may apply more broadly. Judge Lynch's concurrence notes that the court's logic may extend to other forms of legal process issued under ECPA, including subpoenas. Under the court's holding, Judge Lynch suggested, using ECPA to compel the disclosure of any email-related records stored abroad would be impermissibly extraterritorial, "regardless of the category of information or disclosure order." Moreover, the court's analysis may be relevant to the extraterritorial reach of other authorities, outside of ECPA, that the U.S. government uses to obtain information from technology providers, including the All Writs Act and the Foreign Intelligence Surveillance Act.
- *Shifting the debate on extraterritorial legal process to Congress*. The Department of Justice has said it will "promptly submit legislation to Congress" to address issues raised by the Second Circuit's ruling. Congress is already considering one measure that addresses the overseas reach of warrants issued under ECPA, in the International

Communications Privacy Act ("ICPA"), which was introduced in May. Judge Lynch's concurrence invites Congress to consider issues raised by the decision. According to Judge Lynch, Congress may have had no reason to consider the international reach of U.S. legal process when it enacted ECPA in 1986, but "there is reason now."

- *Creating additional considerations for international law enforcement agreements*. The decision arrives at a time when the U.S. and UK governments are negotiating a bilateral agreement that would permit U.S. technology companies to provide electronic information in response to UK orders targeting non-U.S. persons located outside the U.S., and affording the United States reciprocal rights regarding electronic data stored by UK companies. Because the Second Circuit's decision invalidates the Department of Justice's position that warrants issued under ECPA can reach overseas, the ruling may affect the contours of future international data-sharing agreements.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Litigation and Data Privacy & Cybersecurity practices:

James Garland	+1 202 662 5337	jgarland@cov.com
Alex Berengaut	+1 202 662 5367	aberengaut@cov.com
Marty Hansen	+1 202 662 5204	mhansen@cov.com
Kate Goodloe	+1 202 662 5505	kgoodloe@cov.com