

THE UNSETTLED NATURE OF THE FEDERAL STORED COMMUNICATIONS ACT AS REGARDS STATUTORY DAMAGES

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The U.S. Federal Stored Communications Act (“SCA”) provides for criminal and civil penalties for unlawfully accessing and/or obtaining electronic communications. Under the SCA, it is a federal crime to "intentionally access without authorization a facility through which an electronic communication service is provided" or "intentionally exceed an authorization to access that facility," and by doing so "obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system." Thus, a person can be prosecuted for accessing, without authorization, emails and other electronic communications stored on a computer server. In addition to the criminal provisions of the SCA, the statute makes available a civil remedy for violations. The SCA provides that a "court may assess as damages in a civil action . . . the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000." Punitive damages are available if the violation is willful or intentional. To complete the list of remedies, the statute also authorizes an award of attorney's fees and costs to a prevailing party.

Prerequisites to and calculation of Statutory Damages

An important issue with the SCA involves the amount of damages available under the SCA. Although the SCA sets a damages floor of \$1,000 per violation, the SCA does not define "violation." Some courts have found that each individual unlawfully accessed or obtained email constitutes a separate violation. Others have held that each log-in to an account is a separate violation. Yet others still have found that multiple “log-ins” within a short time-span can be combined and considered to be a single violation. Depending on a court's interpretation of the statute, the minimum civil remedy available could range from \$1,000 to \$1,000 multiplied by the number of electronic communications accessed. Second, it is unclear whether the SCA mandates that a plaintiff prove "actual" damages as a prerequisite to any recovery. Absent actual damages, is a Plaintiff precluded from being awarded statutory damages? Adding more confusion, one court has held that the SCA is inapplicable to emails which have already been opened. This one case, however, appears to be an anomaly. It is fair to say that the state of the SCA is ambiguous and unsettled.

Conclusion

Congress should clarify what are the prerequisites required to secure statutory damages, when actual damages are absent or exceedingly hard to prove. Further, Congress should clarify precisely what constitutes a singular violation of the SCA, such that statutory damages could be easily ascertained. It is the role of Congress to bring the state of federal law into the 21st century, *vis à vis* an increasingly electronic and connected world. Absent action by Congress, it will be up to the various U.S. Courts of Appeals, and ultimately the U.S. Supreme Court, to define the contours of the SCA.

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