

**US LAW BARS DISCLOSURE OF EMAIL COMMUNICATIONS OF FOREIGN
PARTIES THAT ARE STORED BY ELECTRONIC COMMUNICATION
SERVICES**

Peter S. Selvin
Raines Feldman LLP
Beverly Hills, California
pselvin@raineslaw.com

Parties seeking the production through US discovery of email communications from the providers of email services face a significant challenge. A federal statute, the Electronic Communications Privacy Act of 1986 (“the ECPA”),¹ prohibits electronic communications services (“ECS”) from knowingly divulging the contents of email communications stored or maintained on their systems. *Id.* at § 2702 (a)(1).

Although there are certain limited exceptions to this prohibition, civil subpoenas or requests for production of documents that may arise from civil litigation or even international arbitration do not fall within any of those recognized exceptions. Indeed, a recent US case held that party-litigants could be held liable in damages where their service of an “invalid subpoena” on an ECS resulted in the disclosure of the adverse party’s email communications in the context of civil litigation. *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2003). This means that a party seeking the production of such email communications may effectively be limited to discovery requests that are directed to the author or the recipient of those communications. *O’Grady vs. Superior Court*, 139 Cal.App.4th 1423 (2006).

¹ 18 U.S.C.A. § 2510 et seq.

A recent Ninth Circuit case had occasion to address whether the ECPA applied to protect the email communications of foreign parties in circumstances where the litigation was pending outside the US.

Suzlon Energy, Ltd. vs. Microsoft Corp., 671 F.3d 728 (9th Cir. 2011) involved a discovery request that arose out of litigation that was pending outside the US. Suzlon had sued an Indian citizen, Sridhar, in Australia. Seeking production of email communications from Sridhar's Microsoft Hotmail email account, Suzlon made an application in the US pursuant to 28 USC § 1782 for the production by Microsoft of those email communications.²

Microsoft and Sridhar objected to Suzlon's discovery request on, among other grounds, that the ECPA barred Microsoft from producing those emails in civil litigation. The District Court sustained those objections, finding that the ECPA applied to foreign citizens such as Sridhar. Suzlon took an appeal from the District Court order.

The appellate court affirmed. In so doing, the Court focused on § 2702(a)(1) of the statute which provides that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." The Court also noted that the ECPA defines a "user" of an ECS as "**any person** or entity who (A) uses an electronic

² 28 U.S.C. § 1782 allows a foreign party to obtain discovery in the US "for use in a proceeding in a foreign or international tribunal". Suzlon presumably had to seek production of Sridhar's email communications in the US because Microsoft stored those communications on a domestic server.

communication service; and (B) is duly authorized by the provider to engage in such use.” 18 U.S.C. § 2510(13); emphasis added.

Construing the phrase “any person”, the Court concluded that “the plain language of ECPA extends its protections to non-citizens”. 671 F.3d at 729.

As a way of attempting to avoid the impact of the ECPA, foreign litigants have sometimes obtained court orders in their own jurisdictions which have ordered production of email communications from an ECS. The question then arises as to whether a US Court will enforce such an order on the basis of comity.

While foreign monetary judgments are normally given recognition in the US as a matter of statute, an order issued by a foreign court requiring an ECS to produce email communications would likely be viewed by a US Court as injunctive in nature. In the absence of a statute or treaty governing the enforceability of such a foreign order, a US court would enforce the foreign order, if at all, under principles of comity. In this regard, the US court would have to determine whether the underlying claim is “repugnant to fundamental notions of what is decent and just” under US public policy. *Restatement (Second) of the Conflicts of Laws*, § 117, cmt. C (1971).

In a recent case, a federal court in California had occasion to address the enforceability of a French injunction against an internet service provider. In that case, the District Court held that the First Amendment precluded US enforcement of a French

order requiring Yahoo to block French citizens' access to Nazi material displayed or offered for sale on Yahoo's US site. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001). Although the Ninth Circuit Court of Appeal reversed and remanded the District Court's decision, it did so solely on procedural grounds, not on the merits.

Other US cases have also cast doubt on whether US courts will necessarily enforce orders containing injunctive relief that are issued by foreign courts, especially where the foreign order conflicts with US public policy. See, e.g., *In Re Stephanie M.*, 7 Cal.4th 295 (1994) (California court declined to enforce Mexican guardianship decree because it conflicted with California public policy); *Pilkington Brothers, PLC vs. AFG Industries, Inc.*, 581 F.Supp. 1039 (D. Del. 1984) (US Court declines to issue preliminary injunction that was meant to track the terms of an ex parte interim injunction issued by a British court against a Delaware corporation).

In view of the foregoing, parties in civil litigation, whether pending in the US or elsewhere, may have to address the ECPA if they seek stored email communications in discovery where the pertinent communications reside on a server located in the US. As *Suzlon Energy* makes clear, the ECPA's protections extend to non-US citizens and therefore impact the scope of discovery available to parties to litigation outside the US.