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Internet Litigation Update

Stored E-Mail Messages Entitled to Fourth Amendment Protection: The Sixth Circuit recently became the first appellate court to extend Fourth Amendment protection to stored e-mail messages. In *United States v. Warshak*, No. 08-3997, ___ F.3d ___, 2010 WL 5071766 (6th Cir. Dec. 14, 2010), it held that when the government compels an Internet service provider (ISP) to disclose a user's stored e-mail messages, the user's reasonable expectation of privacy might be violated.

The facts underlying the decision were both simple and stark. Without either obtaining a warrant or giving notice to Steven Warshak, who was later convicted of charges related to his fraudulent business practices, the government seized 27,000 of his private e-mail messages. Some of them were highly damning and provided key evidence at his trial.

The Sixth Circuit found that an ISP "is the functional equivalent of a post office or a telephone company" and concluded that it defied common sense to deny e-mail messages lesser Fourth Amendment protection than letters and telephone calls enjoy. Without examining whether people in fact assume that their e-mail messages will remain private, the court held that the Fourth Amendment requires that e-mail messages be given "strong protection" lest the Fourth Amendment become an "ineffective guardian of private communication."

In reaching that result, the court held that the ISP's terms of service, which provided that the ISP could access users' e-mail messages for some purposes, did not affect Internet users' reasonable expectations of privacy. The court also held that such messages can be entitled to protection notwithstanding that ISPs are private businesses.

The above considerations notwithstanding, the Sixth Circuit declined to rule that ISPs' "terms of service" agreements can never eliminate the reasonable expectation of privacy in stored e-mail messages. Instead, the court suggested that based on the level of review and inspection of stored communications engaged in by an ISP, it might still be possible to argue that an Internet user did not have a reasonable expectation of privacy in his or her stored communications in rare instances.