10: Statutory Privacy: Stored Content

- Administrative
  - Next Time: 544-566 and Four Handouts (on website)
    - This is a modification to the original assignment.
  - Sign-ups for In-class presentations (11/27 and 12/4): E-mail me your preference by next Monday.
  - News
- Last Time
  - Fourth Amendment Online
    - If line isn't content/non-content or prospective/retrospective, what better way to draw line between private and not-so-private information?
    - "Private" communications (e-mail, IM, etc) to third parties
    - Can Encryption create (by itself) an REP?
      - The Lex Luthor example.
      - Versus the encrypted file on your hard drive, e.g.
      - Versus the encrypted file on a person's website, e.g.
      - Orin launched his career with this one.
      - Todd: I think encryption is like any other closed container.
        - Can only "seize" and then obtain a warrant to open it later.
        - Lex Luthor example is poor because it's a caesar cipher and doesn't require a computer to open it.
          - Why does that matter? Quotes in reading about brown bag and "frailest cottage in the kingdom."
  - Statutory Scheme Generally
    - Table on 383
      - Prospective
        - Content
          - Wiretap Act
        - Non-Content
          - Pen Register Statute
      - Retrospective (Stored)
        - Stored Communications Act of ECPA (for content and non-content, although protections vary depending on which).
    - Governs BOTH private conduct and government conduct
      - Different standards and exceptions apply.
    - All of these statutes define parallel CRIMES for violations.
      - Title III: Five-year felony.
      - Pen/Trap: Misdemeanor.
      - SCA: Misdemeanor but felony with certain motives.
  - Wiretap Act
    - To Wire or Electronic Communications
      - Also applies to room bugs (Oral communications) but not in this class.
      - Congress' concern about the human voice.
        - Interestingly: Does NOT apply to silent video (no human voice).
        - Phillip: Vocal/Non-vocal distinction no longer makes sense in an age of IM/SMS/Email.
    - Provider-Protection Exception
      - Text on 404
        - Necessary incident
          - to the rendition of service
          - or to the protection of the rights or property of the provider of that service
      - Scope of "Rights and Property"
        - Hypo on 408:
          - Can University wiretap all communications on computer network in order to:
            - Protect safety of students
            - Prevent use of p2p networks for copyright infringement
            - Monitor discussions about drug use or other dangerous/illegal behavior?
        - What about commercial ISPs?
        - What about employers?
      - Does/Should Title III apply to the intruder using your network?
  - Pen-Register / Trap and Trace
    - DRAS
      - New definition.
        - Used to cover "numbers dialed"
      - What are the limits of DRAS?
        - Cell-site signals?
        - On-Star/GPS tracking?
      - Notice ironic twist:
        - If something isn't DRAS, it's not that the police can't obtain it. On the contrary, the police can obtain it on their own.
      - What about _police initiated_ monitoring of
    - Court order: Legal standard to obtain (and comparison with T3)
      - Most importantly: Certification requirement.
        - In re: application of USA: No discretion whatsoever.
        - Only protection is accountability. THIS agent certified the need.
          - Are they really likely to be civilly liable or prosecuted?
      - SO many contrasts with Wiretap Requirements
        - Standard
          - PC, Necessity, Minimization
          - Certification of relevance
        - Court's role
          - Scrutinize, suggest changes, reject.
          - Ministerial
        - Remedy for violation
          - Suppression, liability, criminal prohibition.
          - Liability, criminal prohibition
- Stored Communications Act
  - General Overview of Statute
    - Go over chart on 434.
  - Specific SCA dichotomies / Puzzles
    - RCS vs. ECS: Opened e-mail versus Unopened E-mail.
      - What are the stakes?
        - Does the standard really matter?
          - 2703(d) orders and Kennedy.
      - Theofel and parsing of 2710(17)(B) (436-38).
      - Philip: Don't they have RCS/ECS privacy backwards? Aren't my files stored on a password-protected FTP server more private in some sense than my e-mail messages?
        - Because an e-mail necessarily involves two parties, while a stored file is often accessible only to me.
    - Public versus Non-public providers
      - How are they treated differently under the statute? (Chart)
        - Voluntary disclosure rules: no restrictions for non-public. Lots for public.
        - Non-public providers cannot be RCSes (track statutory language why) so lots of stored content is not covered.
      - What is the line between public and non-public providers?
        - Anderson v. UOP case.
      - Why the distinction?
    - Disclosure to Government versus Disclosure to other private parties
- Remaking Statutory Privacy
  - Planning
    - What dichotomies matter to you?
      - About the communications themselves
      - About the providers
      - About the recipients of information
      - About the nature of disclosure
    - What standards are appropriate?
      - Wiretap
      - Warrant
      - D-Order
      - Subpoena
      - Relevance + Certification of Court
      - Nothing Needed
      - Any of the above + consent to customer/user/subscriber
    - What remedies for violation?
      - Suppression
      - Criminal Sanction
      - Civil liability
    - What exceptions?
      - Emergency
      - Consent of User
  - New Framework