

Privacy

Individual rights in a technical world

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Introduction

Looking at the business world today, the impact of computer communications technology on the workplace is difficult to exaggerate. The amazing explosion of desktop computers and other technical devices has led to an enormous increase in both the amount and importance of electronic communication. Estimates are that employees this year have sent over 60 billion electronic messages through electronic-mail systems.¹ Due to the pervasiveness of computer technology in the workplace, serious questions have been brought to light, concerning whether this technology presumptively may limit an employee's right of privacy. This issue of employee privacy is considered one of the most important issues facing companies today.² Estimates state that over twenty-five percent of the messages sent by American workers are subject to some type of electronic monitoring.² Yet the majority of these workers are not informed of any monitoring at all. The question becomes, do employers have the right to look at employees' e-mails, and do employees have a right of privacy that should prevent such intrusion? The laws concerning these questions are unclear at best, and nonexistent in many situations. This paper will discuss these laws and rights, and suggest what should be done to improve the current situation.

The Existing Laws

When most people think of 'my rights to privacy' they are thinking of the fourth Amendment of the Constitution. Which states that the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated..."³ yet this right does not apply when it comes to the private sector, nor does it specifically apply to electronic invasions of privacy. Therefore, when it comes to the issue of e-mail, employees find no aid in the Constitution. However, in a similar type of privacy issue, we can examine the

Supreme Courts dealings with telephone privacy rights in the private sector. An analysis of this issue, as it is closely related to e-mail privacy, is where the laws governing e-mail began.

In 1967 (*Katz vs. U.S.*) the Supreme Court created a two-part test. In a case between the privacy rights of an employee, and the searching rights of an employer, the court was faced with some hard decisions. They took into account whether an employee had a reasonable “expectation of privacy”, and also considered the reasonableness of the search by the employer.⁴ This two-part test set the stage for future privacy issues that technology would introduce.

The next big even for computer privacy came in 1986, when the United States Congress amended the federal wiretap laws, and adopted the Electronic Communications Privacy Act (“ECPA”). The ECPA instituted protection for both the transmission of electronic communications (including e-mail) and the storage of such communications.⁵ Title I of the ECPA forbids the interception, disclosure, or use of any oral, wire, or electronic communication.

⁵ There are, however, two exceptions. Employers can intercept employee electronic communications if the employer is the provider of the communication system and is using the system in the ordinary course of business. Secondly, an employer can intercept electronic communications if the employee gave prior consent to allow the employer to conduct such interceptions. On top of this, the ECPA only applies to ‘intercepted’ electronic communications. Therefore, if you have something stored it’s not protected by the ECPA. In 1994 there was a case, *Steve Jackson Games, Inc. v. U.S. Secret Services*⁶, which found that the retrieval of stored e-mail messages or other electronic communications does not qualify as a violation of the ECPA. Apart from this ECPA there are no federal laws regarding employee computer privacy.

Cases of Privacy

There are not many laws written for computer privacy, and so we must look into different cases to get a better feel of what the courts feel about the issue of computer privacy.

The first case we will examine is one that sided with the employer. On January 18, 1996, the United States District Court for the Eastern District of Pennsylvania issued the Smyth memorandum opinion. This concluded that an at-will employee does not have a reasonable expectation of privacy in the contents of his/her e-mail communications sent through the employer's e-mail system. In addition, the court held that an employer's interest in preventing inappropriate comments or illegal activity from being transmitted over its e-mail system far outweighs any privacy interest an employee may have in his e-mail comments.⁷ This was a huge decision for employee privacy of electronic communications, seeing as it is the first federal decision to hold that a private sector 'at-will' employee has no right of privacy in the contents of his or her e-mail when sent over an employer's e-mail system.

The case dealt with a wrongful discharge, filed by Michael Smyth against his employer Pillsbury Company. Pillsbury discharged him for sending inappropriate e-mail communications to his supervisor. Unknown to Smyth, Pillsbury intercepted the e-mails. Smyth argued that Pillsbury had informed its employees that their e-mail communications would remain confidential and would not be used as a basis for reprimand or dismissal.⁷ Under the law, the courts examined the two-parts to the case. They determined that the reasonable "expectation of privacy" was outweighed by the reasonableness of the search by the employer.

An employee takes pleasure in a belief that the drawers or files in his or her office are private, notwithstanding the fact that his supervisor or coworkers may enter the workspace. Similarly, Smyth's use of his employer's e-mail system could not remove his subjective expectation of privacy in the contents of his e-mail messages simply because other employees have access to the computer network. In this regard, the court did note that Pillsbury informed its employees that e-mail messages were confidential, but did not find the employer's statements indicia of Smyth's expectation of privacy.⁷ Had the court properly treated an electronic privacy issue as it would have a non-electronic one, it would not have found that Pillsbury's e-mail system stripped Smyth's e-mail messages of any privacy protection. "In this context, Smyth so egregiously departed from current doctrine on the law of privacy that the decision may be validly distinguished and limited to its peculiar findings."⁷

In examining a similar case, *O'Connor v. Ortega*, the courts ruled very differently when the circumstances were similar but the context had nothing to do with technical privacy. Dr. Ortega was employed as a psychiatrist at a state hospital.⁸ He became subject to an investigation regarding various improprieties. During the investigation numerous items were seized from his desk and files. The court found that Ortega had reasonable expectation of privacy in his desk and file cabinets, and noted that the concepts of privacy and solitude, while similar, are analytically distinct.⁸ There should be no difference in the way that cases involving electronic privacy, and those that don't involve technology are treated. This is a flaw of the court system that tried the Smyth case.

To further our argument against treating cases such as the ones described differently we consider the vast capacities of computers today. Computers can already be used in replace of answering machines, faxes, radio, television, as well as being used for e-mail. If cases containing these technologies are treated differently than others, only more problems will arise. Paradoxically, the privacy protection afforded postal mail and voice mail far outstrips that currently afforded e-mail.¹ Moreover, unlike postal mail, e-mail reaches its intended recipient almost instantaneously and may be more secure than postal mail through encryption. The anachronistic distinction between the protections afforded employees in their telephone communications verses those afforded employees in their computer communications is no longer legitimate.¹

Consider the development of Universal Messaging Systems. These systems allow individuals to send e-mail communications or voice mail communications over the company's computer network (based on employee preference).⁷ Messages sent as e-mail can also be transformed by the receiver into a voice mail message or vice-versa. But, what happens when an e-mail message is retrieved as a voice mail message, and the employer intercepts the voice mail message? Which level of privacy protection should the message be afforded? Consider the reverse situation. An employee sends a voice mail via telephone, and it's retrieved as an e-mail. Should the employee expectation of privacy be diminished? To these questions there are no easy answers, but the current state of privacy law only adds more confusion to a complicated issue.

Conclusion

The current situation of employee privacy is a balancing act; the courts have to weigh the balance of employee interests v. employer efficiency, productivity, and reasonability. However,

there is a problem when the courts are leaning towards the employer in cases of electronic privacy more than they would in a non-electronic privacy case. A proper balancing of interests may, in fact, weigh more favorably in upholding or safeguarding the employee's privacy interests. It seems likely that improved employee privacy could result in a more efficient workplace. Increased employee privacy sends a positive message from the employer to the employee. That message perfectly states that the employer trusts the employee to be responsible for his or her time and productivity. Such a message builds up the working relationship between employers and employees and imputes personal dignity to the workplace. Quite possibly, an employer who monitors the workplace constantly and is privy to all intra-company communications may create a workplace filled with distrust. Undeniably, an employee who does not trust his own employer has much less of an incentive to be efficient, resourceful, and productive. The court's finding in the case of *Smyth v. Pillsbury* sets the employee as the employer's opposition. This view of the workplace is a horrible one to promote, because it portrays the employee as incapable of managing his or her own responsibilities. "Without debate, companies that find the need to monitor an employee's every move also view the workplace as a battleground of competing interests, but it is quite possible that successful companies do not treat employees as enemies. Instead, these companies provide their employees with both personal and professional incentives to perform productively."⁷ Laws should be made, so that courts would be forced to look at electronic cases in the same ways as non-electronic way. Moreover, a working environment would benefit if courts would base decisions more on the principles of personal autonomy, individual respect, and mutual trust.

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⁸O'Connor v. Ortega, 480 U.S. 709, (1987)