

NOW +

NEXT

ELECTRONIC DISCOVERY AND EVIDENCE LAW ALERT | NIXON PEABODY LLP

JULY 22, 2016



Second Circuit holds that domestic warrants on U.S. e-mail providers cannot reach content held overseas

By Jonathan Sablone and Ronaldo Rauseo-Ricupero

In last week's major appellate decision in the closely-watched [Microsoft Corp. v. United States](#) (2nd Cir., No. 14-02985), the Second Circuit held that the Stored Communications Act (SCA) (18 U.S.C. §§ 2701 et seq.) "does not authorize courts to issue and enforce against U.S.-based service providers' warrants for the seizure of customer e-mail content that is stored exclusively on foreign servers." This ruling puts criminal prosecutors on notice that e-mail housed in non-U.S. servers will remain outside the reach of SCA warrants.

In this case, the government sought to recover by SCA warrant e-mails held by Microsoft in furtherance of a narcotics trafficking investigation. Responding to the search warrant would have required Microsoft to retrieve information from servers held in Dublin and Microsoft refused to do so. After both the magistrate and district court in the Southern District of New York ruled in favor of the government, Microsoft was held in contempt and appealed to the Second Circuit.

Notwithstanding the admission by Microsoft that it was possible for it to collect the requested data and bring it into the United States remotely, the appeals court held that the SCA warrant could not compel Microsoft to do so: "We reject the approach, urged by the government and endorsed by the [d]istrict [c]ourt, that would treat the SCA warrant as equivalent to a subpoena. [...] As the subpoena-warrant distinction is significant here because, unlike warrants, subpoenas may require the production of communications stored overseas. 15 F. Supp. 3d at 472 (citing *Marc Rich*, 707 F.2d at 667)." Opinion at 28.

The reaffirmation that the "care, custody and control" language in the civil subpoena and grand jury subpoena retains extraterritorial power even when SCA warrants do not apply takes on new importance given that this ruling was issued just two days after the European Commission's final adoption of the [EU-U.S. Privacy Shield](#). Moreover, while the court itself recognized that the "ease with which a wrongdoer can mislead a service provider that has overseas storage facilities into storing content outside the United States," and acknowledged the cumbersome nature of the present mechanisms for facilitating international criminal discovery through mutual legal assistance treaties, it nonetheless concluded that the SCA's interest in consumer privacy and the limits of its territorial reach did not permit the warrant to be upheld. Opinion at 41.

With the high degree of interest in this case, as evidenced by the dozens of amicus curiae briefs filed by groups as disparate as the Government of Ireland to the U.S. Chamber of Commerce, the ACLU to Apple, the government may be considering further appellate review in the future.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Jonathan Sablone at jsablone@nixonpeabody.com or (212) 224-6395
 - Ronaldo Rauseo-Ricupero at rrauseoricupero@nixonpeabody.com or (617) 345-1071
-