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Electronic Communications Privacy Act Does Not Apply Outside United States

April 8, 2010

In Matter Of First Impression, Court Holds that ECPA Is Not Implicated By Transmissions That Touch U.S. Networks, But Are Allegedly Intercepted Or Disclosed Abroad

Yahoo!, Inc., represented by O'Melveny & Myers LLP, secured an important victory in the Northern District of California, which has implications for internet and telecommunications companies operating abroad. With plaintiffs around world increasingly seeking to use American courts to redress alleged harms in their home countries, there has been a proliferation of lawsuits seeking to have U.S. law apply to conduct occurring overseas. *E.g., Sarei v. Rio Tinto*, No. 02-56256 (9th Cir. 2009); *Balintulo v. Daimler AG*, No. 09-2778 (2d. Cir. 2009). Such cases pose delicate foreign-policy concerns and raise a host of important legal issues. The general rule is that domestic statutes have no extraterritorial force, absent a clear statement of Congress to the contrary. *E.g., Small v. U.S.*, 544 U.S. 385, 388-89 (2005). But this rule has not deterred the plaintiffs' bar from seeking to use U.S. courts to adjudicate claims arising in their home countries.

The *Zheng v. Yahoo!* Case

In *Zheng v. Yahoo!*, the court held that plaintiffs may not sue under the Electronic Communications Privacy Act ("ECPA") for alleged privacy violations that plaintiffs said occurred in the People's Republic of China ("PRC"). *See* 2009 WL 4430297. The four plaintiffs in *Zheng* — three political dissidents who now live in the United States, as well as a California organization that one of them founded — sought to hold Yahoo! liable for Yahoo! China's alleged provision of their personal information to Chinese law enforcement officials in connection with PRC law enforcement investigations. To establish a nexus between their case and the United States, plaintiffs argued that their allegedly disclosed communications must have, at some point, been routed through Yahoo!'s U.S. servers, and that this was enough to create such a link.

The *Zheng* plaintiffs sought to hold Yahoo! liable under ECPA, 18 U.S.C. §§ 2510 *et seq.*, as well as under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.* Enacted in 1986, ECPA affords privacy protection to electronic communications. Title I of ECPA amended the federal "Wiretap Act" to address the *interception* of electronic communications. Title II created the "Stored Communications Act," which was designed to address *access* to stored communications. As predicate violations of the UCL, plaintiffs asserted that Yahoo! violated ECPA, and also that it violated the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, and various international treaties — all under the theory that Yahoo! China's alleged disclosure of information aided and abetted the PRC in illegitimate criminal prosecutions. The *Zheng* case might have magnified the risk that U.S. companies face of being sued by foreign plaintiffs for the acts of foreign governments had the court found merit in the plaintiffs' claims.

Yahoo! moved to dismiss the ATS and TVPA claims on the grounds that such claims — which directly implicate the PRC's enforcement of its own laws — were not justiciable under, *inter alia*, the act-of-state doctrine and principles of international comity. Yahoo! also argued that plaintiffs had failed to state a claim under the ATS and TVPA (click here to see copies of the briefs filed by O'Melveny). Confronted with this motion, plaintiffs abandoned their ATS and TVPA theories, leaving only the ECPA claim.

The Court's Ruling

In her recent ruling, which was not challenged on appeal, Judge Maxine Chesney dismissed all the remaining ECPA and UCL claims in the case with prejudice. Judge Chesney held that an electronic communication must be intercepted or disclosed in the United States in order to create ECPA liability. Communications intercepted or disclosed abroad, she rightly held, are beyond ECPA's jurisdiction, "even if the communications, prior to their interception and disclosure, traveled electronically through a network located in the United States." Relying on cases interpreting ECPA's

predecessor statute, which did not cover e-mail transmissions, as well as ECPA's legislative history and the presumption against extraterritoriality, the court rejected plaintiffs' urging to read ECPA more broadly or to rely on cases in the drug interdiction context where courts in the Ninth Circuit have taken a more expansive view of jurisdiction. (Click here to read Judge Chesney's opinion).

About O'Melveny's Alien Tort Statute and Privacy Practices

O'Melveny has been at the forefront, for over a decade, in handling cases of this sort. Its partners (including Sri Srinivasan) defended Ford Motor Company in the late 1990s in groundbreaking cases arising out of World War II. O'Melveny's partners (including Daniel Petrocelli and Matt Kline, who handled the Yahoo! case) defended the Unocal Corporation successfully at trial in the first ATS case brought against a multinational corporation. (Click here to read about the Unocal case.) The firm's partners, including Messrs. Petrocelli and Kline, also submitted key amicus briefs on behalf of the Chamber of Commerce and other business groups in the first ATS case heard before the Supreme Court, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). And the firm, led by Mr. Srinivasan, is currently handling three important appellate matters — each of which presents issues of great significance to corporations subject to ATS suits. Those cases, on behalf of Ford Motor Company, Rio Tinto, and ExxonMobil, raise complex and novel issues, including whether corporations can be held liable under the ATS on an aiding-and-abetting theory. (Click to read briefs related to the Ford Motor Company and Rio Tinto cases.)

O'Melveny's work on the *Zheng* case is the latest success of its privacy practice as well, which involves extensive experience under ECPA and similar statutory and regulatory regimes. The practice includes Tim Muris, the former chairman of the Federal Trade Commission, who advises a wide range of companies on privacy issues — as do partners Christine Wilson (who was also at the FTC), Tom Brown (who worked at Visa before joining O'Melveny), and Randall Edwards (who has a decade of experience in this area).

Zheng v. Yahoo!, Inc.

- Yahoo!, Inc.'s Motion to Dismiss Under Rule 12(b)(6)
- Yahoo!, Inc.'s Reply in Support of Its Motion to Dismiss Under Rule 12(b)(6)
- Yahoo!, Inc.'s Motion to Dismiss Under Rules 12(b)(1) and 12(b)(7)
- Yahoo!, Inc.'s Reply in Support of Its Motion to Dismiss Under Rules 12(b)(1) and 12(b)(7)

Judge Chesney's Opinion in *Zheng v. Yahoo!, Inc.*

- Order Granting Defendants' Motion to Dismiss Under Rule 12(b)(6)

Unocal: *The American Lawyer*

- O'Melveny Wins *The American Lawyer* "Litigation Department of the Year" 2004

Sosa v. Alvarez-Machain, et al.

- Amicus Brief In Support of the Petitioner

Balintulo, et al. v. Daimler AG, Ford Motor Company, et al.

- Defendants' Opening Brief
- Defendants' Reply Brief
- Defendants' Supplemental Brief Concerning Corporate Liability Under the Alien Tort Statute
- Defendants' Supplemental Letter Brief Concerning Jurisdiction

Sarei, et al. v. Rio Tinto plc, et al.

- Defendants' Opening Supplemental Brief

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