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## Steps to take in wake of Gmail wiretapping decision

Mobile, Web- and cloud-based companies could also face class-action lawsuits. Here's how to prepare for that possibility.

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Computerworld - A recent decision by a federal court in California could expose mobile, Web- and cloud-based businesses to class-action lawsuits for doing nothing more than processing user data. U.S. District Judge Lucy Koh, ruling in a civil lawsuit alleging that Google violated federal and state wiretapping laws when it processed emails through its Gmail service, held that the processing of user data could constitute an illegal interception of electronic communications.

Koh's decision reflects a very narrow interpretation of what it means to process user data in the ordinary course of business. Google, for example, routinely machine-scanned Gmail messages to create user profiles and provide targeted advertising. More troubling for the online community, however, is that when paired with the very broad definition of electronic communications under the federal wiretapping statutes, the decision has the potential to expose a host of current data processing activities to costly class-action litigation. Fortunately, there are certain specific steps that an at-risk business may undertake to mitigate or even avoid this liability.

### An expansive application of the federal wiretapping statute

The source of the problem is an anachronistic federal wiretap statute, first enacted in 1968. At that time, the landline telephone system was the predominant communications system, and the voice telephone call was about the only thing that resembled an "electronic communication." In fact, the original wiretap statute did not even refer to electronic communications but rather described only wire and oral communications; the term "electronic communication" was added almost a generation later, in 1986. Today, almost 30 years later, the term "electronic communication" remains largely undefined and is applied (or misapplied) to a wide variety of user-initiated data transfers and related technologies.

In application, the wiretap statute prohibits the interception of oral, wire or electronic communications, subject to various exceptions. A significant exception, and the one at issue in the Gmail litigation, excludes liability for interceptions made in the ordinary course of business. That is, any service through

which users send and receive data may process that data within the ordinary course of business without running afoul of the wiretap statute.

In the Gmail litigation, plaintiffs filed a class-action lawsuit alleging that Google illegally intercepted emails sent to and from Gmail users when it processed those messages to develop user profiles and provide targeted advertising within Gmail. Google argued that the processing was exempted from the statute because it was done in the ordinary course of business and that its users consented to the processing.

Koh rejected the "ordinary course of business" argument based on a very narrow definition of what constituted the Gmail "service." Google argued that the Gmail service included all of Gmail's features and, therefore, the processing required to provide those features was necessarily done in the ordinary course of business. The court instead viewed the Gmail service narrowly, limiting it strictly to the transmission and receipt of email. Therefore, the court reasoned, the only processing conducted in the ordinary course of business (exempted from liability under the statute) was processing necessary for the routing, termination or management of the email message. Any additional "processing" was not within the ordinary course of business and was prohibited.

Google also argued that Gmail's users consented to the processing of their emails. In the court's opinion, having already determined that the statutory exception did not apply, the terms-of-use and privacy policy posted by Google and consented to by its users should have been specific enough to establish consent to the processing of the emails for creating user profiles and serving targeted ads.

### Mitigate the risk

Given competing priorities in Congress, the federal wiretapping statute is unlikely to be amended anytime soon. Koh's recent decision contributes to the general climate of uncertainty regarding application of the statute and may encourage future litigation. In fact, Google recently filed for leave to appeal the decision, citing various "copycat" litigations already in process. In the wake of Koh's decision, mobile, Web- and cloud-based service businesses should be taking

affirmative steps to protect their interests, including the following:

#### *Terms-of-use, terms-of-service and privacy policies*

Your terms-of-use, terms-of-service and privacy policies are your first line of defense. As a result of the court's narrow interpretation of activities that constitute data processing in the ordinary course of business, it is more important than ever to review such policies to ensure that they reflect your current business practices. These policies should clearly describe the scope of services being provided and users' consent to the processing of their data. Equally critical, be sure that your staff is appropriately trained and that these policies are strictly followed in your day-to-day business operations.

#### *Insurance coverage*

Insurance coverage for your business should be closely examined to ensure that it aligns with the nature and scope of your activities, specifically including the risks attendant to an online commercial enterprise. Comprehensive general liability policies are good starting points, but frequently they contain exclusions for claims that allege violations of federal or state statutes, and do not provide coverage for various online risks.

#### *Be attentive to the details!*

If a lawsuit related to your specific data processing practices is filed, there may be a number of statutory defenses and exceptions that apply. Their availability may depend on the precise details of your business.

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