ECPA and the Tech Industry

Why industry supports ECPA reform

The Internet offers a two-fold boost to economic growth: All sectors are dependent on the Internet to reach customers, streamline operations, and compete globally. Most recently, companies large and small are finding huge advantages in flexible and inexpensive "cloud" services. Plus, the Internet and communications sector is itself one of the most dynamic and innovative in the country.

Trust, security, and control are critical to information technology development. Every company wants to be confident in the confidentiality of its own data and the data customers entrust to it. This includes ensuring that data is protected against overzealous government investigators. Of course, law enforcement agents need access to electronic evidence in many cases. But government powers should be subject to checks and balances. One of the most important of these is the requirement – followed everyday in the physical world - that government agents get a warrant from a judge before accessing private data.

Unfortunately, the Electronic Communications Privacy Act (ECPA) of 1986, the federal law that defines the rules for government access to private digital information, is woefully out of date. As a result, the U.S. Justice Department argues that it does not need a judge's approval before requiring service providers to disclose stored data or to track the location of their mobile users. The gaps and ambiguities in ECPA undermine trust, affecting both companies that hold data on behalf of customers and companies that want to use the cloud to store their own proprietary data.

The need for ECPA reform

1) Under current law, ECPA allows government agents to demand access to stored data with a mere subpoena, issued without any prior approval by a judge. Moreover, as data moves from local storage to the cloud, the government argues that it does not need to go to the owner of the data. Instead, the government claims that it can go to the cloud provider, demand the data with a subpoena, and prohibit the data owner from being notified. This needs to change: When government agents want ISPs and cloud providers to disclose sensitive data, they should get a warrant from a judge.

2) The current rules are absurdly complicated. One rule for "opened" email, a different rule for unopened. One rule for email less than 181 days old, a different rule for email more than 180 days old. Even large companies, with teams of lawyers and paralegals, find the complexity of the law a burden. Start-ups must spend time and money on lawyers that would be better spent finding new ways to innovate.

Now is the time for ECPA reform

Last year, the Senate Judiciary Committee approved an ECPA reform bill, introduced by Chairman Patrick Leahy, which would require government agents to obtain a warrant from a judge before demanding access to the content of private online information. The bill never reached the full Senate, but Chairman Leahy plans to re-introduce it this year.