



U.S. Department of Justice

Criminal Division

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Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

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Stewart Baker, Esq.  
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1330 Connecticut Avenue, NW  
Washington, DC 20036

Dear Stewart:

I read your article entitled "How Far Will the Feds Go to Push Favorable Surveillance Laws?" (*see* E-Commerce Law Week, Issue 217) taking the Justice Department in general and the Computer Crime and Intellectual Property Section (CCIPS) in particular to task for allegedly "purposely" concealing an adverse opinion by a United States magistrate judge on an application for an Internet pen/trap order. You also imply that the government will go to any length ("it shows how far the government will go to get ISPs to comply with its surveillance orders") to dupe companies to comply with the government's wishes, even when those requests are in violation of existing law. You conclude your article by stating that, because of the government's underhanded behavior, ISPs and other companies should not "simply rely[]" on DOJ's interpretation of the law.

I do not believe that your article is either fair or accurate. This is particularly disturbing since both DOJ and CCIPS have developed a productive relationship based on well-placed trust and mutual benefit with many ISPs and other companies, many of which are your clients. This is not to suggest or imply that the government's interests are always going to be the same as those of private-sector companies or that those companies should not seek independent advice from competent counsel such as yourself. However, to suggest that the government engaged in some shady or underhanded behavior is both false and harmful in terms of developing and nurturing a mutually-beneficial relationship.

Neither DOJ nor CCIPS did anything to conceal the order issued by a magistrate judge in In re Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register, Trap and Trace, or other Device on E-Mail Account, slip op, CR-00-6091 misc. (N.D.Ca. Nov. 17, 2000) (denying the government's application for a pen/trap order and concluding that 18 U.S.C. § 3122 applied only to telephones and not the Internet), which was a publicly-filed and publicly-available document.

You fault the government for failing to publicize this order; however, DOJ was under no obligation to do so. Further, I would note that this was an order issued by a non-Article III judge,

which was never adopted (or rejected) by a United States district court judge or any other Article III judge. As such, that order would, at most, be binding precedent before the magistrate judge who issued the order, and would not constitute binding authority for any other judge, including other magistrate judges in that district.

Far from hiding the issue, although federal courts throughout the country had overwhelmingly been applying the pen/trap statute to the Internet, both CCIPS and DOJ publicly and forthrightly acknowledged the existence of the very legal issue that you state they were trying to hide. On June 12, 2001, Assistant Attorney General Michael Chertoff informed the House Judiciary Committee that, "[a]lthough numerous courts across the country have applied the pen/trap statute to communications on computer networks, no federal district or appellate court has explicitly ruled on its propriety" (an entirely truthful statement). He further stated that, "private litigants have challenged the application of the pen/trap statute to such electronic communications based on the statute's telephone-specific language." (See Statement of Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice before the Subcommittee on Crime at [http://www.cybercrime.gov/cybercrime61201\\_MChertoff.htm](http://www.cybercrime.gov/cybercrime61201_MChertoff.htm)). As you know, Congress saw the wisdom of DOJ's view, as well as the views of every federal judge save one to consider the issue, when it passed the USA PATRIOT Act last year, clarifying that 18 U.S.C. § 3122 does indeed apply to the Internet.

In order to clear up the misimpression that I fear your article created, I would greatly appreciate it if you would publish this letter in your next edition of E-Commerce Law. As you know, I hold you in the highest regard and have great respect both for your integrity and your ability; however, with all due respect, I believe that this particular article was inaccurate and may well have unintended and deleterious consequences.

With best professional and personal regards, I remain.

Sincerely Yours,



John G. Malcolm  
Deputy Assistant Attorney General

cc: Martha Stansell-Gamm, CCIPS Chief