

United States District Court
Southern District of Texas
FILED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUN 16 2006

Michael N. Milby, Clerk

IN THE MATTER OF THE	§	
APPLICATION OF THE UNITED	§	
STATES OF AMERICA FOR AN	§	Magistrate No. H-06-356M
ORDER AUTHORIZING (1)	§	
INSTALLATION AND USE	§	
OF A PEN REGISTER AND TRAP	§	
AND TRACE DEVICE OR PROCESS,	§	
(2) ACCESS TO CUSTOMER RECORDS,	§	
AND (3) CELL PHONE TRACKING	§	

**BRIEF IN RESPONSE TO COURT'S MAY 24, 2006 ORDER REGARDING
POST-CUT-THROUGH DIALED DIGITS**

The United States of America, hereinafter "the Government," by and through the United States Attorney for the Southern District of Texas, files this Brief in Response to Court's May 24, 2006 Order Regarding Post-Cut-Through Dialed Digits and in support states the following:

I. INTRODUCTION

The Government filed an application to install and use a pen register and a trap and trace device. In the application, the Government asked the court to authorize the investigative agency to install and use a pen register to record or decode dialing, routing, addressing, or signaling information, including "post-cut-through dialed digits." The Court denied the request for post-cut-through dialed digits that could possibly reveal call contents based on the statutory definitions of "pen register" and "trap and trace device" and issued the order without that language. The Court then ordered the Government to submit briefing in support of acquiring "post-cut-through dialed digits." Specifically, the Court asked the Government to address the following two matters:

1. All legal authority supporting its contention that post-cut-through dialed digits are obtainable under the Pen/Trap Statute, including statutes, regulations, case law, legislative history, and secondary legal authorities;

2. Whether technology is reasonably available to separate content from non-content in post-cut-through dialed digits. If not, please explain why currently available technologies are inadequate or infeasible from the perspective of law enforcement.

Part II of this brief discusses the pen/trap statute and in particular the definition of “pen register” and “trap and trace device.” Part III reviews what is meant by the term “post-cut-through dialed digits.” Part IV discusses 18 U.S.C. § 3121(c) and how that section evidences Congress’s intent to allow certain collection of content information where the Government does not have technology reasonably available to separate the content information from the non-content information authorized under the statute. Part V discusses what technology is and is not reasonably available to separate content information from post-cut-through dialed digits. Part VI discusses the Government’s efforts to ensure that any content information recovered incidentally not be used for investigative purposes.

II. PEN REGISTER STATUTE

The pen/trap statute, 18 U.S.C. §§ 3121-3127, permits the court to issue an order authorizing the installation and use of a pen register or trap and trace device upon application and proper certification by the Government. 18 U.S.C. §§ 3122, 3123. Prior to the enactment of the Patriot Act in 2001,¹ the pen/trap statute defined “pen register” in pertinent part as:

a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached...

18 U.S.C. § 3127(3) (West 2000). “Trap and trace device” was defined as

a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

communication was transmitted.

18 U.S.C. § 3127(4) (West 2000).

This language in the pen/trap statute became obsolete when applied to cellular telephone calls and was “ill-equipped to facilitate the tracing of communications that take place over the Internet.” 147 Cong. Rec. S10990, S11000 (Oct. 25, 2001) (Senator Leahy’s analysis of the Patriot Act). In 2001, § 216 of the Patriot Act modified the definitions of “pen register” and “trap and trace device.” Patriot Act, Pub. L. No. 107-56, § 216(c)(2) &(3), 115 Stat. 290. “Pen register” is now defined in pertinent part as

a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication....

18 U.S.C. § 3127(3) (West Supp. 2006). “Trap and trace device” is defined in pertinent part as

a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

18 U.S.C. § 3127(4) (West Supp. 2006).

These definitions were amended in the Patriot Act to extend the application of the pen/trap statute to Internet traffic while ensuring that this amendment did not permit the use of a pen/trap order aimed at collecting content. 147 Cong. Rec. H7159, H7188 (Oct. 23, 2001) (Representative Conyers’ section-by-section analysis of H.R. 3162); 147 Cong. Rec. S11006-11007 (Sen. Leahy’s section-by-section analysis of H.R. 3162); *cf. In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F. Supp. 2d 747, 761-62 & n.18 (S. D. Tex. 2005)

(acknowledging that the purpose of the amendments to the pen/trap definitions in the PATRIOT Act was to expand their reach to cover electronic communications). This Court's concerns arise from the 2001 amendments to these definition that added the language "shall not include the contents of any communications" and the application of this language to "post-cut-through dialed digits."

III. POST-CUT-THROUGH DIALED DIGITS

As the application explained, "post-cut-through dialed digits" refers to digits that are dialed from the target phone after the initial call setup is completed. *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 456 (D.C. Cir. 2000). In some instances, such as when the caller is placing a credit card or calling card call, the initial phone number dialed is not the number of the party being called. That is, the initial number is the phone number to the phone company that will connect the caller to the intended destination. It is not until the initial call is connected that the dialing party enters the number of the final destination of the call. In this type of case, that final number sequence is necessary to route the call to the intended party and, therefore, identifies the place or party to which the call is being made. *See id.* The post-cut-through dialed digits in this case are the type of non-content information specifically authorized by the statute for capture under a pen/trap order. *See* 18 U.S.C. § 3123, 3127(3) & (4). Post-cut-through dialed digits also can represent call content, such as when subjects call automated banking services and enter account numbers, or call voicemail systems and enter passwords, or call pagers and enter call-back telephone numbers (which are considered numeric messages.) *See United States Telecom Assoc.*, 227 F.3d at 456.

This Court construes the definitions of "pen register" and "trap and trace device" to exclude the collection of post-cut-through dialed digits because of the possibility that this information may include content. Although the definitions of "pen register" and "trap and trace device" establish that

these devices and processes are not permitted to target content information, the plain language of § 3121(c) as well as certain legislative history establishes that Congress did not intend to completely bar the Government from receiving post-cut-through dialed digits when content might be inadvertently or incidentally collected and technology is not reasonably available to filter out the content.

IV. SECTION 3121(c)

In 1994, Congress recognized in a revision to 18 U.S.C. § 3121, that the complexity of telecommunications network communications creates impossible challenges to separating all content from non-content dialing, routing, addressing, and signaling information in real time. Rather than prohibit the Government from receiving any dialing, routing, addressing, or signaling information in such instances, Congress amended the pen register statute to limit the interception of content during the execution of a pen register. The limitation established by Congress, and the burden of compliance with that limitation, was codified in § 3121(c) as follows:

(c) Limitation – A Government agency authorized to install and use a pen register under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing.

Communications Assistance for Law Enforcement Act (“CALEA”), Pub. L. No. 103-414, § 207, 108 Stat. 4279, 4292 (1994). The legislative history of § 3121(c) makes clear that Congress added the provision to the pen register statute specifically to address the present scenario—one in which the stream of information delivered by the carrier includes “dialing or signaling information necessary to direct or process a call” as well as “communication[s] conducted through the use of dialed digits.” H.R. REP. NO. 103-827, at 32 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3512.

Section 3121(c) conclusively declares that the carrier is not barred from sending and the Government is not barred from receiving any stream of dialing, routing, addressing, or signaling information simply because it may contain content. Rather, the section shows Congress intended for the Government to use technology where reasonably available to separate the content from the dialing, routing, addressing, and signaling information used to process a call. This section also presupposes that technology may not reasonably be available in every instance to restrict the record or decoding of information to exclude all content.

After seven years' experience with this formulation, Congress amended the statute again in 2001 in the Patriot Act, keeping the same core approach, but expanding § 3121(c) to explicitly include trap and trace devices and the placement of both pen registers and trap and trace devices on electronic networks:

(c) Limitation – A government agency authorized to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

18 U.S.C. § 3121(c) (West Supp. 2006); *see* Patriot Act, Pub. L. 107-56, § 216(a), 115 Stat. 288.

Senator Leahy's comments during the Senate Proceedings and Debates concerning the Patriot Act show that Congress was aware that pen register and trap and trace devices collected content in post-cut-through dialed digits. 147 Cong. Rec. S11000. According to Senator Leahy, as recently as June 2000, the FBI informed the Senator that there had been no change in technology to better restrict the recording or decoding of dialing and signaling information to exclude all content. *Id.* Although Senator Leahy expressed his concern over the Government's acquisition of content,

Congress, rather than eliminate § 3121(c) and replace it with a complete ban on the Government's receipt of routing, addressing, dialing, and signaling information that may also contain content, modified § 3121(c) to include trap and trace devices, maintaining the essence of the original provision.

Notably, the addition of the "shall not include the contents of any communication" language to the pen/trap definitions and the modification of § 3121(c) occurred in the same section of the Patriot Act. The section-by-section analysis of § 216 introduced by Senator Leahy is insightful in that it supports the conclusion that the amendments to the pen/trap definitions were not intended in any way to trump the provision in § 3121(c):

[Section 216] also ensures that the pen register and trap and trace provisions apply to facilities other than telephone lines (e.g., the Internet). It specifically provides, however, that the grant of authority to capture "routing" and "addressing" information for Internet users does not authorize the interception of the content of any such communications. It further requires government to use the latest available technology to insure that a pen register or trap and trace device does not intercept the content of any communications.

147 Cong. Rec. S11006-S11007. This summary of § 216 treats the two amendments separately and, like § 3121(c) itself, presupposes that the Government may receive incidentally and unavoidably collected content information during the operation of a pen register or trap and trace device.

Although the Government found no published case perfectly on point, two courts have suggested that post-cut-through dialed digits cannot be obtained under the pen/trap statute because those digits may represent content. *See United States Telecom Ass'n*, 227 F.3d at 462 ("No court has yet considered that contention, however, and it may be that a Title III warrant is required to receive all post-cut-through digits"); *In re Application of the United States of America for an Order Authorizing the Use of a Pen Register and Trap on [xxx] Internet Service Account/User Name*

[xxxx@xxx.com], 396 F. Supp. 2d 45, 48 (S.D. Mass. 2005) (the acquisition of post-cut-through dialed digits that reveal content is not authorized under the pen/trap statute). However, neither case directly addressed the issue or conducted any reasoned analysis on the question, nor did either of these cases address the implications of § 3121(c).

More importantly, interpreting the pen/trap statute as these cases suggest would violate the rules of statutory construction. A basic rule of statutory construction is that a statute should be interpreted so that no provision is rendered “superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2000). Reading the definitions of “pen register” and “trap and trace device” to exclude all extraction of all post-cut-through dialed digits simply because they may incidentally include content information would render § 3121(c) entirely superfluous. In other words, if a pen register or trap and trace device could under no circumstances transmit any stream of information that might contain content, then there simply would never be a need for the Government to filter out content and § 3121(c) would be mere surplusage.

The Government acknowledges that the pen/trap statute makes a distinction between content and non-content information and that Title III generally governs the acquisition of content information. However, § 3121(c) and the legislative history of that provision make clear that Congress did not intend to impede the Government’s acquisition of non-content information generally obtainable under the pen/trap statute merely because the Government does not have the technology to filter out all content information. Thus, the fact that post-cut-through dialed digits may constitute content in some circumstances does not preclude the Government’s acquisition of those digits provided it does not have technology reasonably available to filter out the content.

V. REASONABLY AVAILABLE TECHNOLOGY

Attached, under separate seal as Exhibit A, to this document is an affidavit prepared by the Federal Bureau of Investigation. The affidavit explains that technology is not reasonably available to the Government to separate content from non-content in post-cut-through dialed digits. The affidavit also explains in detail the technology that is currently available and why that technology is not adequate from the perspective of law enforcement.

VI. GOVERNMENT POLICY ON NON-USE OF CONTENT INFORMATION COLLECTED UNDER THE PEN/TRAP STATUTE

The Government does not seek, through pen/trap orders, to obtain the right to collect content. Title III and other vehicles are appropriate for this. Accordingly, in May 2002, then-Deputy Attorney General Larry D. Thompson issued a memorandum setting forth the Department's policy regarding the avoidance of "over-collection" in the use of pen registers and trap and trace devices that are deployed under the authority of 18 U.S.C. § 3121-3127. The memorandum establishes the following policies: consistent with § 3121(c), reasonably available technology shall be used to avoid over-collection; and, when over-collection does occur despite use of reasonably available technology, no affirmative investigative use shall be made of that information except to prevent immediate danger of death, serious physical injury, or harm to the national security². The memorandum does suggest that an investigative agency should still maintain a record of the full information obtained from a pen register or trap and trace device for future court purposes.

² The memorandum provides an example when a pen register, despite the use of reasonably available technology, records a bank account number and personal identification number that those numbers should not be affirmatively used for any investigative purpose.

VII. CONCLUSION

In the pen/trap statute, Congress established a means for the Government to collect certain non-content information. In § 3121(c), Congress recognized that content may necessarily be collected incident to the collection of the authorized non-content information because of the limitations of presently available technology. By enacting that section, Congress expressed its intent that the Government not be impeded in collecting the non-content information by the lack of reasonably available technology to filter out the content. Post-cut-through dialed digits may contain non-content information clearly authorized by the pen/trap statute as well as content information. The Government does not have reasonably available technology to filter out the content of post-cut-through dialed digits. Thus, the receipt of post-cut-through dialed digits that contain content is not prohibited under the pen/trap statute. Moreover, should such digits contain content, such content shall not be used save for purposes specifically excepted by statute or department policy. The Government respectfully requests that this Court reconsider its ruling.

Respectfully submitted,

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