

**Fourth Amendment applicability
outside the box**

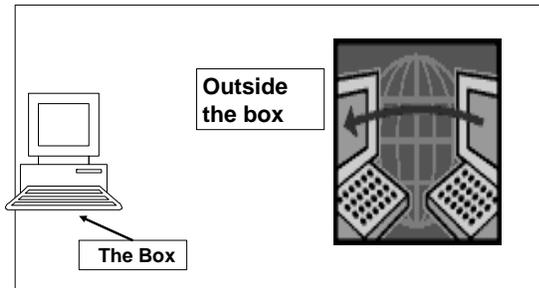
National Center
For Justice And The Rule Of Law
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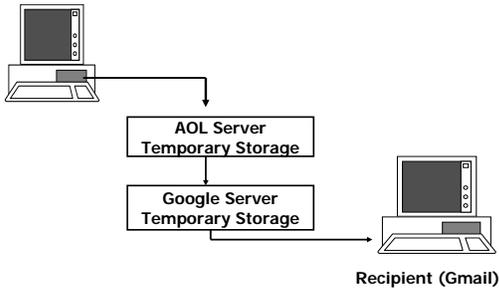
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"inside the box, outside the box"



Sender (AOL)

obtaining evidence



investigating on the internet /networks

three different legal frameworks

1. obtaining info that has no legal regulation
2. Fourth Amendment
3. statutory regulation

Does the 4th Apply ?

Applicability

part A: need gov't activity:
"Search" or "Seizure"

part B: that activity must intrude upon a
protected interest

this presentation is about Part B

Expectation of Privacy Analysis

must have legitimate expectation of privacy invaded by
gov't search

two prongs

- 1 individual has subjective expectation of privacy
- 2 society recognizes that expectation as justified
 - If either prong missing, no protected interest

uncertain F/A applicability outside the box

non-consensual interception of communications, etc,
over the Internet to another party

example: email

possible analogies:

its like a letter in the mail

its like numbers dialed on a telephone

its like any info possessed by third party

Peer-to-Peer (P2P) Networks

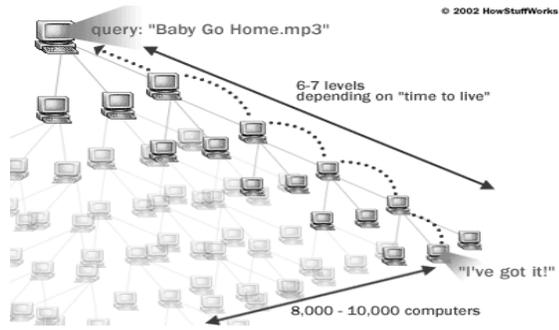
file-sharing technology --- creates virtual networks

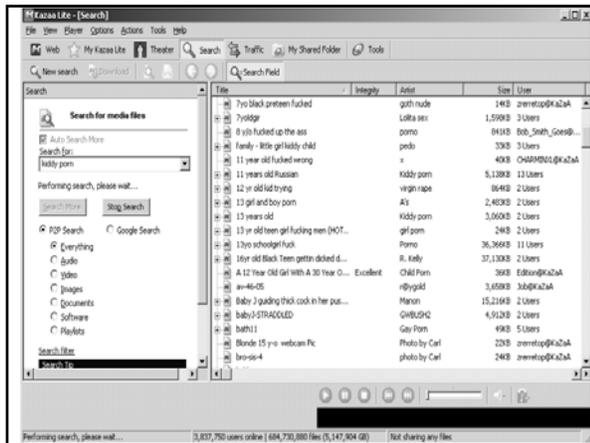


criminal activity:

- Copyright Infringement
- Computer Hacking
Worms -- Viruses -- Theft of information
- Child Exploitation and Pornography

How Gnutella Works





no REP in P2P

U.S. v. Ganoë, 538 F.3d 1117 (9th Cir. 2008)

P2P network

"To argue that Ganoë lacked the technical savvy or good sense to configure Lime Wire to prevent access to his child pornography files is like saying that he did not know enough to close his drapes."

followed in *Borowy*

To the right of this text box are several horizontal lines for notes.

| |
|--|
| connecting computer to local network |
| <p>US v. King, 509 F.3d 1338 (11th Cir. 2007)</p> <p>connected own laptop in his dorm room to military base network</p> <p>knew activities on network subject to monitoring</p> <p>airman looking for music found porn on King's computer</p> <p>after report, investigator located King's computer on network</p> <ul style="list-style-type: none"> ▪ found porn file ▪ additional CP files <p>REP?</p> <p>hard drive contents "akin to items stored in the unsecured areas of a multi-unit apartment building or put in dumpster accessible to the public"</p> |

| |
|---|
| voluntary disclosure |
| <p>assume risk that third party will disclose information, item to gov't</p> <div style="display: flex; justify-content: space-around; align-items: center;">     </div> <div style="display: flex; justify-content: space-around; align-items: center; margin-top: 10px;">   </div> |

| |
|---|
| Traditional F/A doctrine |
| <p>No F/A Protection from 3rd Party Disclosures to Gov't</p> <p>Rationale: <i>Risk Analysis -- Voluntary Exposure</i></p> <p>misplaced belief to whom voluntarily confides will not reveal secret</p> <p style="text-align: right;"><i>Miller</i></p> <p>such "risk" is "probably inherent in the conditions of human society"</p> <p style="text-align: right;"><i>Hoffa</i></p> <p>vol. exposure to public eliminates F/A protection</p> <p style="text-align: right;"><i>Katz</i></p> |

No F/A protection against

1. disclosure of subscriber info by ISPs
Contra N.J.

2. Email recovered from recipient

3. Internet chat rooms

doctrines:
voluntary exposure
assumption of risk

4. Posting Info on Website

application of Fourth Amendment principles to --

1. Virtual worlds

2. cloud computing

3. web based data storage

what are the
relevant considerations?

virtual worlds

<http://www.lively.com/html/landing.html>



create own virtual space
chat and interact with your friends
in rooms you create



express yourself
customize your avatar and
stream personal videos and
photos



add your room to your site
Invite your friends to chat and
decorate

virtual worlds

lds

What is a Virtual World?

AVATAR - Graphical representation of you.
(note) - It's probably not a realistic depiction.



virtual Porn

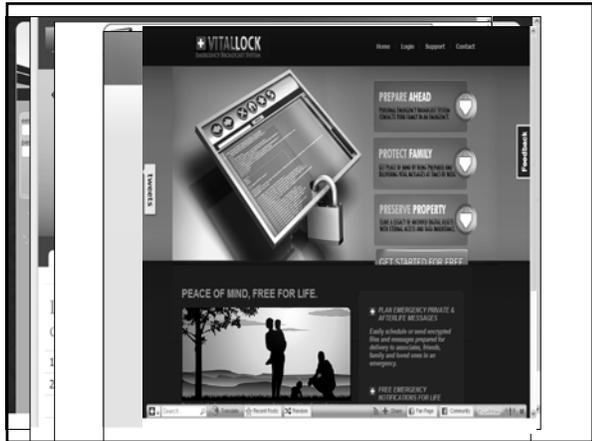


rooms in virtual world



getting more cloudy !





on line storage



City of Ontario v. Quon, 130 S. Ct. 2619 (2010):
some answers?

- cop sent text messages to wife, mistress via gov't issued pager
- agency reviewed printouts obtained from provider to determine if needed more capacity for police business

issues:

See memo for full summary

1. Quon have REP in messages?
2. Wife / mistress have REP in messages?
3. Was search Reasonable ?

police pager policies

Formal Written Policy

- explicitly said user had no REP
- could audit, monitor, or log all activity
- not for personal use
- Quon aware of and signed

"Informal Policy"

- Lt. Duke: you pay overages, will not audit

Quon: NO answers

- "case touches issues of far reaching significance"
- concern: "broad holding" on REP "might have implications for future cases that cannot be predicted"

Therefore:

1. assumed Quon / women had REP
2. search reasonable



dicta on REP analysis -- *possible* factors

- Duke's statements change in policy?
- did Duke have "fact or appearance" of authority to change / guarantee REP
- should public/ private employees be treated differently
- gov't had interests to review messages:
 - performance evaluations
 - litigation on lawfulness of police actions
 - comply w/ open records laws

- Rapid changes in communication
- many employers expect / tolerate personal use
- **employer policies "especially"** when "clearly communicated"
- some state statutes require employers to notify when monitoring electronic communications
- uncertain evolution of **workplace norms** / law's treatment

- Cell phone / text messaging pervasive -- hence:
 - one view:

"essential means or necessary instruments for self-expression, even self-identification"
 - another view:

due to ubiquity / affordability employees can buy own

Scalia, concurring

- Applicability discussion "unnecessary" & "exaggerated"
- rejects "implication" about electronic privacy that Ct should decide less –

The-times-they-are-a-changin' is a feeble excuse for disregard of duty.

- courts/ litigants likely to use dicta as "heavy-handed hint about how they should proceed"



The Court's standard

"is (to put it mildly) unlikely to yield objective answers"

Sotomayor concurring in *Jones*

Privacy does not equal secrecy

- should reconsider 3rd party doctrine: "ill suited to the digital age"
- people reveal great deal of info to 3rd parties to carry out mundane tasks
 - phone numbers dialed /text to cellular providers
 - URLs visited
 - e-mail addresses to ISPs
 - books, groceries, and medications purchased online

Sotomayor concurring

- Doubts that people would accept w/o complaint warrantless disclosure to Gov't list of Web sites visited in last week, or month, or year
- Does not assume that all info voluntarily disclosed to some member of public for limited purpose is, for that reason alone, disentitled to F/A protection

Smiling Bob meets the 6th Circuit



Is email protected by Fourth Amendment?

Warshak #1,
532 F.3d 521 (6th Cir. 2008) (en banc)

QUESTION not ripe:

privacy expectations

- "may well shift over time"
- "shifts from internet-service agreement to internet-service agreement"
- requires knowledge about ever-evolving technologies

variety of agreements

Service providers

- will **"not ... read or disclose** subscribers' e-mail to anyone except authorized users"
- "will not intentionally monitor or disclose any private email message" but "reserves the right" to do so in some cases
- right "to pre-screen, refuse or move any Content that is available via the Service"
- e-mails will be provided to government on request
- other individuals will have access to email / can use information
- **no REP** in any communications

U.S. v. Warshak (#2),
631 F.3d 266 (6th Cir. 2010)

SCA subpoena on less than probable cause violates 4th Amend

- analogy to letters / phone calls
- ISP = post office / telephone company
- **subscriber agreement: limited access only to protect ISP**
- not holding: subscriber agreement will *never* be broad enough to snuff out REP if ISP intends to "audit, inspect, and monitor" emails, might be enough

