

IN THE SUPREME COURT OF CALIFORNIA

No. S230051

FACEBOOK, INC., INSTAGRAM, LLC, AND TWITTER, INC.,
Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,
Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,
Real Parties in Interest.

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County of San Francisco
The Honorable Bruce Chan, Judge Presiding
Nos. 13035657, 13035658

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INTRODUCTION

This brief is submitted in response to the Court's December 21, 2016 order directing the parties to address whether sections 2702(a)(1) and (2) of the Stored Communications Act (SCA) should be construed to apply to communications that were, when sent, configured to be public, and hence generally accessible to the public.

Much of the content at issue in this case is not accessible to the public, and thus the treatment of that content will not be affected by the resolution of the issues raised in the supplemental briefing order. To the extent that defendants wish to obtain public content, there is no need for them to obtain it from the Providers—if a communication is public, a litigant can obtain it without the Provider's assistance. Perhaps for that reason, defendants have not argued that the materials they seek are exempt from the disclosure prohibitions of SCA. Rather, as the Court of Appeals observed, “[i]t is undisputed that the materials Defendants seek here are subject to the SCA's protections.” (*Facebook, Inc. v. Superior Court* (2015), 240 Cal.App.4th 203, 213, review granted Dec. 16, 2016, No. S230051.) Because defendants have waived any argument that the materials they seek are not subject to the SCA, the Court should resolve this case without considering such an argument.

If the Court does consider the issues raised in the supplemental briefing order, it should conclude that sections 2702(a)(1) and (2) of the SCA prohibit covered service providers from disclosing the contents of communications irrespective of the privacy setting of the communications. The public availability of a communication is relevant to a provider's ability to disclose that communication only because section 2702(b) contains eight enumerated exceptions, one of which permits a provider to disclose content with the “lawful consent” of the user. When a user chooses to make a communication freely accessible to the public, he or she has necessarily

consented to its disclosure. Although some of the authorities cited in the Court's supplemental briefing order suggest that the SCA may not apply to publicly available communications at all, most of those authorities address the SCA's restrictions on access to stored communications, set out in section 2701, rather than the SCA's prohibition on provider disclosure, set out in section 2702.

Significantly, while the existence of "lawful consent" permits providers to disclose content, it does not require them to do so. Rather, the SCA vests providers with discretion to decide whether to disclose content when an exception may apply. A contrary interpretation that construed the exceptions as compelling disclosure would permit private parties and law enforcement to circumvent the disclosure prohibition of sections 2702(a)(1) and (2) anytime they believed an exception existed. Congress recognized provider discretion as an important means of promoting the SCA's privacy-enhancing purposes, and if the Court chooses to address the issue, it should do so as well.

ARGUMENT

A. Most of the content at issue in this case is not public and thus will not be affected by the resolution of the issues identified in the Court's order.

Defendants' subpoenas sought "any and all public and private content" associated with Facebook and Instagram accounts purportedly belonging to the victim and the percipient witness as well as "any and all public and private" content from Twitter associated with the account purportedly belonging to percipient witness. (1 AE 12-18; 53-56.) As defendants have acknowledged, much of that content is not publicly available. (1 AE 103 [acknowledging that much of the data sought is not available publicly because "privacy settings vary post-by-post" and that the defense also seeks "private messages"].)

Specifically, most, if not all, of the Facebook or Instagram content sought by defendants is not readily accessible to the public, as defendants recognize by stating that they are unable to obtain it by visiting the Facebook and Instagram profiles at issue. (1 AE 103.) Defendants also acknowledge that they are seeking nonpublic Twitter content that is not available to visitors of the Twitter profile at issue. Because that content is not publicly available, the application of the SCA to public content is not directly relevant to deciding the issues on appeal.¹

The Court's order addresses only a small subset of the information that defendants sought, such as the publicly available Twitter communications from the public Twitter profile associated with the percipient witness. Defendants have not suggested, however, that they do not have access to the public content or that that SCA's disclosure prohibition does not apply to those communications. To the contrary, as the Court of Appeals observed, "[i]t is undisputed that the materials Defendants seek here are subject to the SCA's protections." (*Facebook, supra*, 240 Cal.App.4th at p. 213; accord Defs.' Br. at p. 10.) Accordingly, defendants have waived any argument that the materials they seek are exempt from the disclosure prohibitions of the SCA. (*People v. Bryant* (2014) 60 Cal.4th 335, 363 ["If a party's briefs do not provide legal argument and citation to authority on each point raised, "the court may treat it as waived, and pass it without consideration.""] [quoting *People v. Stanley* (1995) 10 Cal.4th 764, 793].)

Furthermore, because so much of the content that defendants seek is not public, resolving the issues raised in the Court's supplemental briefing order will not allow the Court to avoid the constitutional questions presented

¹ As the Providers have explained in the Petition for Writ of Mandate, defendants have already obtained much of the nonpublic content they seek from the People, and they could obtain additional content by issuing subpoenas to the users who were parties to the sought-after communications. (See Facebook, Instagram and Twitter's Petition for Writ of Mandate at 28.)

in this case. The Court should therefore treat those issues as waived and avoid confronting them. Such a course is especially appropriate because, to the extent defendants' subpoenas seek publicly available content, defendants do not need subpoenas to obtain that content. The ready availability of information from other sources is itself a reason to decline to enforce a subpoena compelling the Providers to produce it. (Cf. *People v. Smith* (1985) 38 Cal.3d 945, 958 ["Obviously, the right to subpoena witnesses . . . does not authorize the indiscriminate use of the process of the court to call witnesses whose testimony . . . is grossly cumulative."] [quoting *People v. Fernandez* (1963) 222 Cal.App.2d 760, 768].)

B. Section 2702 of the SCA categorically prohibits providers from disclosing user communications.

1. Sections 2702(a)(1) and (2) prohibit disclosure of public and nonpublic content alike.

Sections 2702(a)(1) and (2) prohibit a provider of an "electronic communications service" or "remote computing service" from disclosing user communications or records. Subsection 2702(a)(1) broadly restricts "a person or entity providing an electronic communication service" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." Subsection 2702(a)(2) likewise restricts "a person or entity providing a remote computing service to the public" from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service." Neither provision excludes publicly available content from its prohibition.

Paragraphs (1) through (8) of section 2702(b) set out eight voluntary exceptions to the disclosure prohibition—that is, circumstances in which a provider "may" disclose content. While none of the exceptions expressly addresses the original privacy setting of a communication, paragraph (b)(3)

permits a provider to disclose communications “with the lawful consent of the originator or an addressee or intended recipient” of the communication. When the originator of a communication has made it available to the public, he or she has necessarily consented to its disclosure. Thus, as applied to communications that are available to the public, the lawful consent exception allows a provider to disclose communications to any member of the public.

The legislative history of the SCA confirms that Congress intended public content to be subject to the general disclosure prohibition of section 2702(a)(1) and (2), as modified by the consent exception of section 2702(b)(3). The House Judiciary Committee observed that a provider may have “lawful consent” under section 2702(b)(3) to choose to disclose content if, among other things, the communication was made in a manner indicating that the user reasonably understood that it would be made freely available to the public. (H. R. Rep. No. 99-647, 2d Sess., p. 66 [noting that “a subscriber who places a communication on a computer ‘electronic bulletin board,’ with a reasonable basis for knowing that such communications are freely made available to the public,” may have given consent for disclosure of that communication].) That statement presupposes that the prohibitions of section 2702(a)(1) and (2) would otherwise apply to that content. If they did not, there would be no need for section 2702(b)(3) to apply.

2. As relevant here, the lawful consent exception of section 2702(b)(3) applies only to content that the user seeks to make available to the public at large

Some of the content that defendants seek consists of communications that may have been shared with others but not with the public at large, or communications that were allegedly publicly accessible at one time but are no longer public. (1 AE 103.) The SCA does not permit provider disclosure of such content to the public.

That a user permits content to be viewed by a large number of people does not mean that the content is publicly available or that the provider has “lawful consent” to disclose it to those outside the group for whom it was intended. Other circumstances surrounding the communication also matter. (See H. R. Rep. No. 99-647, *supra*, at p. 66 [noting that “conditions governing disclosure or use” as relayed to the user can form the basis to “imply consent”].) Even if a post is available to a large group of people, if it is not available to the public at large, then the user cannot be said to have consented to public disclosure—instead, the user has consented only to disclosure to those persons for whom the post was intended. Accordingly, a “critical inquiry” is whether “users took steps to limit access” such that the communication is not accessible “to the general public.” (*Crispin v. Christian Audigier, Inc.* (C.D.Cal. 2010) 717 F.Supp.2d 965, 990.) As one federal court has observed, a contrary rule based “on the number of users who can access information” would be unworkable because it “would result in arbitrary line-drawing.” (*Ibid.*) The “[p]rivacy protection provided by the SCA” cannot reasonably be made to “depend on the number of Facebook friends that a user has.” (*Ehling v. Monmouth-Ocean Hosp. Serv. Corp.* (D.N.J. 2013) 961 F.Supp.2d 659, 668.)

In addition, because permissible disclosure under section 2702(b)(3) requires user consent, users may revoke consent by taking a once-public post and rendering it private, or deleting the post or their entire account. By doing so, a user has “actively restrict[ed] the public from accessing the information.” (*Ehling, supra*, 961 F.Supp.2d at p. 668.) In that case, the consent exception of section 2702(b)(3) is no longer satisfied because any disclosure to persons that are not currently authorized to access the communication would “exceed[] the boundaries” of the since-revoked consent. (*Gilday v. Dubois* (1st Cir. 1997) 124 F.3d 277, 297 [considering the conceptually related consent exception to the Wiretap Act and holding

that “a reviewing court must inquire into the *dimensions of the consent* and then ascertain whether the interception exceeded those boundaries”] [quoting *Griggs-Ryan v. Smith* (1st Cir. 1990) 904 F.2d 112, 119].)

Thus, content is “public,” in the operative sense, only if it is unrestricted such that anyone (including defendants) can access it. If it is restricted in any way, such that defendants are not able to access it without the Providers’ involvement, then the content is not public and the lawful consent exception of section 2702(b)(3) would not be satisfied.

3. Legislative history and court opinions suggesting that the SCA does not apply to public content refer to the access provisions of section 2701, not the disclosure provisions of section 2702.

The supplemental briefing order refers to several authorities suggesting that the SCA may not apply to publicly available communications. Those authorities primarily refer to section 2701 of the SCA, which criminalizes unauthorized access to stored communications. They say little about the disclosure prohibitions of section 2702(a)(1) or (2), which, as explained above, are not subject to a similar blanket exception for publicly available content.

a. The text and legislative history of the SCA confirm that section 2701 is subject to a “public content” exception that does not apply to section 2702.

Section 2701 of the SCA provides for the criminal punishment of anyone who “intentionally accesses without authorization a facility through which an electronic communication service is provided” or “intentionally exceeds an authorization to access that facility” and “thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system[.]” (18 U.S.C. § 2701(a)(1), (2).)

While section 2701 does not contain an exception for publicly available content, the access provisions of the SCA are subject to an

exception contained in the Wiretap Act, which states that “[i]t shall not be unlawful under [the SCA] for any person . . . to intercept or *access* an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.” (18 U.S.C. § 2511(2)(g)(i) [emphasis added].) Thus, while section 2701 prohibits unauthorized access to communications, section 2511(2)(g)(i) makes clear that access is not prohibited if a system is configured to be publicly accessible. Importantly, the exception applies only to access. Section 2511(2)(g)(i) contains no exception for “divulg[ing]” communications, and thus by its terms it does not alter the disclosure prohibition of section 2702(a)(1) or (2).

The legislative history is consistent with this construction. In discussing “New section 2701,” the Senate Judiciary Committee noted that “[t]his provision addresses the growing problem of unauthorized persons deliberately gaining access to ... electronic or wire communications that are not intended to be available to the public.” (Sen. Rep. No. 99-541, 2d Sess., pp. 35-36, reprinted in 1986 U.S.C.C.A.N., p. 3599.) Congress was aware “that some electronic communication services offer specific features, sometimes known as computer ‘electronic bulletin boards,’ through which interested persons may communicate openly with the public to exchange computer programs in the public domain and other types of information that may be distributed without legal constraint,” but it had no “intent to hinder the development or use of ‘electronic bulletin boards’ or other comparable services.” (H. R. Rep. No. 99-647, *supra*, p. 62.) Thus, “[t]o access a communication on such a system should not be a violation of the law.” (*Ibid.*)

Importantly, this language refers to section 2701, not section 2702, because it appears within a section of the legislative history entitled “Proposed section 2701.” (H. R. Rep. No. 99-647, *supra*, p. 62.) The

legislative history of section 2702, which falls under a section entitled “Proposed section 2702,” contains no similar discussion suggesting that section 2702(a)(1) or (2) does not apply to public content. Instead, as discussed above, it says only that the “lawful consent” exception may permit disclosure of content “freely made available to the public” depending on the “conditions governing disclosure and use.” (*Id.* at p. 66.)

b. Case law suggesting a “public” exception to the SCA also focuses on access, not disclosure.

Consistent with the SCA’s text and legislative history, case law suggesting a “public content” exception for the SCA does so predominantly within the context of section 2701, not section 2702. That is likewise true of the authorities referenced in the Court’s order for supplemental briefing. Most of those authorities refer to section 2701, while one case (*People v. Harris*) addresses section 2703 and expressly holds that it applies to public content. Only two of the cases address section 2702, and of those, one (*Viacom Int’l. Inc. v. YouTube LLC*) supports Providers’ construction of that provision.

For example, in *Konop v. Hawaiian Airlines* (9th Cir. 2002) 302 F.3d 868, the Ninth Circuit considered an alleged violation of section 2701 based on unauthorized access. The plaintiff in *Konop* was a former employee of Hawaiian Airlines who had set up a password-protected bulletin board on which employees could discuss issues and concerns. The airline circumvented the password on the bulletin board to access the communications, and the plaintiff sued under section 2701, arguing that the airline did not have authorization to access the communications in the bulletin board. The court recognized both that section 2701 was intended to “protect electronic communications that are configured to be private” and that the statute applied to the plaintiff’s password-protected website. (*Id.* at p.

875.) The court did not consider section 2702 because disclosure by a provider was not at issue.

In *Snow v. DirecTV, Inc.* (11th Cir. 2006) 450 F.3d 1314, the Eleventh Circuit considered a similar claim of unauthorized access. In that case, Snow hosted a website critical of DirecTV's anti-piracy efforts. The website purported to "expressly forbid[] access by DIRECTV and its agents." (*Id.* at p. 1316.) After DirecTV employees and its lawyers accessed the website, Snow sued on the theory that they had violated section 2701. The court rejected that claim, emphasizing that "Snow's complaint fails to allege, as the SCA requires, that the website was configured to not be readily accessible by the general public." (*Ibid.*) The court noted that section 2511(2)(g)(i) expressly authorizes interception of or access to publicly accessible communications, and it concluded that providing a warning that purportedly limited access to a website was not sufficient to prohibit access. If such a warning were sufficient, the court reasoned, "the floodgates of litigation would open and the merely curious would be prosecuted." (*Id.* at p. 1321.) As in *Konop*, the court did not address section 2702. (Accord, *Ehling, supra*, 961 F.Supp.2d at p. 666 [considering an alleged violation of section 2701 and holding that where a user takes steps to limit access, a communication is "configured to be private"].)

In both *Konop* and *Snow*, the courts used the terms "SCA" and "ECPA" (the Electronic Communications Privacy Act) as shorthand for section 2701. That practice led to confusion, as later reflected in *Crispin v. Christian Audigier Inc.* (C.D.Cal. 2010) 717 F.Supp.2d 965. In that case, the Central District of California determined that section 2702 prohibited the litigants from using a subpoena to compel content from Facebook, but when presented with defendant's argument that some communications may have been available to the public, it concluded that further findings of fact were necessary to determine the privacy settings of those communications. (*Id.* at

pp. 990-91.) In suggesting that the SCA did not apply to publicly available content, the court incorrectly relied on *Konop, Snow*, and the sections of the legislative history addressing section 2701, but it did not appropriately consider the text or legislative history of section 2702 with respect to public content. Thus, to the extent that the court in *Crispin* suggested that section 2702(a) does not apply to content that is readily accessible to the general public, it relied on misapplication of authority analyzing section 2701.

The other case involving section 2702 considered the public nature of a communication in the context of consent. In *Viacom Int'l Inc. v. YouTube LLC* (S.D.N.Y. 2008) 253 F.R.D. 256, the court found “colorable” the plaintiffs’ argument that users who post content such that it is “freely made available to the public” may have consented to disclosure. (*Id.* at p. 265.) It did not hold that public content is exempt from section 2702, and in fact it acknowledged that “[i]t is not clear from this record whether plaintiffs’ interpretation of the ECPA is correct.” (*Ibid.*)

The final case mentioned in the Court’s order is *People v. Harris* (Crim. Ct. N.Y. 2012) 949 N.Y.S.2d 590, in which a New York appellate court considered section 2703 of the SCA. Section 2703 defines the mechanisms through which the government can compel disclosure of information in criminal cases, and the *Harris* court held that section 2703 applies to the government’s efforts to compel Twitter to disclose public tweets. The court did not hold that public content is exempt from the SCA generally, or from section 2703 specifically—to the contrary, the court required the government to comply with the SCA and obtain a search warrant in order to compel Twitter to disclose content that was 180 days old or less as required by section 2703. (*Id.* at pp. 878-79 [holding that “ECS content information less than 180 days old (tweeted on December 31, 2011) may only be disclosed pursuant to a search warrant” and requiring the government to obtain a new search warrant for this content].) Thus, while

Harris did not address section 2702, it, too, supports the position that public communications are not excluded from the voluntary disclosure regime of section 2702.

C. The consent exception of § 2702 may permit disclosure but does not require it.

As explained above, this case does not require the Court to consider the application of the SCA to publicly available content. To the extent that the Court does reach that issue, however, it should conclude that the SCA leaves the disclosure of such content to the discretion of the provider. A provider is permitted under the SCA to disclose such content, but it is not required to do so.

1. The lawful consent exception, like all exceptions of section 2702, is discretionary and does not permit a private litigant to compel disclosure by a provider.

While section 2702(b)(3) authorizes a provider to disclose content with the lawful consent of the originator, it does not compel provider disclosure. Instead, it vests discretion in a provider by stating that a provider “may” disclose content based on “lawful consent.” (18 U.S.C. 2702(b)(3); see *United States v. Rodgers* (1983) 461 U.S. 677, 706 [103 S.Ct. 2132, 76 L.Ed.2d 236] [“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”].) Congress’s use of the word “may” in section 2702(b)(3) is particularly significant when contrasted with other provisions of the statute. Section 2703(c)(1)(C), for example, states that the government can “require” a provider to disclose non-content records or other information when the government “has the consent of the subscriber or customer to such disclosure.” (18 U.S.C. § 2703(c)(1)(C).) No parallel provision authorizes the government, let alone a private party, to require disclosure of *content* based on consent. The structure of the statute thus demonstrates that Congress meant to ensure that providers would retain the discretion to

choose whether to disclose content based on a user's consent. (See *Russello v. United States* (1983) 464 U.S. 16, 23 [104 S.Ct. 296, 78 L.Ed.2d 17] ["Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."] [quoting *United States v. Wong Kim Bo* (5th Cir. 1972) 472 F.2d 720, 722].)

Courts interpreting the SCA have repeatedly confirmed that "while consent may *permit* production by a provider, it may not *require* such a production." (*In re Facebook* (N.D.Cal. 2012) 923 F.Supp.2d 1204, 1206; see also *Schweickert v. Hunts Point Ventures, Inc.* (W.D.Wash. Dec. 4, 2014) No. 13-cv-675RSM, 2014 WL 6886630, at *13 ["Even if the Court could compel Plaintiff to consent to the disclosure of some [of] her emails under Rule 34, the providers would still only be permitted, but not required, to turn over the contents under 18 U.S.C. § 2702(b)(3)"]; *State v. Bray* (Or. Ct. App. 2016) 383 P.3d 883, 891 [noting that "under [the] plain language of 18 USC § 2702(b), disclosure pursuant to exception is discretionary"].)

That interpretation of section 2702(b)(3) makes sense in light of the overall purpose of the SCA to protect user privacy. (*Sams v. Yahoo! Inc.* (9th Cir. 2013) 713 F. 3d 1175, 1179 [the purpose of the SCA is "to protect[] the privacy of electronic communications"]; *United States v. Graham* (4th Cir. 2016) 824 F. 3d 421, 438 (conc. opn. of Wilkinson) [the SCA "creates a set of Fourth Amendment-like privacy protections by statute"] [quoting *Sams*], cert. granted *sub nom. Graham v. United States* (2016) __ U.S. __; *Garcia v. City of Laredo, Tex.* (5th Cir. 2012) 702 F.3d 788, 791 ["Congress passed the SCA as part of the Electronic Communications Privacy Act to protect potential intrusions on individual privacy"].) The existence of consent may sometimes be obvious—such as where a user expressly informs the provider that he or she consents to disclosure of content contained in that

account. But in many cases, the presence of lawful consent may not be obvious—such as where the consent is provided to the provider in a form that does not permit the provider to verify that the person providing the consent is the person who created and used the account.

In addition, if the existence or alleged existence of a voluntary exception such as consent under § 2702(b) were sufficient to compel disclosure, then law enforcement could compel disclosure of content based on that exception, even though the SCA does not permit a governmental entity to compel disclosure of content with anything other than a search warrant. (See 18 U.S.C. § 2703(a), (b); *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 288 [holding that the government must obtain a warrant to obtain communications content from a provider].) The voluntary nature of the §2702(b) exceptions is further supported by the other exceptions. For example, § 2702(b)(5) creates an exception that allows a provider to disclose content “as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service.” 18 U.S.C. § 2702(b)(5). If the existence of a § 2702(b) exception were sufficient for a third party to compel disclosure of content, then the government or any private party could compel disclosure by alleging that disclosure would help protect the provider. (See *O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1442 [rejecting argument that section 2702(b)(5) authorizes compelled disclosure in response to a subpoena, noting that “effect of such an interpretation would be to permit disclosure whenever someone threatened the service provider with litigation.”].) Such a construction of the SCA would create an end-run around the statute and effectively replace the provisions of § 2703 that limit the circumstances in which the government can obtain stored communications.

The only published, contrary authority interpreting the lawful consent exception is the decision of the Court of Appeal in *Negro v. Superior Court*