

Electronic Surveillance Law

Act I

1

Barking at RFID



- Many stores use Radio Frequency ID tags (RFID) to track merchandise. RFID tags respond when "interrogated" with a particular radio frequency. If a pallet of razors is stolen from WalMart, can police set up a RFID checkpoint to see if anyone leaves the parking lot with the hot merchandise?
- If they identify a car that responds, can they use the RFIDs to track the car? The person carrying the razors?

2

Sources of protection against surveillance

- Law
- Architecture/Technology
- Markets
- Norms

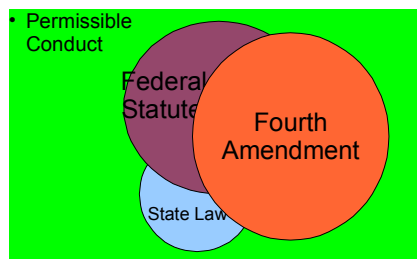
3

Sources of protection against surveillance

- Law:
 - Fourth Amendment
- Statute
 - Federal
 - State

4

Sources of legal protection



5

Federal Statutes

- Wiretap Act (Omnibus Crime Control and Safe Streets Act of 1968)
- Electronic Communications Privacy Act (ECPA) of 1986
 - Wiretap Act, updated
 - Stored Communications Privacy Act
 - Pen Register / Trap and Trace
- USA PATRIOT Act, 2001

6

Communications Privacy

- Type of communication
 - Wire
 - Oral
 - Electronic
- What's accessed
 - Content
 - Addressing
 - Subscriber information
- Timing of access
 - Real-time (intercept)
 - Stored communications

7

18 U.S.C. § 2510, Definitions

- (1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;
- (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;
- (12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include:
 - (A) any wire or oral communication;
 - (B) any communication made through a tone-only paging device;
 - (C) any communication from a tracking device (as defined in section 3117 of this title); or
 - (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

8

§ 2510, Definitions

- (4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.
- (17) "electronic storage" means--
 - (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
 - (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

9

§ 2511. Wiretap Act Prohibitions

- (1) Except as otherwise specifically provided in this chapter any person who--
- (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
- (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--
 - (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
 - (ii) such device transmits communications by radio, or interferes with the transmission of such communication; or
 - (iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce.
- (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
- (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

10

§ 2701. Stored Communications

- (a) **Offense.**--Except as provided in subsection (c) of this section whoever--
 - (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
 - (2) 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 shall be punished as provided in subsection (b) of this section.
- Recall that "electronic storage" means-- (§ 2510(17))
 - (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
 - (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

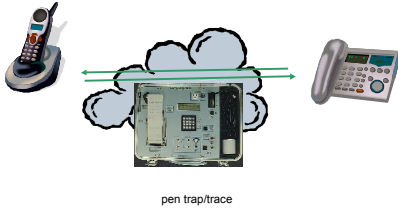
11

Telephone call from Alice to Bob
How could law enforcement record it?



12

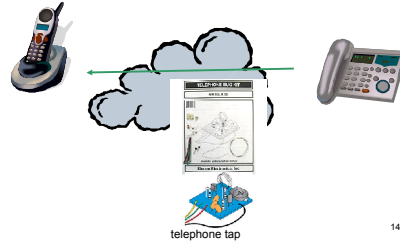
Telephone call from Alice to Bob



pen trap/trace

13

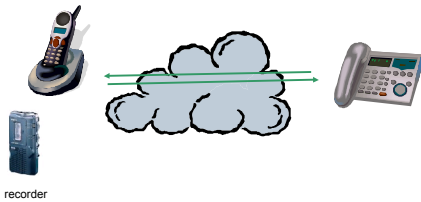
Telephone call from Alice to Bob



telephone tap

14

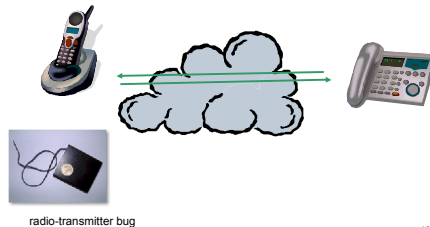
Telephone call from Alice to Bob



recorder

15

Telephone call from Alice to Bob



radio-transmitter bug

16

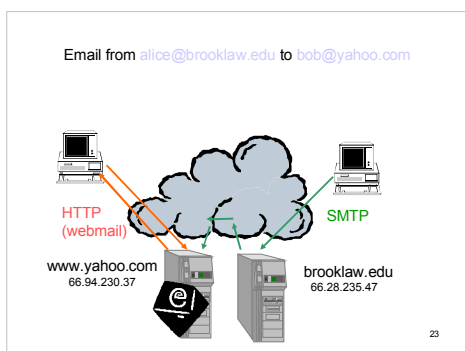
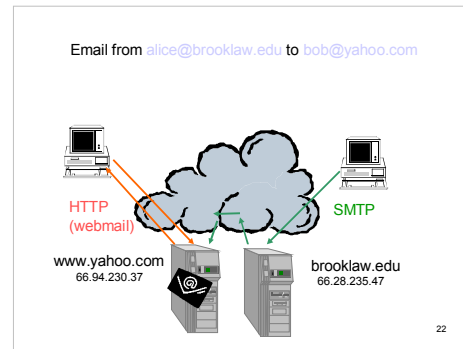
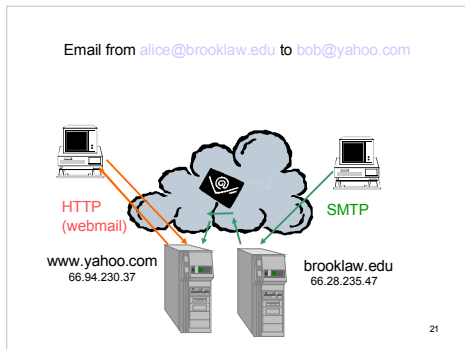
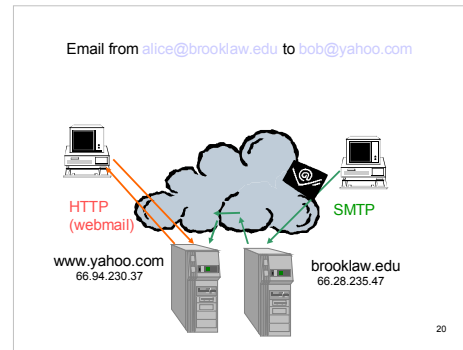
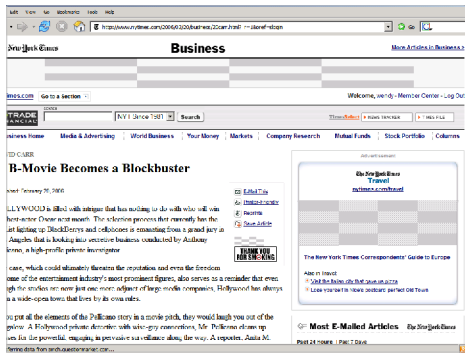
Hypos

- Eve wants to listen to the conversation between Alice and Bob. Has she violated the law if:
 - she clips a recorder to the telephone line outside Alice's house?
 - she uses a scanner to pick up Bob's cell phone communicating with the tower?
 - she plants a bug in Alice's study?
 - she asks Doug to hold a tape recorder outside Bob's bedroom window?
 - she plants a video-only recorder at Bob's door?

Hypos

- Law enforcement agents want to listen to the conversation between Alice and Bob. Can they? How?
 - if they believe Bob is planning to shoplift a pack of WalMart razors?
 - if they believe Alice and Bob are engaged in a drug smuggling operation?
 - They file an affidavit saying "Alice is a shady character, and wiretaps are the easiest way to solve these crimes"?
 - They pick up the line and hear Alice talking about taking her kids to soccer practice. Can they keep listening?

18



STEVE JACKSON GAMES

The logo for Steve Jackson Games is shown, featuring a pyramid and the text "STEVE JACKSON GAMES". Below the logo is a list of products: "Board Games", "Role Playing Games", "Tabletop Games", "Video Games", "Novels", "Comics", "Cartoon Strips", "Puzzles", "Dice", "Dice Games", "Dice Sets", "Dice Storage", "Dice Trays", "Dice Towers", "Dice Shakers", "Dice Rollers", "Dice Containers", "Dice Bags", "Dice Boxes", "Dice Cases", "Dice Covers", "Dice Mats", "Dice Pads", "Dice Rugs", "Dice Tables", "Dice Umbrellas", "Dice Vests", "Dice Wigs", "Dice Hats", "Dice Shoes", "Dice Socks", "Dice Gloves", "Dice Goggles", "Dice Masks", "Dice Scarves", "Dice Suits", "Dice Dresses", "Dice Skirts", "Dice Pants", "Dice Shorts", "Dice Undershorts", "Dice Underwear", "Dice Socks", "Dice Shoes", "Dice Socks", "Dice Shoes", "Dice Socks", "Dice Shoes", "Dice Socks".

claims:

- Privacy Protection Act
- Wiretap Act (ECPA Title I)
- Stored Communications Act (ECPA Title II)



Trial court ruled for plaintiffs

- Privacy Protection Act
- Stored Communications Act (ECPA Title II)

On appeal:

- Wiretap Act (ECPA Title I)
 - Interception?