

U.S. ACCESS TO ELECTRONICALLY STORED EVIDENCE ABROAD

Is Access to Cloud-Based Evidence
Abroad About to Change?

Joseph J. Schwerha IV, M.S., J.D.



Microsoft v. Ireland

Can a U.S. law enforcement agency compel a U.S. company to disclose the content of electronically stored data the provider stores outside the U.S.?

Scope: broad v. narrow

Not Arguing Who is Right or Wrong

Facts

- On December 4, 2013, Warrant Issued - SCA
- Microsoft objected to producing information stored in the Ireland datacenter but produced the non-content data stored in the U.S.
- December 18, 2013, Microsoft moved to vacate the warrant for the content.
 - The magistrate judge rejected the motion to vacate.
 - Microsoft appealed to the District Court for the Southern District of New York.
 - Microsoft appealed to the Second Circuit Court of Appeals

Microsoft's Arguments

- Amounts to Extraterritorial Search & Seizure via search warrant.
- Rule 41 does not give authorization for extraterritorial application, the Government cannot achieve a search and seizure in Ireland.
 - See USA PATRIOT Act (nationwide service v. worldwide service)
- In 1990 , the Supreme Court rejected a proposed amendment to Rule 41 that would have permitted issuance of warrants to search property outside the U.S.
 - Microsoft stated that the Government could compel disclosure of content stored in Ireland using the Ireland-U.S. Mutual Legal Assistance Treaty (MLAT).
- Bad Consequences if we Ignore MLATs.

The Government's Argument

- U.S. service providers cannot avoid compliancy with compulsory SCA process simply by storing data abroad.
- Location of storage provider is only important thing
- Law allows for like circumstances with use of subpoena
- SCA warrants are different from a normal warrant.
- Failure would undermine criminal investigations.

The Magistrate's Opinion

- statutory language is ambiguous as to whether 2703 (a) incorporates substantive warrant requirements of Rule 41, or just procedural.
 - They discovered that warrants issued under SCA are “Hybrids:” part warrant and part subpoena.
 - An SCA warrant is obtained like warrant (based on the showing of probable cause to a magistrate) and executed like a subpoena , that it is served on the provider that posses information.
- search does not even occur until the data is reviewed by the law enforcement in the U.S., so there is no extraterritorial search.
- MLAT process was “slow and laborious” and that countries have the discretion to turn down MLAT requests.

Others

- Generally take position of Microsoft
- Various Reasoning
 - Jan Phillip Albrecht, MEP
 - Irish Special Interest Groups
 - Verizon, EFF, Apple, Cisco
 - Use MLATs
 - Seizure for Sure Abroad
 - Zwilling, Kerr, Westmoreland
 - Use MLATs

Government Requested Change to Fed. R. Crim. P. 41

- 2013 Gov't Filed Request
- Proposed Rule is published, approved by Advisory body and one vote from being submitted to US Supreme Court
- What are proposed changes?

Two New Circumstances

- (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district

if:

New Circumstances

the district where the media or information

is located has been concealed through

technological means; or

New Circumstances

(B) in an investigation of a violation of
18 U.S.C. § 1030(a)(5), the media are
protected computers that have been
damaged without authorization and are
located in five or more districts.

Issues

- Is the about Venue?
- Does search occur when obtain data?
- Can DOJ/Judge circumvent MLATs?
- What about legitimate businesses using encryption?
- Does this allow for too big of a search?
- Will this circumvent wiretap requirements?
 - See NIT use
- *Shouldn't this be before Congress?*

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