



# PRIVACY & SECURITY LAW



## REPORT

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### Litigation

#### Actual Damages

## Unresolved Questions: When Are Actual Damages Required in Stored Communications Act Cases?

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**A** reoccurring question in privacy litigation is when actual damages are required for a plaintiff to maintain an action. Recently, in contrast to other courts, the U.S. Court of Appeals for the Fourth Circuit, in *Van Alstyne v. Elec. Scriptorium Ltd.*, No. 07-1892, 2009 WL 692512 (4th Cir. March 18, 2009) (8 PVLR 467, 3/23/09) ruled that a plaintiff must prove actual damages to recover a statutory award under the Stored Communications Act (“SCA”), 18 U.S.C. § 2707(a), but need not prove damages in order to recover either punitive damages or attorneys fees.

This hybrid ruling not only highlights the complexity of the issue but also suggests that litigation under the SCA and similar legislation may be fueled by the burn rate of attorneys’ fees as opposed to any specific harm suffered by a potential plaintiff.

### The SCA

The SCA is part of the Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. § 2510 *et seq.*, and it precludes a person from, intentionally and without authorization accessing a facility through which an electronic communication service is provided and thereby obtaining, altering, or preventing authorized access to a

wire or electronic communication while it is in electronic storage.<sup>1</sup> In addition, the SCA creates a private right of action for “any other person aggrieved” by a violation of the SCA, and permits recovery of equitable relief, reasonable attorneys’ fees, punitive damages, as well as other damages. Those other damages are statutorily defined as the sum of the actual damages suffered by the plaintiff and any profits made by the defendant due to the violation, which in no case can be below the SCA’s statutory minimum of \$1,000.<sup>2</sup> It is the latter form of damage—the actual damage provision—that was at issue in *Van Alstyne*, as it related to the apparent “floor” created for actual damages: \$1,000 per violation.<sup>3</sup>

### The Van Alstyne Case

On March 18 the Fourth Circuit (which includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia) handed down its decision in *Van Alstyne* and ruled that while a plaintiff must establish actual damages to obtain the statutory award under the

<sup>1</sup> 18 U.S.C. § 2701(a)(1-2).

<sup>2</sup> 18 U.S.C. § 2707 (a-c).

<sup>3</sup> For a general discussion of ECPA, see Andrew Serwin, *Information Security and Privacy: A Practical Guide to Federal, State, and International Law*, Chapter 3 (2d ed. West 2008).

SCA, a plaintiff need not prove actual damages in order to obtain either punitive damages or attorneys' fees. In order to understand the *Van Alstyne* decision and its potential impact on privacy litigation, it is important to understand the facts of the case and the legal landscape that preceded the decision.

Bonnie Van Alstyne was employed by Electronic Scriptorium Limited ("ESL") as its vice president of marketing. While employed by ESL, Van Alstyne was assigned a company e-mail account, but she occasionally used her personal AOL password-protected e-mail account to conduct business. During the course of her employment, Van Alstyne claimed to have been sexually harassed by one of the owners of ESL and was ultimately terminated. Multiple lawsuits resulted, the first being a complaint by Van Alstyne seeking recovery for sexual harassment and unemployment benefits. ESL responded by filing its own suit against Van Alstyne alleging a number of business torts. During discovery, ESL produced some of Van Alstyne's e-mails which she suspected had been improperly obtained from her personal AOL account. Van Alstyne's suspicions were confirmed during the deposition of the alleged harasser, ESL's principal, who admitted to having repeatedly accessed Van Alstyne's AOL account after she left ESL. Armed with this information, Van Alstyne filed a second action against the principal and ESL, seeking recovery under the SCA.

Significantly, Van Alstyne's SCA complaint went through several amendments. Originally, Van Alstyne made a claim for actual damages which encompassed a claim for attorneys' fees and costs in defending the ESL complaint against her as well as a claim for mental anguish and emotional distress. Subsequent amendments ultimately resulted in a pleading that withdrew Van Alstyne's claims for emotional distress and any claim for damages incurred in the defense of the ESL complaint. Instead, Van Alstyne's claim for relief was limited to punitive damages and "statutory minimum damages" under the SCA. The case went to trial and the jury rendered a verdict in favor of Van Alstyne, awarding statutory damages of \$1,000 per violation of the SCA, punitive damages and attorneys' fees. Thus, despite the lack of actual damages, Van Alstyne was awarded a significant sum by the jury.

### **The *Doe* and *In Re Hawaiian Airlines, Inc.* Decisions**

The defendants appealed the jury's award, arguing that Van Alstyne's lack of actual damages precluded her recovery of statutory damages under the SCA. In addressing this issue, the *Van Alstyne* court looked not only to the remedial provisions of the SCA, but to similar statutory analysis of other privacy decisions.

In *Doe v. Chao*, 540 U.S. 614 (2004) (3 PVL 235, 3/1/04), the U.S. Supreme Court considered whether a plaintiff must prove actual damages to qualify for the minimum statutory award under the Privacy Act of 1974 (5 U.S.C. § 552a(b)). The Privacy Act provides governmental agencies detailed guidance as to how to handle records and permits civil relief to those harmed by the government's failure to comply.<sup>4</sup> In reviewing

<sup>4</sup> Andrew Serwin, *Information Security and Privacy: A Practical Guide to Federal, State, and International Law*, §§ 25:6-25:32 (2d ed. West 2008).

the express language of the Privacy Act, Justice David Souter for the majority noted that the Act used the phrase "actual damages sustained," and therefore opined that a "straightforward textual analysis" resulted in the conclusion that statutory damages were available only to plaintiffs who proved they suffered actual damages due to the violation of the Act.<sup>5</sup> In doing so, the court noted that the lower courts were divided as to what, exactly, "actual damages" were but, as the issue was not before the court, declined to make this determination. The court stated that out-of-pocket expenses necessary for recovery of a statutory award "suffice to qualify under any view of actual damages."<sup>6</sup>

The *Van Alstyne* court applied this holding and found that a plaintiff must prove actual damage as a prerequisite to obtaining statutory damages under the SCA because, like the Privacy Act, the SCA limits the award of damages to "actual damages suffered" as well as "any profits." Thus, the *Van Alstyne* Court believed it was bound by the Supreme Court's statutory analysis in *Doe* regarding language that was "in all important respects identical to that already interpreted by the Supreme Court." In addition, the *Van Alstyne* court noted that if Congress had wished a different result, it would have used language permitting the recovery of either actual damages or statutory damages.<sup>7</sup>

In arguing against this result, Van Alstyne relied upon the decision of *In re Hawaiian Airlines, Inc.*, 355 B.R. 225 (D.C. Haw. 2006) (5 PVL 1207, 9/4/06). There the district court considered a pilot's claim that Hawaiian Airlines had allegedly gained improper access to a website he maintained by posing as two employees who were authorized to access the site. Apparently the website was being used to post bulletins critical of Hawaiian Airlines as well as the pilot's union. The pilot (Konop) brought an action against Hawaiian Airlines claiming violations of the Wiretap Act and the SCA, among other claims. While aware of the *Doe* decision, the Hawaiian district court nevertheless ruled that Konop did not need to prove actual damages or profits. In doing so, the *In re Hawaiian* court distinguished *Doe* by noting that the SCA (as opposed to the Privacy Act) "explicitly states that a person aggrieved by a violation of the Act may recover and this recovery is not tied to actual damages or profits." *In re Hawaiian*, 355 B.R. at 230. However, the *Van Alstyne* court rejected this argument, stating that the language in the SCA providing recovery to an "aggrieved person" is limited to relief "as may be appropriate" which is, in turn, defined as in-

<sup>5</sup> See *Doe*, 540 U.S. at 620-627.

<sup>6</sup> *Doe*, 540 U.S. at 627, fn. 12, citing *Fitzpatrick v. IRS*, 665 F.2d 327, 331 (11th Cir. 1982) (actual damages are restricted to pecuniary loss) and *Johnson v. IRS*, 700 F.2d 971, 972-974 (5th Cir. 1983) (actual damages can cover adequately demonstrated mental anxiety even without any out-of-pocket loss).

<sup>7</sup> The *Van Alstyne* Court referenced The Wiretap Act, which is also found in the ECPA, and deals with unauthorized access to electronic communications *while they are in transit* (as opposed to when they are being stored). The Wiretap Act provides for "... the greater of ... the sum of the actual damages suffered by the plaintiff and any profits made by the violator ... or ... statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000." 18 U.S.C. § 2520(c)(2), see also Andrew Serwin, *Information Security and Privacy: A Practical Guide to Federal, State, and International Law*, Chapter 5 (2d ed. West 2008).

cluding “damages under subsection (c),” which requires “actual damages.”<sup>8</sup>

### **Punitive Damages and Attorneys’ Fees**

Despite requiring “actual damages” to be proven as a threshold matter for the recovery of statutory damages under the SCA, the *Van Alstyne* court noted that the same was not true for claims of punitive damages or attorneys’ fees. This result is again based upon the language of the SCA. Specifically, Section 2707(c) of the SCA states that “[i]f a violation [of the SCA] is willful or intentional, the court may assess punitive damages.” The *Van Alstyne* court noted that this provision lacks any limiting language requiring actual damage and further noted that the jury found that the claimed acts were intentional and willful. Thus, the award of punitive damages did not have a threshold requirement of “actual damages” to be recoverable. Similarly, the *Van Alstyne* court considered Section 2707(b)(3) of the SCA, which provides for “a reasonable attorney’s fee and other litigation costs reasonably incurred.” Again, the court believed there was no limiting language requiring actual damage to be proven prior to an award of attorneys’ fees.

### **Lessons Learned from *Van Alstyne***

There are several lessons to be learned from the *Van Alstyne* decision. Most obviously, the issue of standing (whether someone is entitled to recover) based upon the existence of actual damage will continue to occupy the courts in privacy litigation. In addition, two outstanding questions are (i) whether actual damage must be proven for a statutory recovery; and (ii) what constitutes “actual damage.” The Supreme Court in *Doe* suggests that it might be out-of-pocket costs and/or claims

for emotional distress. However, this is far from the last word on the matter. Notably, the plaintiff in the *Van Alstyne* case had amended her complaint to eliminate claims for either of these potential measures of “actual damage,” and therefore the question remains unresolved.

Second, if the reasoning of the *Van Alstyne* court is adopted by the majority of jurisdictions, it may result in privacy litigation being fueled by the prospect of the recovery of attorneys’ fees and punitive damages, without any need to establish actual damages. This will likely result in situations where plaintiffs’ counsel will have little incentive to resolve cases prior to trial, given that the expenditure of fees is, in and of itself, a damage (at best it may result in a circumstance similar to California’s Proposition 65 cases where plaintiffs seek an early settlement on meritoriously weak cases based upon the threat of an attorneys’ fee award).<sup>9</sup>

Third, the *Van Alstyne* decision is yet another reminder to employers that a company’s access to an employee’s e-mail account is questionable and fraught with liability issues even when the account is accessed through company property. At the very least, employers should review their e-mail and electronic communications policies and should consider potential liability for accessing employee electronic records, especially those that are either maintained or exist through a third-party provider as opposed to the employer. Even in the heat of litigation, care should be used when accessing such potentially private information as it may result in further litigation and liability—something ESL and its owner learned the hard way.

<sup>8</sup> 18 U.S.C. § 2707(a-c).

<sup>9</sup> Proposition 65 is a statute requiring specific warnings regarding knowledge of the potential of toxic substances in consumer goods and/or environments (e.g., gas stations). Failure to provide such warnings and comply with the terms of Proposition 65 result in statutory damages including attorneys’ fees.