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Wiretapping The Internet: Is VoIP Different?

A coalition of Internet Service Providers (“ISP CALEA Coalition”) filed a brief in opposition to Law Enforcement’s Petition. It argued that there is no basis for a blanket Commission finding that all broadband telephony services are covered by CALEA. The ISP CALEA Coalition recognizes that Law Enforcement has a great and legitimate interest in accessing communications content and call-identifying information in order to investigate and prevent crime (including the serious threat of terrorism), and its members have implemented extensive measures to ensure that Law Enforcement has the capabilities it needs to perform its mission within the bounds of applicable law. But the Petition goes well beyond the law. Specifically, applying CALEA to broadband access and broadband telephony would be inconsistent with the statute, legislative history, and Commission’s decisions under the Communications Act that many such services are information services.

In CALEA, Congress struck a careful balance among “three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.” The ISP CALEA Coalition believes that the Petition overturns this balance, exalting law enforcement’s interest in intercept capabilities above all of the other objectives embodied in CALEA.

CALEA addressed the interests of law enforcement by mandating carefully focused intercept capabilities for providers of common carrier telecommunications services (including commercial wireless services), and certain other electronic communications services that replace local exchange service. At the same time, CALEA preserved the *status quo* for Internet services and other “information services,” by explicitly excluding them from the coverage of CALEA. Thus, these services remain free to develop without having to implement required network modifications to assist law enforcement, but the obligations of Title III and ECPA continue to apply. For “information services,” the assistance requirements of Title III and ECPA mean that service providers must cooperate with law enforcement by turning over information from their networks; the difference is that, in order to promote continued technological innovation, their networks need not be redesigned to provide particular intercept capabilities.

The language and structure of CALEA demonstrate at every turn Congress’s commitment to protecting innovation from law enforcement regulation. Even in traditional telecommunications, Congress did not offer law enforcement a guarantee that every conversation would always be subject to wiretap. Nor did Congress offer an assurance that future wiretaps must continue to be as convenient to law enforcement as they were in 1994. Finally, Congress refused to create a regulatory system that depends on getting prior clearance from regulators before new technologies are deployed. Instead, it set a few simple requirements mandating only the results that telecommunications carriers must achieve, not the methods they must use. Rather than obtain prior clearance, carriers may deploy the technologies as they see fit, subject only to the risk of a civil enforcement action by law enforcement. And the law enforcement agencies that bring such suits must demonstrate both that alternative technologies for obtaining the same information are not reasonably available and that the compliance by the carrier was reasonably achievable.

The Petition proposes that the Commission simply ignore these limitations and impose a regulatory scheme that Congress rejected. The Petition requests that the Commission find that all providers of “broadband access” and “broadband telephony” services – regardless of their technology or market penetration – are covered by CALEA. However, the statute, legislative history, and Commission precedent all clearly show that broadband telephony is an information service, not covered by CALEA. Congress intended this result, in order to allow for unfettered technological innovation, and Law Enforcement does not have the authority to rewrite CALEA.