Anonymity

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Internet Law
Fall 2007
Class 11

Where we are

- Introduction
- Part I: Public Law
  - Jurisdiction
  - Free Speech
  - Intermediaries
  - Privacy
- Part II: Private Law

In today's class

- The importance of anonymity
- Looking behind the mask
  - By private parties
  - By the government
- Compelled prospective monitoring?

Electronic privacy law

Questions you should *always* ask

- Is the intermediary revealing *content* or *non-content* information?
- Is the intermediary revealing information to a *private party* or the *government*?
- Is the intermediary revealing information *voluntarily* or being *compelled* to?
- Is the privacy breach *retrospective* or *prospective*?

Road map

What kind of data?

Content

To whom?

Government

Private parties

Non-content

Today

Thursday

Next Tuesday

Road map (zoomed in)

Today

Retrospective

	Private	Government
Voluntary		
Compelled		

Prospective

	Private	Government
Voluntary	n/a	n/a
Compelled		

ECPA (1986)

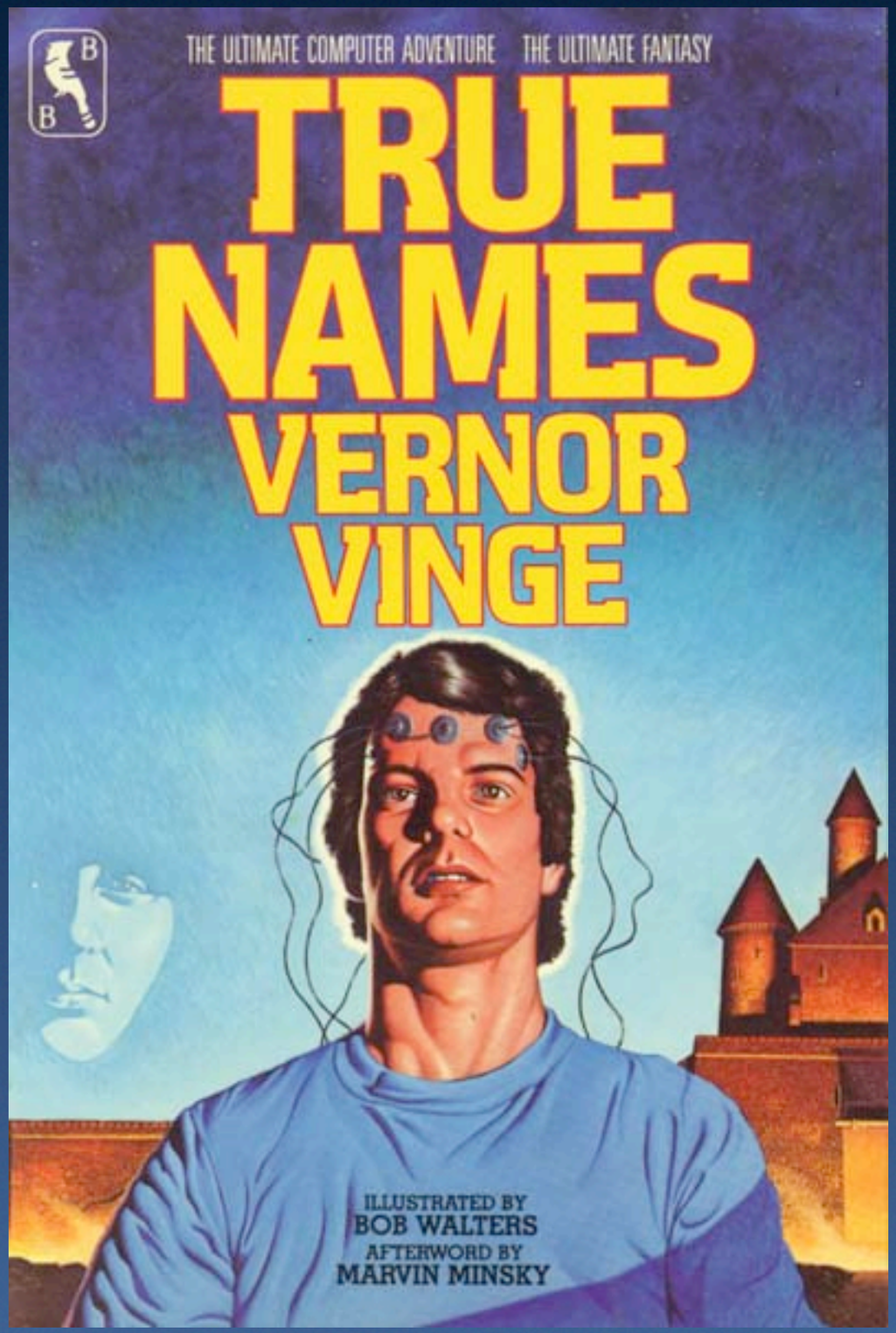
- Electronic Communications Privacy Act
  - Title I: amends Wiretap Act (18 U.S.C. §§ 2510 *et seq.*)
  - Title II: Stored Communications Act (18 U.S.C. §§ 2701 *et seq.*)
  - Title III: Pen Registers / Trap and Trace (18 U.S.C. §§ 3121 *et seq.*)

My attitude towards these statutes

- Three words: You. Can. Read.
  - The statutes are complex and changing
  - This isn't a a crim pro course
  - In practice, you'll look it up
- Goal: learn the basic framework, and where you'd look when you need to figure out the details

Why anonymity matters

Vernor Vinge, *True Names* (1981)



Who is Mr. Slippery?

- Mr. Slippery is a notorious cybercriminal
- Roger Andrew Pollack is a novelist
- What happens if someone makes the connection?
  - They show up with the black helicopters
  - File for later: why does Vinge call the government the “Great Enemy?”
- Is anonymity good or bad?

Anonymity and section 230

- Think back to last week: how would the cases have changed if there were no anonymity online?
- It's not a panacea: *Cubby, Drudge,* and *Roommates.com* involve known posters
- But *Zeran* might have been very different, and maybe *Stratton,* too

Anonymity and pseudonymity

- This is a very important distinction!
- Is Zorro anonymous or pseudonymous?
- There are times when we can hold a pseudonym accountable without knowing who's behind it
- Think of eBay

Anonymity and intermediaries

- It's hard to be anonymous face-to-face
- You generally need an intermediary to establish anonymity
  - E.g. a lawyer or a computer network
- Which means . . .
  - . . . the intermediary becomes capable of revealing your identity

Quick example

- "Ken ZZ07" posts on a web forum at scandalrag.com that I've been dumping toxic chemicals in Long Island Sound
  - I want to sue
- How do I track him/her/it down?
  - First, get an IP address from scandalrag
  - Then, get subscriber information from the owner of that IP block

Private identification

Road map (zoomed in)

Today

Retrospective

	Private	Government
Voluntary		
Compelled		

Prospective

	Private	Government
Voluntary	n/a	n/a
Compelled		

Turning over subscriber data

	Private	Government
Voluntary		
Involuntary		

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Why doesn't ECPA apply here?

- Prohibits disclosing subscriber records . . .
  - . . . but § 2702(c)(5) allows disclosure to "any person other than a governmental agency"
- Thus, if your ISP turns over your information to a private party . . .
  - . . . you're out of luck
  - (unless your contract says otherwise)

Turning over subscriber data

	Private	Government
Voluntary	OK	
Involuntary		

How about compelled disclosure?

- Joe Litigant serves your ISP with a subpoena for your identifying information
  - ECPA doesn't protect you, but can your ISP refuse to turn over the information?
- In the federal system, subpoenas are governed by Fed. R. Civ. P. 45
  - States have their own rules
  - In either, court interpretations matter

In re Subpoena Duces Tecum to AOL

- Some preliminaries:
  - A subpoena *what*?
  - Why is this an "in re" case?
  - Who has standing to move to quash?
  - What information would the court have available in ruling on the motion?

In re Subpoena Duces Tecum to AOL

- Balance: right to speak anonymously vs. no right to commit torts anonymously
- Three-part test to learn a party's identity:
  - Based on the pleadings or evidence
  - "Legitimate, good-faith basis to contend" there's a valid cause of action
  - The "subpoenaed identity information is centrally needed to advance that claim"

Doe v. 2TheMart.com

- Unknown parties go on Silicon Investor and write:
  - Truthseeker: "TMRT is a Ponzi scam that Charles Ponzi would be proud of"
  - Cluemaster: "they were dumped by their accountants … these guys are friggin liars"
  - "Lying, cheating, thieving, stealing, lowlife criminals!!!"

Doe v. 2TheMart.com

- This is a shareholder derivative suit
  - The anonymous posters aren't parties to the case
  - In fact, what's TMRT's theory of why their identities are relevant?
  - Why do you think TMRT wants to know who they are?
- The holding is unsurprising

How do these cases differ?

- The TMRT four-part test to learn a non-party's identity:
  - Sought in good faith
  - Relates to a core claim or defense
  - Directly and materially relevant
  - Unavailable from any other source
- What's different about this test? Why?

Turning over subscriber data

	Private	Government
Voluntary	OK	
Involuntary	Civil subpoena	

Government identification

Road map (zoomed in)

Today

Retrospective

	Private	Government
Voluntary	OK	
Compelled	Civil subpoena	

Prospective

	Private	Government
Voluntary	n/a	n/a
Compelled		

Voluntary disclosure to the feds?

- 18 U.S.C. § 2702(a) says otherwise:
  - "[A] provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity

Turning over subscriber data

	Private	Government
Voluntary	OK	
Involuntary	Civil subpoena	

McVeigh v. Cohen

- boysrch@aol.com sends an email to a Navy volunteer about a toy drive
  - The Navy launches an investigation
    - Through some social engineering, they learn that "boysrch" is Senior Chief Petty Officer Timothy R. McVeigh
      - (What rank comes above Senior Chief?)
- They discharge him for being gay

McVeigh v. Cohen

- Did AOL violate the ECPA?
  - Probably not; they didn't "knowingly" reveal his information to the Navy
- So if the ECPA tells intermediaries what not to do, why is the *government* in violation of it?
  - Otherwise, the statute has no bite at all
  - Hard question: what are the remedies?

Mandatory disclosure done right

- § 2702 has exceptions allowing some voluntary dislosures
  - Why didn't *McVeigh* involve "consent?"
- § 2703 lets the government get a search warrant (on probable cause) or court order (on "reasonable grounds" of relevance)
- Court orders require notice to the subscriber (not necessarily up front); search warrants don't

Turning over subscriber data

	Private	Government
Voluntary	OK	
Involuntary	Civil subpoena	18 U.S.C. §§ 2702 & 2703

Prospective identification

Road map (zoomed in)

Today

Retrospective

	Private	Government
Voluntary	OK	⊘
Compelled	Civil subpoena	18 U.S.C. §§ 2702 & 2703

Prospective

	Private	Government
Voluntary	n/a	n/a
Compelled		

ECPA (1986)

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On the governmental side

- 18 U.S.C. §§ 3121 *et seq.*
  - Pen registers (outgoing) and trap and trace devices (incoming) are phone-era technology, but ECPA uses analogous definitions for Internet-era ones
  - An *ex parte* court order will issue on a certification of relevance
  - NB: this is *only* non-content information

On the private side: *Bunnell*

- TorrentSpy offers the equivalent of hyperlinks to illegal copies of movies
  - The MPAA will soon sue TorrentSpy out of existence
- In the meantime, the MPAA would dearly love to know who's been downloading, and sic its thugs on them
  - There's just one little problem . . .

Server logs

- If TorrentSpy had a list of the IP addresses of its users, it would be discoverable (Fed. R. Civ. P. 26 and 34)
  - But TorrentSpy doesn't have such a list
  - How is that possible?
- TorrentSpy keeps the addresses only long enough to respond to requests
  - It never writes the addresses to a log file

Is data in memory discoverable?

- Or, put another way, is there a duty under the Federal Rules to *preserve* data in memory—data that would ordinarily be thrown out within seconds or minutes?
  - Interesting analogy to "fixed" for purposes of copyright (*MAI v. Peak*)
- There's one terrible fact for TorrentSpy:
  - They affirmatively disabled logging

Bigger issues

- TorrentSpy is a bad actor: they disabled logging, and just look at the name!
- But hard facts make bad law (sometimes)
- Does this case obliterate the distinction between preservation and creation?
- Does it impose design obligations on web sites and ISPs?
- How about privacy policies?

Prospective monitoring

	Private	Government
Voluntary	n/a	n/a
Involuntary	*Bunnell*	18 U.S.C. §§ 3121 *et seq.*

Road map (zoomed in)

Today

Retrospective

	Private	Government
Voluntary	OK	
Compelled	Civil subpoena	18 U.S.C. §§ 2702 & 2703

Prospective

	Private	Government
Voluntary	n/a	n/a
Compelled	FRCP 34	18 U.S.C. §§ 3121 *et seq.*

Next time

Big Brother is watching you