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WHEN IS A PHONE CALL NOT A PHONE CALL? LEGAL ISSUES ARISING FROM BUSINESS USE OF VOIP

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ABSTRACT

The Voice over Internet Protocol allows telephone calls to be placed over the Internet instead of the Public Switched Telephone Network. VoIP did not exist before 1995. Now market research predicts that by 2007, 90 percent of enterprises with multiple locations will start switching to VoIP, and it will account for 75 percent of all world voice traffic.²

This article examines current legal developments that impact business use of VoIP, including the increased business records retention requirements of recent federal laws, proposed new federal eavesdropping rules, and an unsuccessful legal challenge by a state public utility commission to regulate VoIP like a telephone company.

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INTRODUCTION

<1> Before 1995, the term Voice over Internet Protocol (“VoIP”)

never existed. By 2007, market research predicts that 75 percent of all voice traffic will go over the Internet. This rapid transition is already having major economic and legal impacts. States that relied on taxes that accompany telephone service are watching them vanish. Law enforcement is nervous about its ability to wiretap a new technology. The advent of lawsuits against defendants like investment banker Frank Quattrone, where "the case hinged on a single one-line e-mail endorsing company policy,"³ and Arthur Anderson, where document destruction played a key role,⁴ has further emphasized the importance of corporate records retention policies. Federal and state regulators are struggling to keep up with new types of business communications, including VoIP transmissions. This article examines regulatory and legal issues arising from the growth of VoIP as a new form of communication in the business environment that may impact a business's policies.

WHAT IS VOIP?

<2> In 1995, the first VoIP telephone call was made. This consisted of an analog voice signal that was digitized into Internet protocol ("IP") packets of data, sent over a series of networks (the Internet), and put back together at the other end, instead of being placed as a telephone call in real time over the Public Switched Telephone Network ("PSTN").⁵ While it was novel to make a telephone call through computer networks and thereby avoid long distance telephone charges, the quality was low due to choppy sound, echoing, and missed data packets that had been accidentally routed to unknown locations. Another obstacle to the early adoption of this technology was the fact that this type of connection could only be made between two computers specially outfitted for VoIP-enabled transmissions.

VOIP TODAY

<3> The problems associated with VoIP in the 1990s are today being overcome by improvements in the technology, increased standardization and the wider deployment of infrastructure. Because gateway servers are now interfacing between the Internet and the PSTN, communication can now occur not only computer-to-computer, but also computer-to-telephone, telephone-to-computer, and telephone-to-telephone. However, as more people use the Internet's limited bandwidth, problems with packet loss remain. The more traffic on a bandwidth, the more packets are shuttled around, searching for the most efficient route. Distortions in communication quality due to packet loss may be acceptable for most personal

communications, but it is not acceptable for most business applications. Consequently, most corporations currently limit their use to company intranets, where access to the bandwidth is dedicated solely to the corporation. The result is no packet loss.

<4> Nevertheless, the benefits are beginning to outweigh the risks. The most popular reason that businesses and consumers give for switching to VoIP is cost savings. For a flat monthly Internet access fee, one can avoid the per-minute usage charges on long distance phone calls. This is particularly attractive for international calls. The main reason for the cost savings is that VoIP transmissions are not regulated like regular telephone service, and VoIP providers therefore do not have to pay the same taxes and access fees that are passed onto consumers.

<5> Another benefit is the more efficient use of the broadband cable, which carries half of VoIP transmissions. Voice, data (e.g., faxes, e-mail, instant messaging), and video can all be transmitted simultaneously. A further benefit is the portability of telephone numbers. The technology division of Lehman Brothers Holdings, Inc. started using VoIP in early 2001.⁶ After the terrorist attacks on September 11, 2001, the division's Manhattan employees dispersed to several locations throughout the New York area. All the employees had to do was take their telephones with them, plug them in at the new location, and they were operational with the same numbers.⁷ The employees were also able to record an outgoing message that they left in their customers' voice mail inboxes with one click instead of repeating the same message several times a day.⁸

<6> Today, even though VoIP transmissions constitute up to ten percent of all calls made in the United States, with estimates of up to 2.5 million U.S. subscribers, there are still a few downsides.⁹ There is no independent power source. That means if there is a power outage, one cannot make a VoIP call. This could be disastrous in an emergency. The sound quality and reliability are still not up to the level of traditional telephone service. Until there is dedicated bandwidth for VoIP transmissions, congestion will continue to be a problem, resulting in lost packets of data. Businesses and consumers alike will not tolerate clipped speech or no dial tone after experiencing reliable telephone service.

VOIP AND RECORDS RETENTION IN THE POST-9/11 AND POST-ENRON ERA

<7>

Two new federal laws were quickly passed as a result of the 9/11 terrorist attacks and the Enron scandal: the USA PATRIOT Act and the Sarbanes-Oxley Act ("SOX"). The PATRIOT Act expands law enforcement's access to business records to include "any tangible things," if they are sought for an authorized intelligence or terrorism investigation.¹⁰ SOX, which affects publicly-traded companies and private companies planning to go public, created two new crimes for intentionally altering or destroying documents to impede any federal investigation or proceeding, even if the defendant only has reason to know that an investigative action is being contemplated.¹¹

<8> While neither Act specifically addresses VoIP transmissions, the statutory requirements raise the question of whether VoIP transmissions should be treated as telephone calls, which are not normally recorded and retained, or as data, like e-mails, which are generally required to be archived. During a live VoIP call, data streams back and forth along the cable. Once the callers hang up, the data evaporates, as with a regular telephone call. However, when a caller leaves a VoIP voice mail message, it resides on the computer as an e-mail in the form of an audio file in .wav format.

<9> Should VoIP voice mail be subject to electronic records retention requirements because it, like ordinary e-mail, is an electronic record stored in the e-mail inbox? Messages on a conventional voice mail system can easily and inexpensively be transferred to and stored on other recording media. VoIP voice mail messages require substantially more memory than conventional voice mail. Archival requirements, similar to those imposed on e-mail, would create a costly storage problem when applied to VoIP technology.

<10> Commentators on this topic remain cautious and recommend that businesses save everything. For example, one article aimed at corporate and securities lawyers advised that "[a]ll forms of recorded communication, including e-mail and voice mail, fall within the reach of the Sarbanes-Oxley prohibitions and must be preserved."¹²

<11> The Securities and Exchange Commission ("SEC") gives a slightly different interpretation regarding the retention of voice mail messages. When considering any record retention, the SEC's general approach is to focus on the content of the message and its audience, not the type of document. When asked whether voice mail messages were required to be kept according to Rule 17a-4 under the Securities Exchange Act of 1934, which lists records to be preserved by certain exchange members, brokers and dealers,¹³ a public affairs spokesperson

for the SEC said, “[t]he rule does not apply to oral communications,” including voice mail, “only written messages.”¹⁴ This interpretation does not preclude a requirement that brokers make written records of certain information, like buy/sell orders, and all the other requirements listed in Rule 17a-3.¹⁵ However, if any information was left in a voice mail message, the broker would be required to reduce it to writing, thereby eliminating the need to keep the voice mail message.

<12> The SEC’s ruling regarding voice mail retention for SOX purposes is that voice mail messages “generally would not fall within the scope of new rule 2-06 provided they do not contain information or data . . . that is inconsistent with the auditor’s final conclusions, opinions or analyses on that matter or the audit or review.”¹⁶ If the message was a “consultation or resolution of differences of professional judgment,”¹⁷ then it should be retained, but it is hard to imagine someone conveying that type of information in a voice mail message without also reducing it to writing on either the sending or receiving end.

<13> VoIP transmissions can be recorded, labeled, indexed, stored, and retrieved when necessary. They can also be subpoenaed. Future regulatory fines for noncompliance and possible court challenges will most likely determine whether these Acts will change the records retention requirements of VoIP voice mail messages.

INFORMATION SERVICE OR TELECOMMUNICATIONS SERVICE?

<14> Two recent cases show clearly the difficulty of fitting VoIP technology into existing telecommunications law categories. In October 2003, in *Brand X Internet Services v. FCC*, the 9th Circuit Court of Appeals reversed a Federal Communications Commission (“FCC”) ruling, and held that *cable broadband networks* are “telecommunications services,” not “information services,”¹⁸ and therefore are “subject to regulations that force them to resell their lines to outsiders,” like regular telephone companies.¹⁹ The federal Telecommunications Act of 1996 defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”²⁰ “Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”²¹ Cable broadband is a telecommunications service, but what

flows through it is an information service.

<15> In the same month, a federal judge in the United States District Court for the District of Minnesota ruled in *Vonage Holdings Corp. v. Minnesota Public Utilities Commission* that VoIP was not a “telecommunications service,” but was an “information service.”²² Vonage Holdings Corporation (“Vonage”), a leading provider for VoIP transmissions, sought a preliminary injunction to prevent the Minnesota Public Utilities Commission (“MPUC”) from enforcing its order requiring Vonage to comply with Minnesota laws that regulated telephone companies. The court also held that the state law was in conflict with Congress’ intent to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²³ Federal law pre-empted state law in this situation. The judge granted a permanent injunction that barred the MPUC from enforcing its order.

<16> While the federal judge in Minnesota agreed with Vonage that its services transformed the information from VoIP format to PSTN format (or vice versa) and, thus, fit the definition of an information service that uses the Internet, it is inescapable that the end result for users is functionally still a telephone call. The *Vonage* decision left an important question open. Vonage does not provide telephone-to-telephone VoIP service; it only supports computers or computer and telephone connections where the conversion of data format from VoIP to PSTN is clear. However, when VoIP is used to produce a telephone-to-telephone call, courts may view VoIP service from the standpoint of the overall user experience – a telephone call. While the FCC has not yet ruled on the issue, it has left open the possibility that telephone-to-telephone VoIP could be regulated like regular telephone calls.²⁴ It remains to be seen whether the VoIP technology permits a practical regulatory regime to be constructed on this verbal (and possibly only verbal) distinction.

STATE EFFORTS TO REGULATE VOIP

<17> The main implication of the *Vonage* ruling is that Minnesota cannot tax VoIP calls in the same way it taxes regular telephone calls. However, the *Vonage* decision is not binding on other states. Due to the portability of Vonage customers, known only by their IP addresses and not by regular telephone numbers, Vonage says it cannot separate interstate and intrastate traffic, which would be required in order to comply with state regulations.²⁵ Vonage has filed a petition with the FCC seeking

pre-emption of regulation of its services by the States and the exercise of exclusive federal jurisdiction over VoIP transmissions.²⁶

<18> The forty-six states that faced budget shortfalls in 2003 need to find new sources of revenue in 2004.²⁷ As VoIP's popularity grows, states could potentially lose billions of dollars of revenue they would have received from taxes on telephone calls. These revenues support "programs, including universal telephone service, 911 emergency services, and the e-rate school technology fund."²⁸

<19> The States are taking different approaches to their treatment of VoIP technology. Minnesota and California have initiated action to require VoIP providers to register as telecommunications companies.²⁹ Florida is withholding regulation of VoIP.³⁰ A state senator in Pennsylvania has introduced a bill that would "take a stance against regulating VoIP providers."³¹

<20> The California Public Utilities Commission's position is that "a telephone corporation [is defined] as every corporation or person who owns, controls, or manages a telephone line for profit," and "a telephone line [is defined] as any asset used to facilitate telephone communication."³² "VoIP providers argue that their services should be considered data transmission, since those transmissions travel over the same path as Web traffic."³³ In spite of the *Vonage* ruling, California is not halting its attempt to regulate VoIP providers.³⁴

<21> The tension between the mandate from Congress not to regulate and tax the Internet and the budget crises of the States is yet to be resolved. In addition, it seems likely that diversity of state action will ultimately require some type of federal action promoting uniformity. FCC Chairman Michael Powell has stated that he wants to categorize Internet access services as information services that have fewer regulations than telecommunications services.³⁵ In late 2003, the FCC initiated proceedings to address a broad range of VoIP issues. The results should help courts interpret the legislative intent of the federal law and help determine the direction of future federal policy in the area.

APPLICABILITY OF FEDERAL WIRETAPPING LAW TO VOIP

<22> One issue that the FCC is discussing in their proceedings is that this new technology may provide a way to make the detection of crimes more difficult. The Federal Bureau of

Investigation ("FBI") is concerned that VoIP "offers increasing opportunities for terrorists, spies and criminals to evade lawful electronic surveillance," since they could make calls over the Internet, which requires different technology than the FBI currently uses for intercepting regular telephone calls.³⁶ It is also easier to apply strong encryption to VoIP transmissions. Hence, the FBI is pressing the FCC for new Internet eavesdropping rules.³⁷ If the FBI's position prevails, it will have access not only to VoIP calls, but anything else that travels over broadband, including e-mail, instant messaging, and Internet browsing. Civil libertarians are justifiably concerned about privacy and other civil liberty implications.

<23> The FBI already has the ability to seek a court order to conduct surveillance of a broadband user under existing federal wiretapping laws.³⁸ Vonage, for example, has been served with subpoenas for both call records and call data.³⁹ Vonage can retrieve the data immediately because the company has it on hand. When the company receives a request for live voice interception, it is easily able to copy the data stream and send it to another location because all the VoIP calls go through a central server.⁴⁰ It is unclear why the FBI needs additional access beyond what it can obtain under existing laws, but if it is granted, broadband users will need to understand the capability that law enforcement will have to access all of their cable activity.⁴¹

CONCLUSION

<24> In spite of an uncertain future, VoIP continues to grow. In October 2003, Time Warner Cable expanded its VoIP program to four more cities, after launching the program in Portland, Maine, as a test market in May 2003.⁴² On November 11, 2003, Cablevision announced it was offering VoIP services to its one million high-speed Internet customers in the New York market.⁴³ On November 2003, AT&T announced they would be offering VoIP to all of their customers. Cox Communications and Comcast are holding off expansion for now since they are not satisfied that projected consumer cost savings of 10 percent will induce sufficient user demand, and because the technology is not ready for a large number of users.⁴⁴

<25> Everything is pointing to the exponential growth of VoIP use. A recent federal district court decision held that VoIP was an information service and not subject to the same regulation as a regular telephone service. FCC Chair Michael Powell favors very limited regulation of VoIP. There is no immediate federal

regulatory or statutory requirement to add VoIP voice mail messages to any regular records retention procedures. Major cable and telecommunications companies are now offering VoIP to their customers. The technology will continue to improve the quality and reliability of VoIP. With all this going for it, VoIP might even exceed the prediction that by 2007, 75 percent of all voice traffic will travel over the Internet.

PRACTICE POINTERS

While the law and regulations of VoIP are still in transition, here are some steps a business can take now to lessen the impact of future requirements and adapt to this new technology:

1. If there is only VoIP and no other telephone system used in a business, establish a back-up plan in case of a power failure, for example, having a cell phone available for every group of employees.
2. A business should contact all federal and state regulatory bodies that govern the business, for example, the SEC or National Association of Securities Dealers. Determine the records retention requirements of the agency and ask about all types of communication used by the organization, including VoIP. Schedule regular times to check with the regulators regarding updates in requirements, or request notification of any changes.
3. Transfer information required to be retained into a written document, either electronic or paper that is conveyed in a voice mail message. This eliminates the need to retain the voice mail message.
4. Assist clients in writing or updating their record retention plans to include all types of electronic documents. Include a rapid response plan that informs every employee about the suspension of the regular destruction schedule in case a contemplated or actual investigation or proceeding occurs.
5. Designate a single point of contact within the company to answer questions about the record retention policy for the company.
6. Ensure all employees are trained on any new record retention requirements, including how existing policies relate to VoIP transmissions.

FOOTNOTES

1. Paula K. Royalty is a member of the University of Washington School of Law Class of 2005. She is deeply grateful for the help she received on this article from Henry L. Judy, Konrad L. Trope, and John D. Gregory. Royalty can be reached at royalty@u.washington.edu.
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