4. An opinion from the U.S. District Court for the District of Columbia sustaining an objection to a magistrate judge's recommendation determining that private social communications were not in "electronic storage" and therefore could be produced under the Stored Communications Act.

In *Republic of the Gambia v. Facebook, Inc.*, 2021 WL 5758877 (D.D.C. Dec. 3, 2021), U.S. District Judge James E. Boasberg sustained an objection by Facebook to a magistrate judge's order (previously reported in the October 2021 edition of this publication) determining that private communications are not in "electronic storage."

In this litigation, the Republic of the Gambia (The Gambia) applied pursuant to 28 U.S.C. § 1782 for production of content deleted by Facebook for use in its litigation against the Republic of the Union of Myanmar (Myanmar) at the International Court of Justice. See *Republic of the Gambia v. Facebook, Inc.*, 2021 WL 4304851, at *1 (D.D.C. Sep. 22, 2021). The Gambia sought accounts and other content used by Myanmar government agents that sparked the genocide of the Rohingya, a religious minority in Myanmar. The United Nations Human Rights Council (U.N. Mission) found that Myanmar government officials relied on Facebook to credibly spread fake news to develop a negative perception of Muslims in Myanmar as early as 2012. *Id*. at *2. Facebook began deleting and banning accounts of key individuals and organizations in Myanmar in August 2018 but preserved copies of the content it deleted.

At issue in The Gambia's application were The Gambia's three document requests in connection with this deleted content: (1) public and private communications associated with the deleted content; (2) documents associated with Facebook's internal investigation on how it identified the content deleted; and (3) a Rule 30(b)(6) deposition regarding all of the above. *Id*. at *4. Facebook argued that The Gambia's requests (1) violated the Stored Communications Act (SCA) and (2) were unduly burdensome. *Id*. at *1.

After a briefing and a six-hour hearing, the magistrate had granted in part and denied in part The Gambia's motion, rejecting Facebook's arguments that the SCA, 18 U.S.C. § 2701, *et seq.*, prohibited it from releasing much of the requested content. The magistrate also ordered Facebook to produce any nonprivileged documentation relating to its internal investigation. 2021 WL 5758877, at *2. Although Facebook agreed to produce public postings — for example, postings that anyone on Facebook can view — and associated metadata, Facebook challenged the magistrate's conclusion that private pages and communications — for example, direct messages between users — may be disclosed to The Gambia pursuant to a § 1782 subpoena. In particular, Facebook argued that the SCA prohibited disclosure of the deleted private pages and communications stored on its servers. *Id*. at *3.

Judge Boasberg began his analysis with an overview of the SCA as it applied to Facebook's challenge, noting that the SCA "creates a set of Fourth Amendment–like protections by statute, regulating the relationship between government investigators and service providers in possession of users' private information." Its protections apply to content held by providers of an "electronic communication service" (ECS), defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications," as well as providers of a "remote computing service" (RCS), which "means the provision to the public of computer storage or processing

services by means of an electronic communications system." *Id*. (quoting 18 U.S.C. §§ 2510(15) and 2711(2)).

Under the SCA, ECS providers may not disclose any communication held "in electronic storage," which includes "any temporary, intermediate storage of a wire or electronic communication" or "any storage of such communication by an electronic communication service for purposes of backup protection." *Id*. (quoting 18 U.S.C. § 2510(17)). RCS providers may not divulge communications maintained on their service "on behalf of ... a subscriber or customer ... solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents" for any other purpose. *Id*. (quoting 18 U.S.C.§ 2702(a)(2)(A)–(B)).

Judge Boasberg noted that the parties agreed both that Facebook is an ECS with respect to the content at issue and that this content does not fall within the "temporary storage" category of "electronic storage" as those terms are used in the SCA. Accordingly, the dispute centered on whether the deleted private pages and communications were stored "for purposes of backup protection." *Id*. (citing 18 U.S.C. § 2510(17)).

To answer this question, Judge Boasberg noted that "the most relevant definition of 'backup' is 'a *copy* of computer data'" or "a reserve or substitute." *Id*. at *4 (emphasis in original). "Protection" is "the act of protecting," which is defined, in turn, as "keeping from being damaged, attacked, stolen, or injured." He explained that a communication is stored "for purposes of backup protection," then, when it is a "copy" or "reserve" held to prevent it being "damaged" or lost. *Id*. (quoting *Hately v. Watts*, 917 F.3d 770, 791 (4th Cir. 2019)).

With these definitions in mind, Judge Boasberg found that copies of the deleted private accounts and pages at issue, and the communications associated with them, fell within the SCA because Facebook preserved data, including content, on the accounts and pages it deleted. "Facebook stored a duplicate of these communications, among other reasons, in case it was lawfully called upon to produce them by an international body like the United Nations after their removal." He found that these duplicates were a "copy" or "reserve" because they "exist on the same servers, in the same place, in the same format, in exactly the same manner" as they did before the accounts and pages were removed and therefore "literally fall[] within the statutory definition" of "for purposes of backup protection." *Id*. (citing *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004)).

In reaching this conclusion, Judge Boasberg rejected The Gambia's argument that the common understanding of "backup" requires the existence of an original. He noted that the dictionary definitions of "backup" do not require an original to exist and, in fact, contemplates loss of any "original." He also noted that the SCA imposes no requirement that there be an original copy of the communication in order for other material to qualify as backup. *Id*. (citing 18 U.S.C. § 2510(17)(B)). Judge Boasberg also found that his reading of "backup purposes" comported with the SCA's legislative context, which included that "Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards," to avoid hindering the adoption of new communications technologies. *Id*. at *5 (quoting *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 875 (9th Cir. 2002)).