MARIANNE AJEMIAN, coadministrator,[1]
& another[2]

v.

YAHOO!, INC.

SJC-12237

SUPREME JUDICIAL COURT
OF MASSACHUSETTS

March 9, 2017, Argued
October 16, 2017, Decided

COUNSEL: Robert L. Kirby, Jr. (Thomas E. Kenney also present) for the plaintiffs.

Marc J. Zwillinger (Jeffrey G. Landis also present) for the defendant.

Mason Kortz, for Naomi Cahn & others, amici curiae, submitted a brief.

James R. McCullagh & Ryan T. Mrazik, of Washington, & Joseph Aronson, for NetChoice & another, amici curiae, submitted a brief.

JUDGES: Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.[3] GANTS, C.J. (concurring in part and dissenting in part).

OPINION BY: LENK

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[1] Of the estate of John G. Ajemian.

[2] Robert Ajemian, individually and as coadministrator of the estate of John G. Ajemian.

[3] Justice Hines participated in the deliberation on this case prior to her retirement.

OPINION

LENK, J. This case concerns access sought by the personal representatives of an estate to a decedent's electronic mail (e-mail) account. Such an account is a form of property often referred to as a "digital asset." On August 10, 2006, forty-three year old John Ajemian died in a bicycle accident; he had no will. He left behind a Yahoo!, Inc. (Yahoo), e-mail account that he and his brother, Robert Ajemian,[4] had opened four years earlier; he left no instructions regarding treatment of the account. Robert and Marianne Ajemian, John's siblings, subsequently were appointed as personal representatives of their brother's estate. In that capacity, they sought access to the contents of the e-mail account. While providing certain descriptive information, Yahoo declined to provide access to the account, claiming that it was prohibited from doing so by certain requirements of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.* Yahoo also maintained that the terms of service governing the e-mail account provided it with discretion to reject the personal representatives' request. The siblings commenced an action in the Probate and Family Court challenging Yahoo's refusal, and a judge of that court allowed Yahoo's motion for summary judgment on the ground that the requested disclosure was prohibited by the SCA. This appeal followed.

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[4] Because they share a last name, we refer to the members of the Ajemian family by their first names.

We are called upon to determine whether the SCA prohibits Yahoo from voluntarily disclosing the contents of the e-mail account to the personal representatives of the decedent's estate. We conclude that the SCA does not prohibit such disclosure. Rather, it permits Yahoo to divulge the contents of the e-mail account where, as here, the personal representatives lawfully consent to disclosure on the decedent's behalf. Accordingly, summary judgment for Yahoo on this basis should not have been allowed.

In its motion for summary judgment, Yahoo argued also that it was entitled to judgment as a matter of law on the basis of the terms of service agreement, claiming thereby to have discretion to decline the requested access. Noting that material issues of fact pertinent to the enforceability of the contract remained in dispute, the judge properly declined to enter summary judgment for either party on that basis. Accordingly, the judgment must be vacated and set aside, and the matter remanded to the Probate and Family Court for further proceedings.[5]

1. *Background.* In reviewing the allowance of a motion for summary judgment, "we 'summarize the relevant facts in the light most favorable to the [nonmoving parties].'" *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 96 (2016), quoting *Somers v. Converged Access, Inc.*, 454 Mass. 582, 584 (2009). We recite the facts

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[5] We acknowledge the amicus briefs of Naomi Cahn, James D. Lamm, Michael Overing, and Suzanne Brown Walsh, and of NetChoice and the Internet Association.

based on the parties' joint statement of facts, the Probate and Family Court judge's decision, and the documents in the summary judgment record. See Mass R. Civ. P. 56, 365 Mass. 824 (1974).

In August, 2002, Robert[6] set up a Yahoo e-mail account for his brother John. John used the account as his primary e-mail address until his death on August 10, 2006. He died intestate and left no instructions concerning the disposition of the account. Shortly before a Probate and Family Court judge appointed Robert and Marianne as personal representatives for John's estate,[7] Marianne sent Yahoo a written request for access to John's e-mail account. Yahoo declined to provide such access; it wrote that it would instead furnish subscriber information[8] only if presented with a court order mandating disclosure to the account holder's personal representatives. Robert and Marianne

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[6] The personal representatives assert that Robert set up the electronic mail (e-mail) account for the benefit of John, but that both brothers had the password to the account, and that, with John's permission, Robert used it occasionally. Since he used it rarely, he has forgotten the password. Yahoo!, Inc. (Yahoo), claims that John set up the account.

[7] The Uniform Probate Code defines a personal representative as the "executor, administrator, successor personal representative, special administrator, special personal representative, and persons who perform substantially the same function under the law governing their status." G. L. c. 190B, § 1-201 (37).

[8] The subscriber information provided by Yahoo includes e-mail "header" information – i.e., the sender, addressees, and time stamp for e-mail messages – for each e-mail message sent and received, and basic information about the subscriber.

subsequently obtained such an order, and Yahoo provided them the subscriber record information.

In September, 2009, Robert and Marianne filed a complaint in the Probate and Family Court seeking a judgment declaring that they were entitled to unfettered access to the messages in the decedent's e-mail account; they also asked that Yahoo be ordered to provide the requested access. After the judge allowed Yahoo's motion to dismiss their complaint, the Appeals Court vacated the judgment.[9] It remanded the matter to the Probate and Family Court for a determination whether the SCA bars Yahoo from releasing the contents of John's e-mail account to his siblings as the personal representatives of the estate. See *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 580 (2013).

On remand, the parties filed cross motions for summary judgment. Robert and Marianne claimed that they were entitled to access the contents of the Yahoo account because those contents were property of the estate. Yahoo's position was two-fold: the SCA

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[9] The Probate and Family Court judge (the same judge who later ruled on the cross motions for summary judgment) dismissed the complaint on the grounds that a forum selection clause in the terms of service for the decedent's e-mail account required that the action be brought in California. He also determined that res judicata precluded the personal representatives from filing their claim in Massachusetts. The Appeals Court concluded that the doctrine of res judicata did not apply to the allegations in the complaint and that the forum selection and limitations clauses in the terms of service could not be enforced against the personal representatives. See *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 572-573, 577 (2013). These issues are not before us on appeal.

prohibited the requested disclosure and, even if it did not, any common-law property right that the decedent otherwise might have had in the contents of the e-mail account had been contractually limited by the terms of service. In Yahoo's view, the terms of service granted it the right to deny access to, and even delete the contents of, the account at its sole discretion, thereby permitting it to refuse the personal representatives' request.

The judge framed the issue before him as, first, whether the SCA prohibited Yahoo from disclosing the contents of the e-mail account and, if it did not, whether the contents are property of the estate. While the judge allowed Yahoo's motion for summary judgment solely on the basis that the SCA barred Yahoo from complying with the requested disclosure, he also addressed Yahoo's alternative contention that the terms of service contractually limited any property interest that the decedent had in the contents of the account and thereby allowed it to refuse access to such contents. The judge concluded both that the estate had a common-law property interest in the contents of the account and that the record before him was insufficient to establish that the terms of service agreement, purportedly limiting any such property interest, was itself enforceable. More specifically, he determined that there were disputed issues of material fact concerning the formation of that agreement. The judge accordingly denied Yahoo's motion for summary judgment on this separate basis.

Robert and Marianne appealed, and we transferred the case to this court on our own motion.[10]

2. *Whether the SCA prohibits Yahoo from disclosing the contents of the e-mail account.* a. *Statutory overview.* Congress enacted the SCA in 1986 "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."[11] S. Rep. No. 541, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 3555, 3555. Given these vast technical advances, the purpose of the SCA is "to protect the privacy of users of electronic communications by criminalizing the unauthorized access of the contents and transactional records of stored wire and electronic communications, while providing an avenue for law enforcement entities to compel a provider of electronic communication services to disclose the contents and records of electronic communications."[12] *Commonwealth* v. *Augustine*, 467

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[10] Yahoo did not cross-appeal as to the common-law property issue, and does not appear to have contested in the trial court or on appeal that, absent the terms of service, the decedent's estate would have a common-law property interest in the contents of the e-mail account.

[11] The Stored Communications Act (SCA) was enacted as Title II of the broader Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[12] More broadly, the SCA serves to fill a potential gap in the protection afforded digital communications under the *Fourth Amendment to the United States Constitution*. When the SCA was enacted in 1986, the United States Supreme Court repeatedly had held that information revealed to third parties does not warrant Fourth Amendment protection because there is no reasonable expectation of privacy in something that already has been disclosed. See *Smith v. Maryland*, 442 U.S. 735, 745-746 (1979) (no

Mass. 230, 235 (2014), quoting *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 286-287 (4th Cir. 2013).

To achieve this purpose, the SCA provides a tripartite framework for protecting stored communications managed by electronic service providers.[13] First,

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reasonable expectation of privacy in telephone numbers that have been called from particular telephone because such information shared with third-party telephone company); *United States v. Miller*, 425 U.S. 435, 443 (1976) (banking records). Digital communications, including e-mail, are by nature shared with the Internet service providers that store them. See Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1210 (2004) (Kerr). When Congress enacted the SCA, it did so, at least in part, in an effort to ensure that digital communications would be protected, in light of the United States Supreme Court's third-party doctrine. See S. Rep. No. 541, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 3555, 3557, citing *Miller*, *supra* ("because [digitally stored information] is subject to control by a third party computer operator, the information may be subject to no constitutional privacy protection").

[13] The SCA distinguishes between "electronic services – electronic communication services [ECS] and remote computing services [RCS]" *Matter of a Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 206 (2d Cir. 2016) (*Matter of a Warrant*). The act defines ECS as any service which allows users to "send or receive wire or electronic communications," and RCS as a service that provides "storage or processing services by means of an electronic communications system." 18 U.S.C. §§ 2510, 2711. Today, the distinction between ECS and RCS providers essentially has gone the way of the switchboard operator, as most service providers deliver both ECS and RCS services to subscribers. See Kerr, *supra* at 1215 (most network service providers provide both ECS and RCS services); *Matter of a Warrant*, *supra*. In any event, this distinction is not material here, as the restrictions against voluntary disclosure

subject to certain exceptions, it prohibits unauthorized third parties from accessing communications stored by service providers. See 18 U.S.C. § 2701. Second, it regulates when service providers voluntarily may disclose stored electronic communications. See 18 U.S.C. § 2702. Third, the statute prescribes when and how a government entity may compel a service provider to release stored communications to it. See 18 U.S.C. § 2703.

b. *Analysis.* At issue here is 18 U.S.C. § 2702, which restricts the voluntary disclosure of stored communications. That section prohibits entities that provide "service[s] to the public" from voluntarily disclosing the "contents"[14] of stored communications unless certain statutory exceptions apply. See 18 U.S.C. § 2702(b)(1)-(8). The exceptions contained in 18 U.S.C. § 2702(b) allow a service provider to disclose such contents without incurring civil liability under the SCA.[15]

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of the contents of communications to private parties apply to both equally. See 18 U.S.C. § 2702. For convenience, we therefore refer to both types of providers as "service providers."

[14] The SCA defines "contents" as "any information concerning the substance, purport, or meaning of [a] communication." 18 U.S.C. § 2510(8), as incorporated in 18 U.S.C. § 2711(1). The term has been construed to mean "a person's intended message to another (i.e., the 'essential part' of the communication, the 'meaning conveyed,' and the 'thing one intends to convey')." *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1106 (9th Cir. 2014). The personal representatives here agree that they are seeking access to "contents," i.e., the decedent's stored communications.

[15] The SCA affords a civil right of action to "any provider of electronic communication service, subscriber, or other person aggrieved by any violation of [the SCA] in which the conduct

Yahoo contends that 18 U.S.C. § 2702(a) prohibits it from disclosing the contents of the e-mail account, while the personal representatives argue that they fall within two of the enumerated exceptions. The first of these, the so-called "agency exception," allows a service provider to disclose the contents of stored communications "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." 18 U.S.C. § 2702(b)(1). The second, the "lawful consent" exception, allows disclosure "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the [originator] in the case of remote computing service." 18 U.S.C. § 2702(b)(3). We address the applicability of each exception in turn.

i. *Agency exception.* The personal representatives contend that they are John's agents for the purposes of 18 U.S.C. § 2702(b)(1). Because "agent" is a common-law term, and the SCA does not provide an alternate definition, we look to the common law to determine its meaning. When Congress uses a common-law term, we must assume, absent a contrary indication, that it intends the common-law meaning. See *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U.S. 91, 101 (2011); *Beck v. Prupis*, 529 U.S. 494, 500-501 (2000) ("when Congress uses language with a settled meaning at common law, Congress 'presumably knows and

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constituting the violation is engaged in with a knowing or intentional state of mind." 18 U.S.C. § 2707(a). Successful litigants are entitled to equitable relief, damages, and reasonable attorney's fees and costs. 18 U.S.C. § 2707(b).

adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken'" [citation omitted]); *Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 212 (2d Cir. 2016) ("In construing statutes, we interpret a legal term of art in accordance with the term's traditional legal meaning, unless the statute contains a persuasive indication that Congress intended otherwise").

Under the common law, both as construed in the Commonwealth and more generally, an "agent" "act[s] on the principal's behalf and [is] subject to the principal's control." Restatement (Third) of Agency § 1.01 (2006). See *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 743 (2000) ("An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf and for the benefit of the principal, and subject to the principal's control"). The decedent's personal representatives do not fall within the ambit of this common-law meaning; they were appointed by, and are subject to the control of, the Probate and Family Court, not the decedent. See G. L. c. 190B, § 3-601 (personal representatives appointed by Probate and Family Court); G. L. c. 190B, § 3-611 (personal representative subject to removal by Probate and Family Court); Restatement (Second) of Agency § 14F (1958) ("A person appointed by a court to manage the affairs of others is not an agent of the others"); Restatement (Third) of Agency § 1.01 comment f ("A relationship of agency is not present unless the person on whose behalf action is taken has the right to control

the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver"). Accordingly, the personal representatives do not fall under the SCA's agency exception.

ii. *Lawful consent exception.* The personal representatives claim also that they lawfully may consent to the release of the contents of the decedent's e-mail account in order to take possession of it as property of the estate. See 18 U.S.C. § 2702(b)(3); G. L. c. 190B, § 3-709 (a) ("Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property . . . "). Yahoo contends that the personal representatives of the estate cannot lawfully consent on behalf of the decedent, regardless of the estate's property interest in the e-mail messages.[16] In Yahoo's view, the lawful

[16] The question whether the e-mail messages are the property of the estate was raised in the personal representatives' complaint. As previously discussed, on remand from the Appeals Court, the Probate and Family Court judge addressed the question, in dicta, concluding that the e-mail messages were the property of the estate. Yahoo in essence leaves this holding unchallenged for purposes of this case, see note 10, *supra*, contending instead that the terms of service agreement is a binding contract that regulates access to the contents of the account and supersedes any common-law property rights asserted by the estate. Given this, we do not address the judge's ruling that the estate had a common-law property right in the contents of the account. We note, however, that numerous commentators have concluded that users possess a property interest in the contents of their e-mail accounts. See Darrow & Ferrera, Who Owns A Decedent's E-Mails: Inheritable Probate Assets or Property of the

consent exception requires the user's actual consent – i.e., express consent from a living user.

We thus are confronted with the novel question whether lawful consent for purposes of access to stored communications properly is limited to actual consent, such that it would exclude a personal representative from consenting on a decedent's behalf.[17] We conclude

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Network?, 10 N.Y.U. J. Legis. & Pub. Pol'y 281, 311-312 (2007) (arguing that e-mail should be construed as probate asset). See also Arner, Looking Forward by Looking Backward: *United States* v. *Jones* Predicts Fourth Amendment Property Rights Protections in E-Mail, 24 Geo. Mason U. Civ. Rts. L.J. 349, 372-375 (2014); Lopez, Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets, 24 Geo. Mason L. Rev. 183, 215-216 (2016); Watkins, Digital Properties and Death: What Will Your Heirs Have Access to After You Die?, 62 Buff. L. Rev. 193, 198-200 (2014).

[17] There is no Federal or State case law of which we are aware construing the meaning of lawful consent in this context. The only potentially relevant case, cited by the parties, is *In re Request for Order Requiring Facebook, Inc., to Produce Documents & Things*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012) (*In re Facebook*). That case concerned the Facebook account of a young woman who died after falling from the twelfth floor of an apartment building. *Id.* at 1205. While the police apparently came to the conclusion that her death was a suicide, the woman's parents disputed this account and sought to access her Facebook account to present evidence of her state of mind in the days leading up to her death. *Id.* The parents filed an ex parte application to subpoena records from her Facebook account. *Id.* Facebook moved to quash the subpoena on the ground that it violated the SCA. *Id.* The District Court judge ruled in favor of Facebook on the ground that "civil subpoenas may not compel production of records from providers like Facebook." *Id.* at 1206. The judge did, however, note in dictum that "nothing prevents Facebook from concluding on its own that [the parents] have standing to consent on [the woman's] behalf and providing the requested materials voluntarily." *Id.*

that interpreting lawful consent in such a manner would preclude personal representatives from accessing a decedent's stored communications and thereby result in the preemption of State probate and common law. Absent clear congressional intent to preempt such law, however, there is a presumption against such an interpretation. See *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001) ("[R]espondents emphasize that the Washington statute involves both family law and probate law, areas of traditional [S]tate regulation. There is indeed a presumption against pre-emption in areas of traditional [S]tate regulation such as family law"); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a

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Yahoo emphasizes the holding of the decision quashing the subpoena on the ground that it violated the SCA. *Id.* That holding is inapposite here, however, as the issue before us is not whether the personal representatives may compel Yahoo to provide them access to the decedent's e-mail account, but whether Yahoo may provide them such access without violating the terms of the SCA. The personal representatives emphasize the dictum at the end of the decision in support of their contention that "nothing prevents" Yahoo from concluding that they may lawfully consent on the decedent's behalf. *Id.*

Yahoo also points to a decision issued after argument in this case concerning an executor's attempt to provide lawful consent on behalf of a decedent. See PPG Indus., Inc. *vs.* Jiangsu Tie Mao Glass Co., Ltd., U.S. Dist. Ct., No. 2:15-CV-965, slip op. at 1-2 (W.D. Pa. July 21, 2017). Like *In re Facebook*, however, that decision does not answer the question before us. See *id.* at 4 ("[T]he [c]ourt need not decide whether [the executor's consent] to production of [the decedent's] emails is sufficient to establish 'lawful consent' under § 2702[b][3]").

statutory purpose to the contrary is evident" [citation omitted]). The statutory language and legislative history of the lawful consent exception in the SCA do not evidence such a congressional intent.

A. *Presumption against preemption.* In interpreting a Federal statute, we presume that Congress did not intend to intrude upon traditional areas of State regulation or State common law unless it demonstrates a clear intent to do so. See *Egelhoff*, 532 U.S. at 151; Texas, 507 U.S. at 534; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" [citation omitted]); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident"). This presumption ensures that the "[F]ederal-[S]tate balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts" (citation omitted). See *Jones, supra.*

Congress enacted the SCA against a backdrop of State probate and common law allowing personal representatives to take possession of the property of the estate.[18] To construe lawful consent as being limited to

[18] When the SCA was enacted, the probate laws of a majority of States allowed a personal representative to take control of the property of a decedent for the purpose of marshalling the assets of the estate. See, e.g., Alaska Stat. § 13.16.380, inserted by 1972

Alaska Sess. Laws, c. 78, § 1 (every personal representative has right to take possession or control of decedent's property); Ariz. Rev. Stat. Ann. § 14-3709, inserted by 1973 Ariz. Sess. Laws, c. 75, § 4; Ark. Code Ann. § 28-49-101, as amended by 1961 Ark. Acts, Act 424, § 1; Idaho Code Ann. § 15-3-709, inserted by 1971 Idaho Sess. Laws, c. 111, § 1; Ind. Code § 29-1-13-1, as amended through 1979 Ind. Acts, P.L. 268, § 45; Iowa Code § 633.350, inserted by 1963 Iowa Acts, c. 326, § 350; Kan. Stat. Ann. § 59-1401, as amended through 1985 Kan. Sess. Laws, c. 191, § 20; Me. Rev. Stat. tit. 18-A, § 3-709, inserted by 1979 Me. Laws, c. 540, § 1; Md. Code Ann., Est. & Trusts § 7-102, inserted by 1974 Md. Laws, c. 11, § 2; Mich. Comp. Laws § 700.601, as amended by 1979 Mich. Pub. Acts, no. 51; Minn. Stat. § 524.3-709, inserted by 1974 Minn. Laws, c. 442, art. 3, § 524.3-709; N.J. Stat. Ann. § 3B:10-29, inserted by 1981 N.J. Laws, c. 405, § 3B; Okla. Stat. tit. 58, § 290, inserted by 1910 Okla. Sess. Laws § 6322; Or. Rev. Stat. § 114.225, inserted by 1969 Or. Laws, c. 591, § 121; 20 Pa. Cons. Stat. § 3311, inserted by 1972 Pa. Laws, P.L. 508, no. 164, § 2; Utah Code Ann. § 75-3-708, inserted by 1975 Utah Laws, c. 150, § 4; Wyo. Stat. Ann. § 2-7-401, as appearing in 1980 Wyo. Sess. Laws, c. 54, § 1. See also Uniform Probate Code § 3-709 (1969), http://www.uniformlaws.org/shared/docs/probate%20code/upc_scan_1969.pdf [https://perma.cc/SG32-ZUHY] ("Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration"); Uniform Law Commission, Probate Code, http://www.uniformlaws.org/Act.aspx?title=Probate%20Code [https://perma.cc/EZ9C-HURN] (Uniform Probate Code has been adopted by Virgin Islands and eighteen States, including Colorado, Florida, Hawaii, Massachusetts, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and South Dakota); Uniform Probate Code, 8 U.L.A., Index, at 1 (Master ed. 2013).

At common law, personal representatives also have the right to take possession of a decedent's property on behalf of the estate. See, e.g., *Goodwin v. Jones*, 3 Mass. 514, 518 (1807) (personal representative has right at common law to take possession of

actual consent, thereby preventing personal representatives from gaining access to a decedent's stored communications, would significantly curtail the ability of personal representatives to perform their duties under State probate and common law. Most significantly, this interpretation would result in the creation of a class of digital assets – stored communications – that could not be marshalled.[19] Moreover, since e-mail accounts often contain billing and other financial information, which was once readily available in paper form, an inability to access e-mail accounts could interfere with the management of a decedent's estate. See Banta, Inherit the Cloud: The Role of Private Contracts in Distributing or

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decedent's property); *Matter of the Estate of Heinze*, 224 N.Y. 1, 8 (1918) (court-appointed administrator has power over property of decedent under common law); *Felton v. Felton*, 213 N.C. 194, 194 (1938) (court-appointed administrators possess "legal title to the personal assets of their intestate's estate" pursuant to common law).

[19] See Banta, Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death, 83 Fordham L. Rev. 799, 852 (2014) ("Email accounts and social networking sites are the new letters and personal records of today's society. The historical importance of our digital records cannot be underestimated"); Edwards & Harbinja, Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in A Digital World, 32 Cardozo Arts & Ent. L.J. 83, 117 (2013) ("More than ever before, 'ordinary people,' leave digital relics which may be highly personal and intimate, and are increasingly preserved and accessible in large volume after death"); Lamm, Kunz, Riehl, & Rademacher, The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property, 68 U. Miami L. Rev. 385, 389-390 (2014) ("A 2011 survey found that U.S. consumers valued their digital assets, stored across multiple digital devices, at an average of $55,000 per person").

Deleting Digital Assets at Death, 83 Fordham L. Rev. 799, 811 (2014) (noting importance of access to online accounts to individuals trying to manage deceased person's estate).

Nothing in the statutory language or the legislative history of the SCA evinces a clear congressional intent to intrude upon State prerogatives with respect to personal representatives of a decedent's estate.

B. *Statutory language.* The SCA does not define the term "lawful consent," and, unlike the hundreds of years of common law defining the meaning of the term "agent," there is no similar State common-law backdrop with respect to the phrase "lawful consent." Accordingly, we begin with the ordinary meaning of the words. See *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (statutory interpretation inquiry "begins with the statutory text"). "[C]onsent" is defined as "[a] voluntary yielding to what another proposes or desires." Black's Law Dictionary (10th ed. 2014). "[L]awful" is defined as "[n]ot contrary to law; permitted or otherwise recognized by law." *Id.* at 1018. The plain meaning of the term "lawful consent" thus is consent permitted by law.

Nothing in this definition would suggest that lawful consent precludes consent by a personal representative on a decedent's behalf. Indeed, personal representatives provide consent lawfully on a decedent's behalf in a variety of circumstances under both Federal and common law. For example, a personal representative may provide consent to the disclosure of a decedent's health information pursuant to the Health

Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d et seq. (HIPAA). See 45 C.F.R. § 164.502. In like manner, a personal representative may provide consent on a decedent's behalf to a government search of a decedent's property. See *United States v. Hunyady*, 409 F.3d 297, 304 (6th Cir.), cert. denied, 546 U.S. 1067 (2005).

At common law, a personal representative also may provide consent on a decedent's behalf to the waiver of a number of rights, including the attorney-client,[20] physician-patient,[21] and psychotherapist-patient privilege.[22] Under the Uniform Probate Code,[23] a personal

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[20] See, e.g., *Sullivan v. Brabazon*, 264 Mass. 276, 286 (1928) (personal representative may waive decedent's attorney-client privilege); *Marker v. McCue*, 50 Idaho 462 (1931) (same); *Buuck v. Kruckeberg*, 121 Ind. App. 262, 271 (1950) (same); *Holyoke v. Holyoke's Estate*, 110 Me. 469 (1913) (same); *Grand Rapids Trust Co. v. Bellows* 224 Mich. 504, 510-511 (1923) (same); *Canty v. Halpin*, 294 Mo. 96 (1922) (same); *In re Parker's Estate*, 78 Neb. 535 (1907) (same); *Martin v. Shaen*, 22 Wash. 2d 505, 512 (1945) (same).

[21] See *Calhoun v. Jacobs*, 141 F.2d 729, 729 (D.C. Cir. 1944) (personal representative may waive decedent's patient-physician privilege); *Schirmer v. Baldwin*, 182 Ark. 581 (1930) (same); *Morris v. Morris*, 119 Ind. 341 (1889) (same); *Denning v. Butcher*, 91 Iowa 425 (1894) (same); *Fish v. Poorman*, 85 Kan. 237 (1911) (same); *N.Y. Life Ins. Co. v. Newman*, 311 Mich. 368, 373 (1945) (same); *In re Estate of Koenig*, 247 Minn. 580, 588 (1956) (same); *In re Gray's Estate*, 88 Neb. 835 (1911); *Grieve v. Howard*, 54 Utah 225 (1919) (same).

[22] See *Dist. Attorney for the Norfolk Dist. v. Magraw*, 417 Mass. 169, 172-174 (1994) (personal representative may waive psychotherapist-patient privilege); *Rittenhouse v. Superior Court of Sacramento County*, 235 Cal. App. 3d 1584, 1588 (1991) (same).

[23] See note 18, *supra* (listing jurisdictions that have adopted Uniform Probate Code).

representative may sell a decedent's property, Uniform Probate Code § 3-715(23); bring claims on the decedent's behalf, *id.* at § 3-715(22); and vote the decedent's stocks, *id.* at § 3-715(12). Thus, a construction of lawful consent that allows personal representatives to accede to the release of a decedent's stored communications accords with the broad authority of a lawfully appointed personal representative to act on behalf of a decedent.

Finally, had Congress intended lawful consent to mean only actual consent, it could have used language such as "actual consent" or "express consent" rather than "lawful consent." See, e.g., 18 U.S.C. § 2721(a)(2) (prohibiting State departments of motor vehicles from releasing personal information "without the *express consent* of the person to whom such information applies" [emphasis supplied]); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (Congress knew how to provide for liability for aiding and abetting but chose not to do so); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) ("When Congress wished to create [substantial factor liability for an offense], it had little trouble doing so"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble doing so expressly").

Accordingly, nothing in the language of the "lawful consent" exception evinces a clear congressional intent to preempt State probate and common law allowing

personal representatives to provide consent on behalf of a decedent.

C. *Legislative history.* To the extent there is any ambiguity in the statutory language, we turn to the legislative history of the SCA. See *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) (all presumptions used in interpreting statutes may be overcome by "specific legislative history that is a reliable indicator of congressional intent"); *United States v. Awadallah*, 349 F.3d 42, 51 (2d Cir. 2003), cert. denied, 543 U.S. 1056 (2005) (court may look to statute's legislative history where text is ambiguous). The reports of the House and Senate committees on the judiciary shed light on the purpose of the SCA and on 18 U.S.C. § 2702 in particular. The Senate committee report explains that the purpose of the Electronic Communications Privacy Act (ECPA), the broader Federal statute that includes the SCA, is to "protect against the unauthorized interception of electronic communications" and to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. No. 541, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. at 3555. With regard to the ECPA, the House committee report states,

> "The purpose of the legislation is to amend title 18 of the United States Code to prohibit the interception of certain electronic communications; to provide procedures for interception of electronic communications by [F]ederal law enforcement officers; to provide

> procedures for access to communications records by [F]ederal law enforcement officers; to provide procedures for [F]ederal law enforcement access to electronically stored communications; and to ease certain procedural requirements for interception of wire communications by [F]ederal law enforcement officers."

H.R. Rep. No. 647, 99th Cong., 2d Sess., at 16 (1986). This stated purpose demonstrates congressional concern with the protection of stored communications against "unauthorized interception" by "overzealous law enforcement agencies, industrial spies and private parties." S. Rep. No. 541, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. at 3555, 3557. It does not suggest congressional concern over personal representatives accessing stored communications in conjunction with their duty to manage estate assets.[24]

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[24] Given the nascent state of digital technology at the time of the SCA's enactment in 1986, the congressional silence on the impact of the SCA on personal representatives is understandable. When the statute was enacted, the New York Times had mentioned the Internet a total of once. See *Matter of a Warrant*, 829 F.3d at 206, quoting Rosenzweig, Wizards, Bureaucrats, Warriors, and Hackers: Writing the History of the Internet, 103 Am. Hist. Rev. 1530, 1530 (1998). The World Wide Web had yet to be invented, and the use of e-mail by the general public was years in the future. *Matter of a Warrant*, *supra*. As one commentator noted, Congress at that time did not have any reason to foresee the development of digital communications "as a set of assets capable of inheritance or facilitating access to other assets." See Naomi Cahn, Probate Law Meets the Digital Age, 67 Vand. L. Rev. 1697, 1715 (2014).

Beyond Congress's overarching purpose in passing the SCA, the House committee report notes that "lawful consent" "need not take the form of a formal written document of consent." H.R. Rep. No. 647, 99th Cong., 2d Sess., at 66. Instead, such consent "might be inferred to have arisen from a course of dealing . . . – e.g., where a history of transactions between the parties offers a basis for reasonable understanding that a consent to disclosure attaches to a particular class of communications." *Id.* Moreover, lawful consent could "flow from a user having had a reasonable basis for knowing that disclosure or use may be made with respect to a communication, and having taken action that evidences acquiescence to such disclosure or use – e.g. continued use of such an electronic communication system." *Id.*

Congress thereby intended lawful consent to encompass certain forms of implicit consent, such as those that arise from a course of dealing. At the very least, this suggests that Congress did not intend to place stringent limitations on lawful consent even for living users. In sum, we discern nothing in the legislative history of the SCA to indicate a clear intent by Congress to limit lawful consent to "actual consent," such that it could thereby intrude upon State probate and common law.

Absent such clear congressional intent, "we . . . have a duty to accept the reading [of the statute] that disfavors pre-emption." See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Because we must presume, then, that Congress did not intend the SCA to

preempt such State laws, we conclude that the personal representatives may provide lawful consent on the decedent's behalf to the release of the contents of the Yahoo e-mail account.

This does not, however, require Yahoo to divulge the contents of the decedent's communications to the personal representatives. We conclude only that the SCA does not stand in the way of Yahoo doing so and that summary judgment for Yahoo on this basis was not warranted.[25]

3. *Terms of service agreement.* Yahoo maintains that the allowance of its motion for summary judgment also was appropriate on the independent ground that the terms of service agreement, binding upon the decedent and his estate, confers on it the right to refuse the personal representatives access to the contents of the account. Otherwise put, Yahoo contends that the terms of service trump the personal representatives' asserted property interest.

In support of this position, Yahoo relies on the "termination provision" in the terms of service, which purports to grant Yahoo nearly unlimited rights over

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[25] The Legislature is, of course, not precluded from regulating the inheritability of digital assets. Indeed, the Revised Uniform Fiduciary Access to Digital Assets Act, which addresses this issue, has been enacted by a majority of States, including more than a dozen that have done so in 2017, and eight more States currently are considering whether to do so. See Fiduciary Access to Digital Assets Act, Revised (2015), http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20%282015%29 [https://perma.cc/9BAP-3WUW].

the contents of the e-mail account. That provision states:

> "You agree that Yahoo, in its sole discretion, may terminate your password, account (or any part thereof) or use of the Service, and remove and discard any Content within the Service, for any reason, including, without limitation, for lack of use or if Yahoo believes that you have violated or acted inconsistently with the letter or spirit of the [terms of service]. Yahoo may also in its sole discretion and at any time discontinue providing the Service, or any part thereof, with or without notice. You agree that any termination of your access to the Service under any provision of [these terms of service] may be effected without prior notice, and acknowledge and agree that Yahoo may immediately deactivate or delete your account and all related information and files in your account and/or bar any further access to such files or the Service. Further, you agree that Yahoo shall not be liable to you or any third-party for any termination of your access to the Service."

The express language of the termination provision, if enforceable, thus purports to grant Yahoo the apparently unfettered right to deny access to the contents of the account and, if it so chooses, to destroy them rather than provide them to the personal representatives.[26]

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[26] Yahoo's decision not to grant access to the contents of the account and its asserted right to destroy such contents (which it apparently has preserved thus far) is grounded in the substantive

Because the record before him was not adequate to establish the essentials of valid contract formation, the judge was unable to determine – even as an initial matter – whether the terms of service agreement could constitute an enforceable contract.[27] The judge observed that Yahoo had not established that a "meeting of the minds" had occurred with respect to the terms of service, including whether they had been communicated to, and accepted by, the decedent. The judge accordingly denied Yahoo's motion for summary judgment on this alternative ground. We discern no error

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rights it claims to have under the terms of service agreement. It has forborne the exercise of those asserted rights during the pendency of this litigation, in which the enforceability of that contract is squarely at issue. See note 27, *infra*. To the extent that the dissent may suggest otherwise, we are unaware of any reason to believe that, upon remand, were the agreement in whole or pertinent part to be deemed unenforceable for any reason, Yahoo would engage in acts of spoliation or otherwise fail to comply with court orders requiring access to the contents of the account.

[27] The record does not include the parties' legal memoranda supporting their cross motions for summary judgment. Nonetheless, we infer from the judge's ruling, and the parties' briefs on appeal, that the focus of the issue regarding the enforceability of the agreement was as to matters of contract formation. Other considerations, such as consistency with public policy or any putative unconscionability of the terms of service, had yet to be reached. Nor does it appear that any dispute was raised regarding the meaning of the termination provision. We note further that Yahoo has agreed not to exercise its asserted rights under the terms of service "to remove and discard" any content of the e-mail account during the pendency of this litigation. The terms of service, however, include a provision stating that "[t]he failure of Yahoo to exercise or enforce any right or provision of the [terms of service] shall not constitute a waiver of such right or provision."

in this regard, and remand the matter for further proceedings.

4. *Conclusion.* The judgment is vacated and set aside. The matter is remanded to the Probate and Family Court for further proceedings consistent with this opinion.

So ordered.

CONCUR BY: GANTS (In Part)

DISSENT BY: GANTS (In Part)

DISSENT

GANTS, C.J. (concurring in part and dissenting in part). I agree with the court that the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.*, does not prohibit Yahoo!, Inc. (Yahoo), from disclosing to the personal representatives of an estate the electronic mail (e-mail) messages in the decedent's account so that the personal representatives may perform their duties under our State probate and common law. I also agree with the court that the judge's allowance of summary judgment on behalf of Yahoo must be vacated. I write separately because, where there were cross motions for summary judgment, I would go beyond the court's order of remand and issue an order directing judgment in favor of the personal representatives on their motion for summary judgment.

In deciding the cross motions for summary judgment, the Probate and Family Court judge made two rulings of law. First, he ruled that "the content of the decedent's e-mails are property of the [e]state; there is no genuine issue of material fact as to this issue." Second, he ruled that "the SCA prohibits [Yahoo] from divulging the contents of the decedent's e-mails to the [p]ersonal [r]epresentatives." Yahoo does not challenge the first ruling on appeal. This court has determined that the second ruling is an error of law. However, rather than order that judgment issue in favor of the personal representatives on their complaint seeking a declaration that they are entitled to complete access to the contents of the decedent's e-mail account, the court orders that the matter be remanded to the Probate and Family Court to adjudicate disputed issues of material fact as to whether the "terms of service" agreement constitutes a binding, enforceable contract that "trump[s] the personal representatives' asserted property interest" in the contents of the account. *Ante* at ___.

The order of remand is unnecessary. I recognize that there remain disputed issues of fact as to whether the terms of service agreement was executed by the decedent and binds the estate, and unresolved disputed issues of law as to whether it would be contrary to public policy to enforce an agreement comprised of eleven pages of boilerplate language that a prospective user must accept "as is" before Yahoo will grant the user access to its service. Therefore, for purposes of this opinion, I assume for the sake of argument that the terms

of service agreement is both binding and enforceable against the estate. But even with this assumption, when one looks closely at the specific section (section thirteen, governing termination) that Yahoo claims is relevant to the issue on appeal, it cannot as a matter of law yield a judgment in favor of Yahoo.

Section thirteen allows Yahoo "for any reason" to terminate a user's password, account, or use of the service, and to "remove and discard any Content within the service."[1] It further provides that Yahoo is not liable "for any termination of your access to the Service." Yahoo does not and cannot contend that the authority claimed in this termination provision gives it any ownership interest in a user's content. In fact, section eight of the terms of service provides, "Yahoo does not claim ownership of Content you submit or make available for inclusion on the Service." All that section thirteen does is allow Yahoo to discard any of the content owned by the user (or, here, the estate of the user) on its servers without risk of liability for doing so. Thus, it would permit Yahoo to discard e-mail messages in a terminated account without fear that it will be held liable if, many years later, the user's estate seeks access to those messages.

The issue on appeal, however, is not whether Yahoo is liable to the estate for content that it previously discarded, but whether a court may order Yahoo to provide the plaintiffs with content it continues to retain. The provision cannot reasonably be interpreted to mean

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[1] See *ante* at ___ for the full text of section thirteen of the "terms of service" agreement.

that Yahoo has the contractual right to destroy a user's e-mail messages after the user initiates a court action to obtain the messages. Such destruction would violate our prohibition against the spoliation of evidence. See *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003) (doctrine of spoliation of evidence "is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results"). Nor can it justify the destruction of such e-mail messages after a court orders that they be provided to the user or his or her personal representatives. Such destruction would constitute contempt of a court order.

If the motion judge on remand were to rule that this provision contractually allows Yahoo to destroy e-mail messages in its possession that are owned by a user (or a personal representative of the estate of the user) after the user has filed a court action to obtain access to these messages, we would surely reverse that ruling. So why remand the case to permit that possibility?

Not only is the remand unnecessary, but it also is unfair to the plaintiffs. The additional cost of further litigation is a financial pinprick to a Web services provider such as Yahoo, but it is a heavy financial burden on the assets of an estate, even a substantial estate. The plaintiffs should not have to spend a penny more to obtain estate property in the possession of Yahoo that they need to administer the estate.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT PROBATE AND FAMILY COURT DEPARTMENT

NORFOLK DIVISION

DOCKET NO. NO-09E-0079

ROBERT AJEMIAN, individually and with MARIANNE AJEMIAN, as co-administrators of the ESTATE of JOHN G. AJEMIAN,
Plaintiffs

vs.

YAHOO! INC.,
Defendant

JUDGMENT OF DISMISSAL

(On Plaintiffs' Complaint in Equity, filed September 9, 2009)

Upon consideration of the pleadings, the Court (Casey, J.) in a separate Memorandum of Decision and Order **denied** the Plaintiffs' Motion for Summary Judgment and **allowed** the Defendant's Motion for Summary Judgment. Accordingly, the Court hereby enters the following:

1. The Plaintiffs' Complaint in Equity is hereby **DISMISSED**.

Dated: 3/10/16 /s/ John D. Casey
John D. Casey, First Justice
Norfolk Probate and Family Court

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT PROBATE AND FAMILY COURT DEPARTMENT

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Defendant

MEMORANDUM and ORDER

(On Plaintiffs' Motion for Summary Judgment, filed December 24, 2015)
(On Defendant's Cross-Motion for Summary Judgment, filed December 29, 2015)

Upon consideration of the pleadings, the Court (Casey, J.) hereby enters the following:

Plaintiffs' Motion for Summary Judgment is **DENIED** and Defendant's Cross-Motion for Summary Judgment is **ALLOWED**.

BACKGROUND

On or about August 19, 2002, either Robert Ajemian (hereinafter referred to as "Robert") or John

Ajemian (hereinafter referred to as "the decedent") created an email account with the address, jajemian_1 (hereinafter referred to as "the account"). The parties dispute whether it was Robert or John who created the account. The plaintiffs, Robert and Marianne Ajemian (hereinafter referred to as "Marianne"), argue that the account was created by Robert and the defendant, Yahoo!, Inc. (hereinafter referred to as "Yahoo!") argues that it was the decedent who created the account. Yahoo! states that in order to complete Yahoo!'s account creation process, the creator of the account would have been required to provide certain information about himself and to assent to Yahoo!'s Terms of Service. Robert claims that he does not recall being presented with Yahoo!'s Terms of Service when he created the account for the decedent. After the account was opened, it was the decedent's primary email account.

The decedent was killed by a motor vehicle on August 10, 2006. The decedent left no Will and no instructions regarding treatment of the account. The decedent's siblings, Robert and Marianne (hereinafter collectively referred to as "the Personal Representatives") were appointed the personal representatives of the decedent's estate (hereinafter referred to as "the Estate"). Thereafter, the Personal Representatives contacted Yahoo! regarding gaining access to the contents of the email account. Yahoo! confirmed that it was maintaining the contents of the email account on a compact disk and provided the Personal Representatives with limited "header" information for the account. However, Yahoo! refused to grant the Personal

Representatives access to the contents of the email account claiming that divulging the contents would be in violation of the Stored Communications Act. Additionally, Yahoo! asserted that the requested disclosure was prohibited by Yahoo!'s Terms of Service.

In 2007, the Personal Representatives filed an initial Complaint in this Court seeking to compel Yahoo! to disclose only subscriber records and email header information (i.e. to, from, cc, date) for the account. The 2007 Complaint asserted no property right in the account or its contents. On January 15, 2008, Yahoo! provided the requested subscriber and email header information from the date of the account's creation to the Personal Representatives. During that time, the decedent sent approximately 522 emails and received 774 emails. The decedent corresponded most frequently with a woman named Anne Drazen, sending her 289 emails and receiving 224 emails from her. Robert testified in his deposition that the decedent took an art history class with Ms. Drazen and that the Estate has no reason to believe that the decedent had any business dealings with her. The decedent's second most communications were with a man named Todd Harrington. During the relevant time period, the decedent sent 169 emails to and received 87 emails from Todd Harrington. Robert testified that Mr. Harrington was the decedent's friend and that like Ms. Drazen, the Estate had no reason to believe that Mr. Harrington had any business dealings with the decedent. The Personal Representatives have never asked Ms. Drazen or Mr. Harrington for consent to access their emails with

John, even though such consent would provide Yahoo! with a sufficient basis for disclosure under the Stored Communications Act. Other than this litigation, the Personal Representatives have not done anything related to the administration of the Estate for years.

On September 9, 2009, the Personal Representatives filed the instant Complaint in Equity seeking a judgment declaring that they are entitled as a matter of law to gain complete and unfettered access to the contents of the email account. The Personal Representatives also seek a mandatory injunction requiring Yahoo! to grant them unfettered access to the contents of the email account. On November 9, 2009, Yahoo! filed a Motion to Dismiss the Complaint noting the following: "(a) the unambiguous, mandatory forum selection clause contained in the contract between the decedent and Yahoo! requires this action to be brought in California; (b) the contractually agreed to one-year statute of limitations applicable to such actions has expired; (c) *res judicata* bars this action; and (d) pursuant to Mass. R. Civ. P. 12(b)(6), the complaint fails to state a claim for which relief can be granted because the private emails in a Yahoo! email account are not 'property' of the estate." On November 10, 2010, the Court (Casey, J.) entered a Memorandum of Decision and Order allowing Yahoo!'s Motion to Dismiss on counts one (1) through four (4) and dismissed the Complaint in Equity without prejudice to refiling the claims in a California court.

On May 7, 2013, the Appeals Court of Massachusetts (hereinafter "the Appeals Court") reversed and

remanded the Court's Order allowing Yahoo!'s Motion to Dismiss. The Court held the following: (1) the action was not barred by the doctrine of claim preclusion; (2) it was not reasonable to enforce against the Personal Representatives the forum selection and limitations provisions in Yahoo!'s terms of service; and (3) remand was required for full briefing and further proceedings regarding the ultimate question of whether the Stored Communications Act prohibited disclosure by Yahoo! of the contents of the decedent's email account. This matter is presently before the Court on cross-motions for summary judgment.

DISCUSSION

Summary judgment is permissible when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56. A moving party may be entitled to summary judgment in one of two ways: first, he may submit affirmative evidence negating the nonmoving party's claim; or second, he may demonstrate that the nonmoving party cannot establish an element of his claim. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 715 (1991), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (White, J., concurring). "Doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment." *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 628 (2007).

"The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he would have no burden on an issue if the case were to go to trial." *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989), citing *Attorney Gen. v. Bailey*, 386 Mass. 367, 371 (1982). If the moving party is able to demonstrate a lack of genuine issue, "the burden shift[s] to the [nonmoving party] to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985).The nonmoving party must then go beyond the pleadings and demonstrate specific facts to show that there remains a genuine issue of material fact requiring a trial. *Slaven v. City of Salem*, 386 Mass. 885, 890 (1982), citing *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975).

In the present case, the critical question is whether the summary judgment record sets forth any genuine dispute of material fact as to whether the Stored Communications Act prohibits Yahoo! from disclosing the contents of the decedent's email address and whether the decedent's emails are property of his estate.

A. Stored Communications Act

Under the Stored Communications Act (hereinafter "SCA"), "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a

communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). Additionally, "a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service – (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service; (B) 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 of any such communications for purposes of providing any services other than storage or computer processing." 18 U.S.C. § 2702(a)(2). It is not necessary in this case to determine whether Yahoo! is an electronic communication service (hereinafter "ECS") or a remote computing service (hereinafter "RCS"). Both ECS and RCS providers are precluded from divulging the contents of a communication subject to the exceptions enumerated below.

The SCA provides for the following exceptions: "A provider described in subsection (a) may divulge the contents of a communication – (1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient; (2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title; (3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote

computing service; (4) to a person employed or authorized or whose facilities are used to forward such communication to its destination; (5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; (6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A; (7) to a law enforcement agency – (A) if the contents – (i) were inadvertently obtained by the service provider; and (ii) appear to pertain to the commission of a crime; (8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency." 18 U.S.C. § 2702(b).

1. The Agency Exception

The Personal Representatives argue that the exception contained in § 2702(b)(1) applies in the present case, i.e. "[a] provider described in subsection (a) may divulge the contents of a communication – (1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." "Agents are fiduciaries who are subject to control by those for whom they act. Court-appointed fiduciaries, such as guardians, executors, administrators, and receivers, are also fiduciaries, but they are *not* agents, because they are neither under the control of the one for whose benefit they are acting nor are they appointed by such person. These appointees have a duty

to act for the benefit of others – the guardian for the ward, the executor or administrator for the family and creditors of the decedent, and the receiver for the entity whose property he is managing – and therefore are classified as fiduciaries. However, their primary responsibility is to the court which appointed them, and since it is the appointing court and not those for whom they act that has the power to control their activities, they do not meet the test of agency." 14 Mass. Prac., Agency § 1:12 (4th ed.) (emphasis in original). Due to the fact that the Personal Representatives are not agents of the decedent, the exception contained in § 2702(b)(1) does not apply to this case.

2. The Consent Exception

The Personal Representatives also argue that the exception contained in § 2702(b)(3) applies in the present case, i.e. "[a] provider described in subsection (a) may divulge the contents of a communication – (3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service." The Personal Representatives do not argue that they received actual consent from the decedent to view the contents of the emails. Rather, the Personal Representatives argue that they may consent to the disclosure of the content of the emails on the decedent's behalf. In support of this position, the Personal Representatives cite to *Negro v. Superior Court*, 230 Cal. App. 4th 879 (2014). In *Negro*, the Court of Appeals for the Sixth District of California held that a litigant in a civil

lawsuit could be compelled by the court to consent to a disclosure of its email communications for discovery purposes and that such forced consent satisfied the SCA. See *Negro v. Superior Court*, 230 Cal. App. 4th 879, 899 (2014).

The *Negro* case is not helpful to the Personal Representatives. In *Negro*, the Court held that the "'lawful consent' exception to the prohibitions of the Act (18 U.S.C. § 2702(b)(3)) is not satisfied by consent that is merely constructive, implied in law, or otherwise *imputed* to the user by a court." *Id*. at 889 (emphasis in original). The Court found in *Negro* that the plaintiff had expressly consented to the disclosure of his emails and the fact that his consent was given pursuant to a court order did not make the consent unlawful under the SCA. *Id*. at 899. The plaintiff had a choice between consenting to the production of the emails or risk such sanctions as the court might elect to impose. *Id.* In the present case, the Personal Representatives do not argue that the decedent gave express consent to the disclosure of the contents of his emails. This Court cannot impute the consent of the decedent nor can it order the decedent to provide express consent. Any order this Court made to Yahoo! to divulge the content of the decedent's emails would be without the express consent of the decedent and would compel Yahoo! to violate the SCA.

Two California Federal cases touch upon the consent exception to the SCA in relation to the legal heirs of a decedent, but neither of the cases specifically address the issue in the present case.

i. *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

In *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1205 (N.D. Cal. 2012), the decedent died after falling from the twelfth floor of an apartment building in Manchester, England. The decedent's surviving family members (hereinafter "the applicants") "were invited by the Coroner's Office to provide records showing [the decedent's] state of mind when she died. [The decedent] apparently had a Facebook account that she used on a regular basis. Applicants dispute that [the decedent] committed suicide and believe that her Facebook account contains critical evidence showing her actual state of mind in the days leading up to her death." *Id*. The applicants subpoenaed records of the decedent's Facebook account for the time period leading up to her death. *Id*. Facebook, Inc. (hereinafter "Facebook") moved to quash the subpoena on the grounds that the subpoena violates the SCA. *Id*.

The United States District Court for the Northern District of California held that "civil subpoenas may not compel production of records from providers like Facebook" because to rule otherwise would run afoul of the privacy interests the SCA seeks to protect. *Id*. at 1206. The Court then went on to hold that having found that the subpoena should be quashed, it lacked "jurisdiction to address whether the Applicants may offer consent on [the decedent's] behalf so that Facebook may disclose the records voluntarily. Any such ruling would amount to nothing less than an impermissible advisory opinion." *Id*. Therefore, the Court in *Facebook*

failed to reach the relevant issue in this case, i.e. whether a personal representative of a decedent may consent on a decedent's behalf so that an electronic communication service may divulge the content of the decedent's communications.

ii. *Clymore v. Federal Railroad Administration*, 2015 WL 776086 (E.D. Cal. 2015).

In *Clymore v. Federal Railroad Administration*, 2015 WL 776086, *1 (E.D. Cal. 2015), the decedent's parents (hereinafter "Plaintiffs") filed a wrongful death action against the Federal Railroad Administration (hereinafter "Defendant") due to the negligent conduct of one of Defendant's employees while acting within the scope of his employment. Plaintiffs provided Defendant with initial discovery including "text messages, emails, and Facebook screen shots of communications between the decedent and Plaintiffs." *Id*. "Thereafter, Defendant requested production of all 'email correspondence, data, social media, and documents for the time period surrounding the emails provided [.]' Doc. 50. Plaintiffs eventually responded with objections and noted 'they do not have in their possession or control the emails or texts sent to or received from [the decedent] during the six months prior to his death, which have not already been produced.' Doc. 50. With regard to the Facebook communications, Plaintiffs stated they 'do not have in their possession or control the password or user name to gain access' to his Facebook account. Doc. 50." As a result of Plaintiffs' response, Defendant subpoenaed Facebook to seek

production of the decedent's Facebook contents. *Id*. "Facebook responded that they were without authority, under the Stored Communications Act (SCA), to produce the contents absent the account owner's consent. Defendant thus requested that Plaintiffs obtain the contents from Facebook, but they refused." *Id*.

"Defendant asserts that because Plaintiffs alleged they are the decedent's legal heirs, they have custody and control of his Facebook account such that they can and should be compelled to produce the requested contents." *Id*. On the other hand, "Plaintiffs insist they cannot obtain control over the decedent's Facebook account because, contrary to Defendant's assertion, Facebook does not give such authority to a deceased person's heirs." *Id*. at *2. The United States District Court for the Eastern District of California concluded that "Defendant has not . . . shown . . . that Plaintiffs have custody and control of the decedent's Facebook contents beyond what they already have or that they can successfully obtain such content." *Id*. at *3. Therefore, the Court concluded that Plaintiffs' refusal to obtain the contents from Facebook was justified and denied Defendant's motion to compel. *Id*. at *4. The Court did not reach the issue in the present case because it did not hold that the decedent's legal heirs could not successfully obtain the content of the decedent's Facebook account. Rather, the Court held that Defendants had not shown that the legal heirs could successfully obtain such content for the purposes of the motion to compel.

B. Emails as Estate Property

The SCA prohibits Yahoo! from disclosing the contents of the decedent's emails to the Personal Representatives. Therefore, the Court need not decide whether the emails are property of the Estate; the SCA as a Federal law would preempt any conflicting Massachusetts law. "[A]n actual conflict exists if compliance with both laws is physically impossible." *Sawash v. Suburban Welders Supply Co., Inc.*, 407 Mass. 311, 316 (1990). Therefore, Massachusetts' probate laws cannot be enforced in a way that compels Yahoo! to make disclosures violating the SCA. Nonetheless, the Court will address the issue of whether emails constitute estate property in the event that it is found on appeal that the SCA does not prohibit Yahoo! from divulging the contents of the decedent's emails.

Despite not finding any case law in Massachusetts or in other jurisdictions dealing with this issue, the Court finds that the decedent's emails are property of the Estate such that the Personal Representatives would be entitled to take possession of the emails if permitted by the SCA. "Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property will be necessary for purposes of administration." G. L. c. 190B, § 3-709. The decedent's "property" "includes both real and

personal property or any interest therein and means anything that may be the subject of ownership." G. L. c. 190B, § 1-201(40). The decedent's property includes both tangible and intangible property. See G. L. c. 190B, § 3-715(a)(6) ("a personal representative other than a special personal representative, acting reasonably for the benefit of the interested persons, may properly: (6) acquire or dispose of tangible and intangible personal property for cash or on credit, at public or private sale; and manage, develop, improve, exchange, change the character of, or abandon an estate asset.").

In *District Attorney for Norfolk Dist. v. Magraw*, the Appeals Court expressed concern that a personal representative with a conflict of interest or a "potential desire to suppress confidences of the decedent could be tempted to deal improperly with documents (e.g., bills, letters, diaries) of the decedent that might be revealing." *District Attorney for Norfolk Dist. v. Magraw*, 34 Mass. App. Ct. 713, 719 (1993). Although *Magraw* does not deal directly with the issue of what constitutes probate property, it suggests that all of the decedent's personal effects – including letters – are property of the estate subject to the personal representative's power to acquire or dispose of the property. In the present case and for the purposes of probate, the Court does not find any meaningful distinction between a letter received through the postal service and a letter received through the internet other than the physical nature of the letters.

Emails are intangible property (if not printed off of the recipient's email account) similar to intellectual property rights. Intellectual property includes "products such as arts, films, electronic media, video games, interactive digital media, multimedia, or design." See G. L. c. 23A, § 64. The Court did not find any Massachusetts case law dealing with the intellectual property rights of a decedent, but probate courts in other jurisdictions have dealt with these rights in the context of the probate of a will. See *Estate of Kerouac*, 126 N.M. 24, 28 (1998) (determining that an estate may only possess the rights to literary property that the decedent owned at the time of death); *Matter of Estate of Hellman*, 511 N.Y.S.2d 485, 486 (1987) (determining "who shall hold legal title to and control the intellectual property rights in the decedent's works"). Given the broad range of property included in a decedent's estate (i.e. intellectual property, bills, letters, diaries), it follows that a recipient's emails become probate property upon death.

Finally, Yahoo! raises the issue of its Terms of Service (hereinafter "the TOS") arguing that the decedent did not have a property right to the contents of his email account. At the time the decedent's account was created in 2002, the TOS provided that Yahoo! could: "in its sole discretion . . . terminate your password, account (or any part thereof) or use of Service, and remove and discard any Content within the Service, for any reason . . . Yahoo may also in its sole discretion and at any time discontinue providing the Service, or any part thereof, with or without notice. You agree that any

termination of your access to the Service under any provision of this TOS may be effected without prior notice, and acknowledge and agree that Yahoo may immediately deactivate or delete your account and all related information and files in your account and/or bar any further access to such files or the Service. Further, you agree that Yahoo shall not be liable to you or any third-party for any termination of your access to the service." The TOS also provides that Yahoo! grants the user "a personal, non-transferable and non-exclusive right and license to use the object code of its Software on a single computer."

Having found that the SCA prohibits Yahoo! from divulging the contents of the decedent's email account, this case may be decided on summary judgment. There are no genuine issues of material fact regarding whether the SCA prohibits disclosure of the emails nor is there a genuine issue of material fact pertinent to whether emails may be considered estate property. However, the Court cannot reach the issue of whether Yahoo!'s TOS should apply in this case on summary judgment. Neither party supplied the Court with the facts necessary to determine whether the TOS is an enforceable contract. It is a well-settled principle of contract law that an enforceable contract requires a "meeting of the minds," consisting of "agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement." *Situation Management Systems, Inc. v. Malouf, Inc.*, 430 Mass. 875, 878 (2000).

In its order of remand of this matter, the Appeals Court held that on summary judgment, "Yahoo! had the burden of establishing, on undisputed facts, that the provisions of the TOS were reasonably communicated and accepted. 'Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 574-575 (2013). The Appeals Court held that the undisputed facts did not establish "that the provisions of the 2002 and amended TOS were reasonably communicated" to the decedent. *Id*. at 575. The Appeals Court provided the following reasoning: "We do not know, and cannot infer, that the provisions of the 2002 TOS were displayed on the user's computer screen (in whole or in part). It is equally likely, given how the affidavit is phrased, that the user was expected to follow a link to see the terms of the agreement. If that was the case, the record would need to contain information concerning the language that was used to notify users that the terms of their arrangement with Yahoo! could be found by following the link, how prominently displayed the link was, and any other information that would bear on the reasonableness of communicating the 2002 TOS via a link." *Id*.

Similar to the Appeals Court, this Court cannot conclude that the undisputed facts establish that the provisions of the 2002 TOS were reasonably

communicated to the decedent.[1] In its Statement of Undisputed Facts, Yahoo! provides the following: "On August 19, 2002, [the decedent] created the Account. In order to complete Yahoo!'s account creation process, [the decedent] would have been required to provide certain information about himself, and to assent to Yahoo!'s Terms of Service." The Personal Representatives state that it was Robert and not the decedent who created the account. Additionally, the Personal Representatives state that Robert does not recall being presented with Yahoo!'s TOS when he created the account for the decedent. In addition to the parties' dispute as to these material facts, the Court cannot decide on summary judgment whether the TOS is an enforceable contract because Yahoo! did not provide this Court with any information regarding whether the provisions of the TOS were reasonably communicated and accepted. Yahoo! provided no facts regarding whether the provisions of the TOS were displayed on the user's computer screen or whether the user had to follow a link to view the provisions. If the user did have to follow a link to view the provisions of the TOS, this Court has no information regarding the language used to convey to the reader that he or she needed to follow the link nor any information regarding how prominently the language was displayed. Accordingly, this Court cannot decide on summary judgment whether the TOS is an enforceable contract.

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[1] Subsequent to the remand in this matter, Yahoo! stipulated that it is not asserting that the amended TOS bars the Personal Representatives' claim that it is entitled to the contents of the account.

CONCLUSION

Based on the foregoing, the Court finds that the content of the decedent's emails are property of the Estate; there is no genuine issue of material fact as to this issue. However, the Court cannot decide on summary judgment whether the TOS is an enforceable contract such that it would prohibit Yahoo! from divulging the contents of the decedent's emails to the Personal Representatives. There is a genuine issue of material fact as to this issue as well as a failure by both parties to provide the Court with the facts necessary to determine whether the TOS is an enforceable contract. Nonetheless, the Court finds that summary judgment is appropriate. The Court finds that the SCA prohibits Yahoo! from divulging the contents of the decedent's email account to the Personal Representatives; there is no genuine issue of material fact as to this issue. Accordingly, it is hereby ordered that:

ORDER

1. The Personal Representatives' Motion for Summary Judgment is **DENIED**.

2. Yahoo!'s Motion for Summary Judgment is **ALLOWED**.

Dated: 3/10/16 /s/ John D. Casey
John D. Casey, First Justice
Norfolk Probate and Family Court

18 U.S.C. § 2702 – Voluntary disclosure of customer communications or records

(a) Prohibitions. – Except as provided in subsection (b) or (c) –

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service –

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) 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 of any such communications for purposes of providing any services other than storage or computer processing; and

(3) 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 (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) Exceptions for disclosure of communications. – A provider described in subsection (a) may divulge the contents of a communication –

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A;

(7) to a law enforcement agency –

(A) if the contents –

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

[(B) Repealed. Pub. L. 108–21, title V, §508(b)(1)(A), Apr. 30, 2003, 117 Stat. 684]

(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

(c) Exceptions for Disclosure of Customer Records. – A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2)) –

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A; or

(6) to any person other than a governmental entity.

(d) Reporting of Emergency Disclosures. – On an annual basis, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report containing –

(1) the number of accounts from which the Department of Justice has received voluntary disclosures under subsection (b)(8);

(2) a summary of the basis for disclosure in those instances where –

(A) voluntary disclosures under subsection (b)(8) were made to the Department of Justice; and

(B) the investigation pertaining to those disclosures was closed without the filing of criminal charges; and

(3) the number of accounts from which the Department of Justice has received voluntary disclosures under subsection (c)(4).

18 U.S.C. § 2703 – Required disclosure of customer communications or records

(a) Contents of Wire or Electronic Communications in Electronic Storage. –

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of Wire or Electronic Communications in a Remote Computing Service. –

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection –

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant

issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity –

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section; except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service –

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) 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 of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records Concerning Electronic Communication Service or Remote Computing Service. –

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity –

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the –

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for Court Order. –

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court

order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) No Cause of Action Against a Provider Disclosing Information Under This Chapter. –

No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) Requirement To Preserve Evidence. –

(1) In general. –

A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention. –

Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of Officer Not Required. –

Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.