September 16, 2005

Via Electronic Filing

The Honorable James Orenstein
United States Magistrate Judge
Eastern District of New York
Long Island Federal Courthouse
924 Federal Plaza
Central Islip, New York 11722-4454

RE: ***In re Application for Pen Register and Trap and Trace Device With Cell Site Location Authority,*** **Magistrate's Docket No. 05-1093 (JO)**

Dear Magistrate Judge James Orenstein:

The Electronic Frontier Foundation ("EFF") respectfully requests permission to file an *amicus curiae* brief in opposition to the Government's pending motion to reconsider the Memorandum and Order entered August 25, 2005 (the "August 25 Order"), __ F.Supp.2d __, 2005 WL 2043534 (E.D.N.Y. Aug. 25, 2005).[1]

EFF submits that the August 25 Order correctly denied the Government's application, purportedly under the combined authority of 18 U.S.C. §§ 3122 and 2703, for an order compelling a telecommunications provider to enable the Government's prospective surveillance of a cell phone user's location. However, in reaching that correct result, EFF is concerned that the Court relied on a mistaken construction of the statute. EFF respectfully requests the Court's permission to file a brief that would provide an alternative reading of the statute that bolsters the Court's ultimate conclusion, and would recommend issuance of an amended order clarifying the Court's reasoning.

EFF is a member-supported legal foundation that litigates to protect free speech and privacy rights in the digital age. As part of that mission, EFF has served as counsel or amicus in a number of key cases addressing the Electronic Communications Privacy Act ("ECPA"), the Communications Assistance for Law Enforcement Act ("CALEA") and related electronic privacy statutes. *See Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994); *U.S. Telecom Ass'n v. F.C.C.*, 227 F.3d 450 (D.C. Cir.

---

[1] EFF respectfully requests leave to file its brief by September 23, 2005, or any date thereafter that the Court deems appropriate. This is ten business days after filing of the moving papers for the Government's motion for reconsideration, which is the time by which an opposition brief would have been due pursuant to Local Rule 6.1(b).

2000); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert denied*, 537 U.S. 1193 (2003); *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004); and *U.S. v. Councilman*, 418 F.3d 67 (1st Cir. 2005).

The federal statutory regime governing electronic surveillance is a "complex, often convoluted area of the law." *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998). EFF seeks to assist the Court in navigating that statutory framework while providing an adversarial balance to the Government's otherwise unchallenged claims. If granted leave to file, EFF would be able to lend its expert voice to the millions of cell phone users with a stake in this decision, who until now have been kept ignorant of the Government's apparently routine abuse of the *ex parte* process. Left unopposed, the Government appears to have successfully hoodwinked a great number of magistrates, baldly misrepresenting the law in order to secretly obtain continuous, real-time location information from telecommunications carriers without probable cause. EFF, if allowed, could offer the Court a crucial opposing viewpoint.

In summary, if this Court were to grant leave, EFF would argue that in reaching its undoubtedly correct conclusion that 18 U.S.C. § 2703(d) does not allow for an order compelling prospective collection of cell location information, the Court misread § 2703(d) to only authorize orders to obtain the "content" of communications. Yet as the Government correctly argues in its motion for reconsideration, § 2703(c)(1)(B) explicitly authorizes § 2703(d) orders ("D Orders") for non-content records: "(1) A governmental entity may require a provider of electronic communication 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… (B) obtains a court order for such disclosure under subsection (d) of this section." 18 U.S.C. § 2703(c).

Even assuming that cell location information constitutes non-content information pertaining to a subscriber of an electronic communication service, a controversial question, the Government's own electronic evidence manual instructs that a D Order is insufficient to obtain information prospectively. [2] The radical new position now offered

---

[2] *See* U.S. Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* at ix, 24 (July 2002), *available at* http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf ("Any real-time interception of electronically transmitted data in the United States must comply strictly with the requirements of Title III, 18 U.S.C. §§ 2510-2522 [The Wiretap Act], or the Pen/Trap statute, 18 U.S.C. §§ 3121-3127," while "18 U.S.C. §§ 2701-12 ("ECPA")… governs how investigators can obtain stored account records and contents from network service providers….").

by the Government is unsupported by 18 U.S.C. § 2703's plain language or ECPA's legislative history,[3] and is contrary to both academic[4] and industry[5] consensus. Prospective collection of non-content information is instead the province of the Pen-Trap Statute, 18 U.S.C. § 3121 *et seq*. However, as this Court correctly found based on Congress' clear guidance in CALEA, *see* 47 U.S.C. § 1002(a)(2)(B), Pen-Trap Orders applied for under 18 U.S.C. § 3122 and issued under 18 U.S.C. § 3123 cannot be used to authorize or compel the prospective collection of location information.

EFF respectfully requests leave to explain its alternative reading of § 2703 at more length, and assure the Court that although it may have misconstrued some of ECPA's particulars, its ultimate conclusion was correct. EFF also seeks to contest the Government's belated argument that a Pen-Trap Order supplemented with a D Order may compel prospective location tracking. Notably, the Government cannot point to any statutory language, legislative history, case law or academic commentary even suggesting such a hybrid order, much less supporting it. If given leave, EFF could offer more extended discussion of why this statutory Frankenstein that the Government has stitched together out of ill-fitting parts is contrary to privacy law and policy, and of dubious constitutionality.

---

[3] The legislative history of ECPA repeatedly refers to records that are "maintained," "kept," or "stored," and offers absolutely no support for the proposition that 18 U.S.C. § 2703 may be used to obtain prospective collection of information. *See generally* S. Rep. No. 541, 99th Cong., 2d Sess. (1986), H.R. Rep. No. 647, 99th Cong., 2d Sess. (1986), and 132 Cong. Rec. H4039-01, 1986 WL 776505.

[4] *See* Orin Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 Nw. U.L. Rev. 607, 617 n. 47 (2003) ("The law draws a distinction between prospective Internet surveillance…governed by the Wiretap Act and the Pen Register Statute… and retrospective surveillance…governed by the Electronic Communications Privacy Act…."), and Deirdre Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 Geo. Wash. L. Rev. 1557, 1565 (2004) ("The Wiretap Act and Pen Register statute regulate prospective surveillance… and the SCA [i.e., the Stored Communications Act portion of ECPA, 18 U.S.C. 2701 et seq.] governs retrospective surveillance….").

[5] *See* U.S. Internet Service Provider Association, *Electronic Evidence Compliance—A Guide for Internet Service Providers*, 18 Berkeley Tech. L.J. 945, 951, 957 (2003) (D Orders are for "historical" non-content records, while Pen-Trap Orders are for "any prospective non-content information….").

For the above reasons, EFF respectfully requests that this Court grant its Motion for Leave to File as Amicus Curiae.

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

By: 

Wendy Seltzer (WS-4188)
250 Joralemon Street
Brooklyn, NY 11201
Telephone: (917) 780-7961
Facsimile: (917) 780-0934
wendy@seltzer.org

Kevin Bankston, EFF Staff Attorney
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x 126
Facsimile: (415) 436-9993
bankston@eff.org

ATTORNEYS FOR AMICUS CURIAE

cc: Burton T. Ryan, Jr.
Assistant U.S. Attorney
United States Attorney's Office
610 Federal Plaza
Central Islip, NY 11722-4454
via Federal Express Overnight Delivery