
FEDERAL STATUTES — STORED COMMUNICATIONS ACT —
FOURTH CIRCUIT UPHOLDS AWARD OF PUNITIVE BUT NOT
STATUTORY DAMAGES. — *Van Alstyne v. Electronic Scriptorium,
Ltd.*, 560 F.3d 199 (4th Cir. 2009).

The rapid rise of electronic communication over the past several decades has created myriad concerns regarding personal privacy.¹ In 1986, Congress passed the Stored Communications Act² (SCA) in response to escalating interference with such communication.³ Enacted as part of the broader Electronic Communications Privacy Act⁴ (ECPA), the SCA allows courts to award plaintiffs both statutory and punitive damages for invasion of electronic privacy.⁵ Recently, in *Van Alstyne v. Electronic Scriptorium, Ltd.*,⁶ the Fourth Circuit held that, absent a demonstration of actual damages, the SCA allows an award of punitive damages and attorney's fees but not statutory damages.⁷ In reaching its decision on the statutory damages question, the Fourth Circuit relied heavily on the Supreme Court's opinion in *Doe v. Chao*,⁸ which interpreted the Privacy Act of 1974⁹ to provide statutory damages only in the presence of actual damages.¹⁰ By approving the punitive damages award in *Van Alstyne* without requiring proof of actual damages, the Fourth Circuit sharpened the teeth of the SCA. However, in considering the question of statutory damages, the court overstated the similarities between the Privacy Act and the SCA, ignoring relevant differences in the acts' texts and legislative histories that indicate that Congress intended the SCA to provide broader relief than the Privacy Act provides. In order to fulfill the SCA's purpose of protecting individual privacy in the realm of electronic communication,¹¹ the Fourth Circuit should have affirmed the district court's grant of statutory damages.

¹ See, e.g., Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 83 n.366 (2000) (remarking that "data privacy concerns rise as individuals use modern technologies . . . such as credit cards, private telephones, and the Internet").

² Pub. L. No. 99-508, tit. II, 100 Stat. 1860 (1986) (codified as amended at 18 U.S.C.A. §§ 2701-2711 (West 2000 & Supp. 2009)).

³ See S. REP. NO. 99-541, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3589 (stating that the SCA "addresses the growing problem of unauthorized persons deliberately gaining access to, and sometimes tampering with, electronic or wire communications that are not intended to be available to the public").

⁴ Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

⁵ 18 U.S.C. § 2707(c) (2006).

⁶ 560 F.3d 199 (4th Cir. 2009).

⁷ *Id.* at 210.

⁸ 540 U.S. 614 (2004).

⁹ 5 U.S.C. § 552a (2006).

¹⁰ *Doe*, 540 U.S. at 627.

¹¹ See S. REP. NO. 99-541, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3589.

Bonnie Van Alstyne worked for the data conversion company Electronic Scriptorium, Ltd. (ESL).¹² In October 2001, the firm's president allegedly sexually propositioned her, and she refused his advances.¹³ Five months after this incident allegedly occurred, ESL terminated Van Alstyne.¹⁴ The two parties brought various claims against one another, ESL for business torts and Van Alstyne for sexual harassment.¹⁵ During the discovery phase of ESL's tort suit, the company produced several emails from Van Alstyne's personal account.¹⁶ After discovering that her former employer had accessed her account without authorization, Van Alstyne brought an action against ESL under the SCA.¹⁷

In the United States District Court for the Eastern District of Virginia, a jury found that ESL's unauthorized access of Van Alstyne's personal email indeed constituted a violation of the SCA.¹⁸ The jury awarded Van Alstyne \$150,000 in statutory damages and \$75,000 in punitive damages against ESL's president, and \$25,000 in statutory damages and \$25,000 in punitive damages against the firm itself.¹⁹ The district court approved the statutory damages awards despite the fact that Van Alstyne had not alleged that she had suffered actual damages as a result of her employer's invasion of her privacy.²⁰

The Fourth Circuit vacated in relevant part and remanded.²¹ Writing for a unanimous panel, Chief Judge Williams based her analysis of the SCA's damages provision on the Supreme Court's interpretation in *Doe v. Chao* of a similarly worded clause in the 1974 Privacy Act.²² Under the Privacy Act, when agency mismanagement or improper disclosure of an individual's administrative record has an adverse effect on the individual²³ and a court finds the agency's action to have been "intentional or willful, the United States shall be liable to the individual in an amount equal to . . . actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000."²⁴ Under the SCA, "[t]he court may assess as damages . . . the sum of the actual damages suffered by the plaintiff and any profits made by the vi-

¹² *Van Alstyne*, 560 F.3d at 201–02.

¹³ *Id.* at 202.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 202–03.

¹⁹ *Id.*

²⁰ *See id.*

²¹ *Id.* at 208, 210.

²² *Id.* at 205.

²³ *See* 5 U.S.C. § 552a(g)(1)(C)–(D) (2006).

²⁴ *Id.* § 552a(g)(4).

olator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000.”²⁵ The *Doe* Court held that the Privacy Act compels the limitation of statutory damages to plaintiffs who can prove actual damages.²⁶ According to the Court, since the first clause of § 552a(g)(4) calculates liability according to the plaintiff’s actual damages, the second clause’s mention of a “person entitled to recovery” must refer exclusively to persons who have suffered such damages.²⁷

Chief Judge Williams adopted this interpretation with regard to the SCA, reasoning that both it and the Privacy Act contain the “substantively identical”²⁸ phrase “but in no case shall a person entitled to recover receive less than the sum of \$1,000”²⁹ and that in both cases this phrase refers to “the immediately preceding provision for recovering actual damages.”³⁰ Chief Judge Williams also noted that Congress has enacted statutes that allow for actual damages as an alternative, rather than a prerequisite, to statutory damages, and that the remedy provisions in these statutes look dissimilar to § 2707(c) of the SCA.³¹

The court next considered and rejected each of the plaintiff’s arguments. Van Alstyne first contended that the SCA’s legislative history indicated that Congress had intended to provide statutory damages even absent a showing of actual damages. The Act’s Senate Report states that “damages under the section includ[e] the sum of actual damages suffered by the plaintiff and any profits made by the violator as the result of the violation as provided in [18 U.S.C. § 2707](c) with minimum statutory damages of \$1,000.”³² The court rejected the contention that this sentence bolstered the plaintiff’s position, reasoning that “[t]he mere mention of ‘statutory damages’ in the legislative history hardly works to conclusively establish” that such damages are available to all successful plaintiffs regardless of whether they demonstrate actual damages.³³

²⁵ 18 U.S.C. § 2707(c) (2006).

²⁶ *Doe v. Chao*, 540 U.S. 614, 627 (2004).

²⁷ *Id.* at 618–22 (quoting 5 U.S.C. § 552a(g)(4)) (internal quotation marks omitted).

²⁸ *Van Alstyne*, 560 F.3d at 205.

²⁹ *Id.* (quoting *Doe*, 540 U.S. at 619) (internal quotation marks omitted).

³⁰ *Id.* (quoting *Doe*, 540 U.S. at 620) (internal quotation mark omitted).

³¹ *Id.* at 205–06. By way of example, the court referred to the damages provision of the Wiretap Act, 18 U.S.C. § 2520(c)(2) (2006), which states that “the court may assess as damages whichever is the greater of . . . the sum of the actual damages suffered by the plaintiff and any profits made by the violator . . . or . . . statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.” *Van Alstyne*, 560 F.3d at 205–06 (quoting 18 U.S.C. § 2520(c)(2)).

³² *Van Alstyne*, 560 F.3d at 207 (first alteration in original) (quoting S. REP. NO. 99-541, at 43 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3597) (internal quotation marks omitted).

³³ *Id.*

The court also addressed the argument that the SCA found its common law roots in the tort of trespass, for which a successful plaintiff may obtain damages even if he cannot show any tangible harm resulting from the defendant's acts.³⁴ Chief Judge Williams reasoned that the SCA created a cause of action that was more akin to trespass to chattel than to trespass to land.³⁵ She then pointed out that a plaintiff can recover on a claim of trespass to chattel only if he or she demonstrates actual damages.³⁶ Therefore, the SCA's common law analogue did not support Van Alstyne's interpretation of § 2707(c).³⁷ Having rejected each of Van Alstyne's contentions, the court vacated her statutory damages award.³⁸

The Fourth Circuit's decision rested on two flawed conclusions. First, the court deemed the SCA's damages clause unambiguous.³⁹ Second, it reasoned that the meaning of the phrase "person entitled to recover" holds constant across the Privacy Act and the SCA. However, the SCA's damages clause is capable of multiple interpretations.⁴⁰ The phrase "person entitled to recover" could refer either to plaintiffs who have proven actual damages or to the broader class of all successful plaintiffs.⁴¹ Not only is the phrase ambiguous, but also its meaning may change subject to its statutory context. The *Doe* Court itself turned to the Privacy Act's drafting and legislative histories in order to construe the phrase.⁴² This interpretive move suggests both that the Court found the clause ambiguous⁴³ and that it relied on information specific to the Privacy Act in order to construe it. Accordingly, it is both appropriate and helpful to look beyond the text of the SCA's damages clause in order to come to a fully informed interpretation of the phrase "person entitled to recover." Examinations of the Act's

³⁴ *Id.*

³⁵ *Id.* at 208.

³⁶ *Id.* (citing *Doe v. Chao*, 540 U.S. 614, 621 (2004)).

³⁷ *Id.*

³⁸ *Id.* at 210.

³⁹ *Id.* at 206.

⁴⁰ See, e.g., *In re Hawaiian Airlines, Inc.*, 355 B.R. 225, 229 (D. Haw. 2006) ("[Section 2707(c)'s] language is susceptible to differing interpretations.>").

⁴¹ See *Doe*, 540 U.S. at 630 (Ginsburg, J., dissenting) (reasoning that "the words 'person entitled to recovery' suggest greater breadth than 'individual [who has sustained] actual damages'" (alteration in original)). Justice Ginsburg pointed out that construing "person entitled to recovery" to encompass no more than persons who had suffered actual damages would render the phrase superfluous. This position echoes the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." *Id.* at 630-31 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted)).

⁴² *Id.* at 622-23 (majority opinion).

⁴³ A prominent canon of statutory interpretation dictates that courts should turn to legislative history only in the face of ambiguous statutory text. See, e.g., *Bedroc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004).

common law analogue and of the text outside its damages provision suggest that courts should award statutory damages under the Act without conditioning them on proof of actual damages. The statute's normative implications also support this construction.

First, the court should have found the SCA's common law analogue in the tort of invasion of privacy, which traditionally allows plaintiffs to recover monetary damages even absent proof of actual damages,⁴⁴ rather than in trespass to chattel, which does not. The Restatement (Second) of Torts defines intrusion upon seclusion, a subset of invasion of privacy, as "intentional[] intru[sion], physical[] or otherwise, upon the solitude or seclusion of another or his private affairs or concerns."⁴⁵ It defines trespass to chattel as "intentional[] . . . us[e] or intermeddling with a chattel in the possession of another."⁴⁶ The definition of the latter tort focuses on unwanted use of another's property. The definition of intrusion upon seclusion, in contrast, describes violation of the less tangible interest in keeping one's personal affairs to oneself.

The SCA's purpose, as expressed in its legislative history, reflects more concern for the interests violated by intrusion upon seclusion than it does for the interests violated by trespass to chattel. The Senate Report accompanying the SCA states that the Act's purpose is to afford electronic communications the same protection that the law offers to first-class mail and telephone communications.⁴⁷ The interest in the secrecy of written and spoken conversations often finds protection in the invasion of privacy cause of action and is significantly dissimilar to the interest that trespass to chattel protects.⁴⁸ Thus, invasion of privacy, with its concomitant remedy of general damages, provides a closer analogue for the SCA than does trespass to chattel.

The Fourth Circuit could have looked to *Doe* to find support for this proposition. In *Doe*, the Court pointed out that invasion of privacy could arguably provide a logical common law antecedent of the

⁴⁴ See *Doe*, 540 U.S. at 621. Although recovery in tort cases generally depends on proof of actual damages, privacy tort victims may often win "general," *id.* (quoting RESTATEMENT OF TORTS § 867 cmt. d (1939); RESTATEMENT OF TORTS § 621 cmt. a (1938)) (internal quotation marks omitted), or "presumed" damages that juries and judges "calculate[] without reference to specific harm." *Id.*

⁴⁵ RESTATEMENT (SECOND) OF TORTS § 652B (1977).

⁴⁶ RESTATEMENT (SECOND) OF TORTS § 217(b) (1965).

⁴⁷ S. REP. NO. 99-541, at 5 (1986), *reprinted in* 1986 U.S.C.A.N. 3555, 3589.

⁴⁸ Compare *Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976) (recognizing an invasion of privacy cause of action arising out of unauthorized reading of mail, since "private individuals have a . . . reasonable expectation that their personal mail will not be opened and read by unauthorized persons"), and *Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041, 1054 (D. Haw. 2000) (holding that a wiretap, if conducted on the plaintiff's personal pager, would constitute a violation of her privacy), with *Seaphus v. Lilly*, 691 F. Supp. 127, 135 (N.D. Ill. 1988) (holding that plaintiff had stated a claim for trespass to chattel by alleging that defendant had slashed his car tires and otherwise vandalized his vehicle).

Privacy Act.⁴⁹ However, the Court decided that the Act's text and legislative history rendered this analogy unavailing to the plaintiff. First, the Privacy Act had created a Privacy Protection Study Commission charged with determining whether general damages should be available under 5 U.S.C. § 552a(g)(1)(C) or (D) for intentional or willful violations.⁵⁰ It was therefore clear that such damages were not already available under the Privacy Act.⁵¹ Furthermore, a prior version of the Act had contained an explicit provision for "general" damages that Congress had eliminated before enacting the law.⁵² Therefore, the statute's history prevented the Court from applying a theory of general damages to § 552a(g)(4).

No such impediment stood in the way of the Fourth Circuit in *Van Alstyne*. The SCA's damages clause never contained a later-abandoned provision for general damages.⁵³ Furthermore, the SCA did not create any sort of commission similar to the Privacy Act's Privacy Protection Study Commission.⁵⁴ The *Van Alstyne* court, then, was free to extend the reasoning in *Doe* and read a provision of general damages into the SCA under an analogy to the tort of invasion of privacy.

A textual analysis of the SCA and the Privacy Act provides a second reason why the Fourth Circuit should have decided in favor of *Van Alstyne* on the issue of statutory damages. The *Doe* Court asserted that the phrase "person entitled to recovery" was a vestige of the earlier version of the Privacy Act that had provided for both actual and general damages.⁵⁵ Thus, it was fitting for the original version of the Act to use "person entitled to recovery" as an umbrella term covering plaintiffs who were eligible for either actual or general damages.⁵⁶ When Congress dropped the general damages provision, "no one apparently thought to delete the inclusive reference to entitlement."⁵⁷ Because earlier iterations of the SCA never included a second type of damages, however, this reasoning cannot apply in interpreting § 2707(c). Particularly in light of the above discussion of the SCA's common law predecessor, an effort to give effect to the phrase "person entitled to recovery" would naturally reach out to plaintiffs who have suffered no actual damages.

⁴⁹ See *Doe*, 540 U.S. at 621.

⁵⁰ *Id.* at 622 (citing Privacy Act of 1974, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1896, 1907).

⁵¹ *Id.*

⁵² *Id.* at 622-23 (citing S. 3418, 93d Cong. § 303(c)(1) (1974)).

⁵³ See H.R. 4952, 99th Cong. § 2706(c) (1986); S. 2575, 99th Cong. § 2707(c) (1986).

⁵⁴ See 18 U.S.C.A. §§ 2701-2711 (West 2000 & Supp. 2009).

⁵⁵ *Doe*, 540 U.S. at 623 n.8 (citing S. 3418).

⁵⁶ *Id.*

⁵⁷ *Id.*

A broader examination of the statutes' texts illuminates an additional reason for differentiating between the acts' statutory damages provisions. The SCA and the Privacy Act premise receipt of statutory damages on different injury standards. Under the Privacy Act, a court may grant monetary damages only to a plaintiff who has suffered a "determination . . . which is adverse"⁵⁸ or an "adverse effect"⁵⁹ as a result of the violations from which his claims arise. Because "adverse determination" and "adverse effect" connote tangible harm, such determinations and effects most likely result only when the plaintiff has suffered actual damages. Thus, it makes sense to interpret § 552a(g)(4) as granting statutory damages only upon a showing of actual damages.

In contrast, the SCA creates a cause of action for any "person aggrieved" by a violation of the Act.⁶⁰ The term "aggrieved" does not connote tangible injury.⁶¹ Accordingly, an interpretation of the SCA to allow provision of statutory damages in the absence of actual damages would not violate a legislative preference like the one expressed in the Privacy Act.

It is possible to discount this distinction between the two statutes by arguing, as did the *Doe* Court, that "[t]he phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision."⁶² Under this interpretation, the difference in the Acts' wordings carries little weight. However, despite the Court's analysis, the structure of the Privacy Act indicates that in that instance, Congress drew a particularly strong connection between the term "adverse effect" and the availability of statutory damages. The Act differentiates clearly between those causes of action that involve adverse effects and those that do not, and it offers monetary damages only to plaintiffs who base their claims on the former causes of action.⁶³ This structural feature

⁵⁸ 5 U.S.C. § 552a(g)(1)(C) (2006).

⁵⁹ *Id.* § 552a(g)(1)(D).

⁶⁰ 18 U.S.C. § 2707(a) (2006).

⁶¹ See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 39 (2d ed. 1995). In a legal context, to "aggrieve" means "to bring grief to" or "to treat unfairly." *Id.* Neither of these definitions mentions tangible negative consequences resulting from such grief or unfair treatment.

⁶² *Doe*, 540 U.S. at 624 (quoting *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995)) (internal quotation marks omitted).

⁶³ The statute provides for actual or statutory damages only in cases arising under § 552a(g)(1)(C) or (D). See 5 U.S.C. § 552a(g)(4). Subsection (g)(1)(C), in turn, applies to an agency's failure to maintain an individual's records, if and only if that failure leads to "a determination . . . which is *adverse* to the individual." *Id.* § 552a(g)(1)(C) (emphasis added). Subsection (g)(1)(D) likewise only applies to agency actions that "have an *adverse* effect on an individual." *Id.* § 552a(g)(1)(D) (emphasis added). By contrast, subsections (g)(1)(A) and (B) do not mention adverse effects. Section 552a(g)(1)(A) creates a civil cause of action when an agency fails to "amend an individual's record in accordance with his request," *id.* § 552a(g)(1)(A), and § 552a(g)(1)(B) creates a civil cause of action when an agency declines an individual's request for access to his or

indicates that “adverse effect” is more than a standing-related term of art in the context of the Privacy Act. Rather, the term marks the availability of statutory damages. The absence of such a clear delineation in the SCA, as well as the replacement of “adverse effect” with the more intangible “aggrieved,” indicates that the Fourth Circuit had less reason than did the *Doe* court to deny statutory damages to a plaintiff who did not assert actual damage.

Finally, Van Alstyne’s explanation for her decision not to allege actual damages illustrates the normative desirability of providing unconditional statutory damages under the SCA. Van Alstyne declined to assert that she had suffered actual damages for the very reason that she wanted to “maintain a modicum of privacy and avoid further invasion of it through discovery.”⁶⁴ Forcing victims of electronic privacy invasions to recount the details of their harms seems to add insult to injury. Allowing these plaintiffs to recover statutory damages without such a showing of actual damages helps to restore their privacy rather than eroding it further.

The Fourth Circuit’s interpretation of the relationship between statutory and actual damages under the SCA will impose undue limits on the recovery of victims of privacy invasion. The court began to further the goals of full recovery and deterrence of SCA violations by approving the award of punitive damages, as well as attorney’s fees and litigation costs, even absent a showing of actual damages.⁶⁵ However, the promise of punitive damages is an unreliable one at best.⁶⁶ Accordingly, the Fourth Circuit should have refused to tie recovery of statutory damages to a showing of actual damages. Only by rejecting this overly narrow interpretation will courts allow for the robust protection of personal privacy contemplated by the SCA.

her own records, *id.* § 552a(g)(1)(B). Subsections 552a(g)(1)(A) and (B) lead in turn only to equitable relief, including production or amendment of a plaintiff’s records and an award of attorney’s fees and costs. *Id.* § 552a(g)(2)–(3).

⁶⁴ *Van Alstyne*, 560 F.3d at 203 (internal quotation marks omitted).

⁶⁵ See Richard S. Zackin, Employer Liable to Employee for Punitive Damages Under the Stored Communications Act for Accessing Employee’s Private Email Account Absent Proof Employee Incurred Actual Damages (Aug. 25, 2009), http://www.gibbonslaw.com/news_publications/articles.php?action=display_publication&publication_id=2865 (remarking that *Van Alstyne*’s award of punitive damages in the absence of actual damages “should serve as a reminder that accessing [employees’ email accounts without authorization] can have serious consequences”).

⁶⁶ See Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77, 133 (2003) (“The problem with punitive damages jurisprudence is that it is so subjective that its availability is uncertain. Additionally, to the extent that the availability of punitive damages is uncertain, it is an unreliable and ineffective remedy.”).