1996

The Communications Assistance for Law Enforcement Act and Protection of Cordless Telephone Communications: The Use of Technology as a Guide to Privacy

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THE COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT AND PROTECTION OF CORDLESS TELEPHONE COMMUNICATIONS: THE USE OF TECHNOLOGY AS A GUIDE TO PRIVACY

I. INTRODUCTION

"One day technology will be commonplace which renders cordless telephone conversations much less easily overheard, and laws designed to punish eavesdroppers far more capable of being punished."[1]

Last Fall the telecommunications industry introduced a new generation of cordless telephones—the 900Mhz cordless telephone.[2] Unlike its predecessors, the 900Mhz cordless telephone has unique features that make it considerably more difficult, sometimes even impossible, to intercept conversations on these

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[1] United States v. Carr, 805 F. Supp. 1266, 1273 (E.D. N.C. 1992).
A cordless telephone consists of a handset and a base unit wired to a landline and a household/business electrical current. A communication is transmitted from the handset to the base unit by AM or FM radio signals. From the base unit the communication is transmitted over wire, the same as a regular telephone call. The radio portions of these telephone calls can be intercepted with relative ease using standard AM radios.
S. Rep. No. 541, 99th Cong., 2nd Sess. 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3563 [hereinafter S. Rep. No. 541].

[2] Telephone Interview with Sharon Curry, AT&T Sales Associate, Randall Park Mall (Nov. 1, 1994).

telephones.[3] Some of these telephones are equipped with scramblers, while other telephones are constantly changing frequencies to ensure the privacy of the user's conversation.[4] These additional safety features have finally prompted Congress to protect the cordless telephone user.

While it is now illegal to intentionally intercept cordless telephone conversations, cordless telephone users have not always been protected. Prior to October 25, 1994, 18 U.S.C. § 2510 et seq. (hereinafter Federal Wiretap Act) did not protect cordless telephone users from private persons or law enforcement agencies who intentionally intercepted their conversations. In fact, the Electronic Communications Privacy Act of 1986 (hereinafter ECPA) amended Title III of the of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter Title III) to expressly exclude cordless telephone transmissions from the definition of "wire" and "electronic" communications.[5]

With the advent of new cordless technology and the ubiquitousness of the cordless telephone, Congress amended the ECPA, by removing the cordless telephone exclusion with the enactment of the Communications Assistance For

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[3]Telephone Interview with Betty Hodges, AT&T Customer Service Representative (Nov. 1, 1994).

[4]The AT&T 900Mhz telephone, Model No. 9100, is equipped with Digital Voice Privacy. This feature digitally encodes the user's voice signal (scrambling) so their phone conversations can not be intercepted by other cordless phones, radios or scanners. *Id.*

In December 1994, VTech Communications announced the release of the Tropez Regency, a 900Mhz digital cordless phone. *Phones: VTech Releases First 900Mhz Digital Spread Spectrum Cordless with Multiple Handset Capability,* EDGE, Jan. 2, 1995. The Tropez Regency incorporates digital spread spectrum technology, thereby enabling the transmit and receive frequencies relayed between the base and handset of the phone to continually change. *Id.* In fact, the Regency uses a propriety digital algorithm which causes the operating channel to change every few milliseconds. *Id.* The result of this technology is that it becomes nearly impossible for an interceptor to lock onto the user's conversation.

[5]Section 2510 Definitions

As used in this chapter—

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception. . ., *but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless the telephone handset and the base unit;*

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo optical system that affects interstate or foreign commerce, but does not include

(A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

(emphasis added).

Law Enforcement Act (hereinafter "1994 Act" or "amendment").[6] Nevertheless, the possibility remains that courts will not protect every cordless telephone communication.[7] The statute remains ambiguous, as Congress did not expressly include cordless telephone communications in the definitions of "wire" or "oral" communications, and reference to its legislative history will not likely illuminate matters.[8] In fact, the definitions of "wire" and "oral" communications in the 1994 Act are virtually identical to the definitions found in Title III of the 1968 Act. Under Title III, Federal and state courts held that cordless telephone communications were neither "wire communications,"[9] nor "oral communications" in which the cordless telephone user exhibited a reasonable expectation of privacy.[10] Recently, however, some state courts have interpreted similar statutes, which forbid the interception of wire and oral communications, to apply to cordless telephone communications.[11]

No doubt, confusion abounds in this area of the law, and Congress' unwillingness to expressly protect cordless telephone communications, and its failure to define a cordless telephone communication as either a "wire," "oral," or "electronic" communication, merely compounds the confusion. This note examines whether the enactment of the 1994 Act will effectively protect cordless telephone users in a background of outdated definitions, misconstrued interpretations and technological distinctions.

Part I of this note reviews the history of the Federal Wiretap Act. Part II analyzes case law interpreting the Federal Wiretap Act and various state wiretap acts. Part III attempts to determine what a cordless communication is—wire, oral or electronic, and whether the new amendment will protect all

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[6]Pub. L. No. 103-414, 108 Stat. 4279, 4290 (1994). Section 202 of the 1994 Act amends 18 U.S.C. § 2510 (1) by striking ", but such term" and all the words after it, and (12) by striking subparagraph (A). *Id.*

[7]*See infra* note 12.

[8]*See infra* part III, C.

[9]*See* Edwards v. Bardwell, 632 F. Supp. 584 (M.D. La. 1986); State v. Howard, 679 P.2d 197 (Kan. 1984); State v. DeLaurier, 488 A.2d 688 (R.I. 1985); *see also* State v. King, 873 S.W.2d 905, 908 (Mo. 1994) (stating that the emerging view is that cordless telephone transmissions were not wire communications even before the 1986 amendment); *but see* United States v. Hall, 488 F.2d 193 (9th Cir. 1973).

[10]A telephone user's "oral communication" is not protected by the Fourth Amendment or the Federal Wiretap Act unless the caller exhibits a reasonable expectation of privacy. *See infra* notes 21-26 and accompanying text. *See also* Tyler v. Berodt, 877 F.2d 705 (8th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990); State v. King, 873 S.W.2d 905 (Mo. 1994); People v. Fata, 529 N.Y.S.2d 683 (1988). After 1986, however, federal courts held that cordless phone communications were not oral communications. *See infra* notes 78 and 83 and accompanying text.

[11]State v. McVeigh, 620 A.2d 133 (Conn. 1993); State v. Bidinost, 644 N.E.2d 318 (Ohio 1994).

cordless telephone users.[12] Lastly, Part IV determines whether there is a better way of legislating in an area that is forever changing and developing.

II. HISTORY OF THE FEDERAL WIRETAP ACT

In 1967 the Supreme Court of the United States decided the seminal case of *Katz v. United States*.[13] Katz was convicted of violating a federal statute that prohibited the transmission of wagering information via telephone.[14] The Federal Bureau of Investigation (FBI) witnessed Katz placing calls from a bank of three public telephone booths on numerous occasions.[15] Without penetrating the inside of the telephone booths, FBI agents attached microphones to two of the booths with tape.[16] When Katz entered the booths, the FBI agents activated the microphones.[17] The microphones were connected to a recorder, thereby enabling the agents to obtain a record of Katz's telephone calls.[18] The recordings disclosed that Katz was placing bets and obtaining gambling information.[19] After hearing the evidence, the district court denied Katz's motion to suppress and permitted the government to introduce the evidence.[20] On appeal, the Supreme Court reversed the lower court's decision, holding that the government's surveillance activities had "violated the privacy upon which . . . [Katz] justifiably relied while using the telephone booth and

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[12]Given the fact that Federal Wiretap Act serves a dual purpose of protecting an individual's privacy right while assisting the State in reducing the incidence of crime, *see* State v. Howard 679 P.2d 197, 206 (Kan. 1984), is it likely that the courts will make a distinction between conventional and new generation cordless phones in an effort to fairly balance the individual's right with the State's interest? Prior to the 1994 amendment, at least one court made that distinction, suggesting that a user of new generation cordless phone may have a justifiable reasonable expectation of privacy due to the phones privacy features. *See* United States v. Smith, 978 F.2d 171, 180 (5th Cir. 1992). Furthermore, the legislative history of the 1994 amendment intimates that when Congress was considering whether to extend the legal protection of the ECPA to cordless phones, it decided only to extend that protection to the "newer generation of cordless phones." H.R. Rep. No. 827, 103rd Cong., 2nd Sess. 12 (1994), *reprinted in* 1994 U.S.C.C.A.N 3489, 3492 [hereinafter H.R. Rep. No. 827]; *see also infra* part III, C.

[13]389 U.S. 347 (1967).

[14]*Id.* 18 U.S.C. § 1084 proscribes the interstate transmission by wire communication of bets or wagers or information assisting in the placing of bets or wagers by a person engaged in the business of betting or wagering.

[15]Katz v. United States, 369 F.2d 130, 131 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

[16]*Id.*

[17]*Id.*

[18]*Id.*

[19]*Katz*, 369 F.2d at 131.

[20]*Id.*

thus constituted a[n illegal] 'search and seizure' within the meaning of the Fourth Amendment."[21]

The analysis of the Court was driven by two essential principles. The Court first determined that the Fourth Amendment protects people and not places.[22] Accordingly, the Fourth Amendment protects persons from unlawful surveillance of their telephone conversations, regardless of where a phone call is made—in an office, in a home, or "even in an area accessible to the public", i.e., a telephone booth.[23] In contrast, the Fourth Amendment does not protect what a person "knowingly exposes" to the public.[24]

Second, the Court overruled prior precedents that limited Fourth Amendment protection to search and seizures of tangible property. The Court concluded that the Fourth Amendment does not require physical penetration. Rather, it prohibits the interception and recording of oral statements even in the absence of a "technical trespass."[25] In summation, the Supreme Court stated that

> [o]nce this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures, it becomes clear that the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.[26]

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[21] *Katz*, 389 U.S. at 353. The Court noted the following:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him a place a call is surely entitled to assume that the words that he utters into the mouthpiece will not be broadcast to the world.

Id. at 352.

[22] *Id.* at 351.

[23] *Id.* The Court recognized, however that surveillance, even of the kind in *Katz*, may be lawful and legitimate if a court order authorizing the use of electronic surveillance is issued. *Katz*, 389 U.S. at 355.

[24] *Id.* at 351.

[25] *Id.* at 353.

[26] *Id.* at 355. The reasonable expectation standard later found in cases interpreting Title III is clearly set forth in Justice Harlan's concurring opinion. Justice Harlan limits protection to those cases in which 1) a

In response to the Supreme Court's decision in *Katz*, and the tremendous scientific and technological developments that made the use and misuse of electronic surveillance possible, Congress sought to update the Federal Communications Act of 1934.[27] Accordingly, Congress passed Title III to better secure the privacy of communication. Title III prohibited the willful interception of "wire" and "oral" communications unless a court had previously issued a warrant.[28] Today, Title III, as amended, remains the primary law guarding the privacy of personal communications in the United States.[29]

From 1968 to 1986, the protections of Title III, however, extended only to those communications that could be recognized by the human ear.[30] In an age of computers, electronic mail, cellular and cordless telephones, Title III had become hopelessly outdated.[31] Plainly, the "primary" law had not kept pace with the development of communications and computer technology.[32] In 1986, Congress moved to amend Title III by incorporating "electronic" communications.[33] In its report, the Senate noted that "today we have large scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones . . . ."[34] In the end, however, Congress failed to expand Title III to reach cordless telephones. In fact, Congress expressly excluded cordless telephone conversations from the definitions of "wire" and "electronic" communications from the ECPA.[35] Congress refused to criminalize the interception of cordless communications since some types of cordless communications could be easily intercepted.[36]

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person exhibits a subjective expectation of privacy and 2) that the expectation be one that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361. *See infra* note 68 and accompanying text.

[27]S. Rep. No. 1097, 90th Cong., 2nd Sess. 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154 [hereinafter S. Rep. No. 1097].

[28]18 U.S.C. § 2511 (1968); *see also* S. Rep. No. 1097, *supra* note 26, at 58, *reprinted in* 1968 U.S.C.C.A.N. at 2113.

[29]S. Rep. No. 541, *supra* note 1, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 3556.

[30]S. Rep. No. 1097, *supra* note 27, at 70, *reprinted in* 1968 U.S.C.C.A.N. at 2154.

[31]S. Rep. No. 541, *supra* note 1, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 3556.

[32]*Id.* Consequently, persons in 1986 were faced with a privacy crisis similar to the tone that had plagued the United States in late sixties.

[33]S. Rep. No. 541, *supra* note 1, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 3555.

[34]*Id.*

[35]*See supra* note 5.

[36]S. Rep. No. 541, *supra* note 1, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 3566; *see also* State v. Smith, 438 N.W.2d 571, 574 (Wisc. 1989) (stating "[w]hen a cordless telephone transmitter is used [, w]eak signals are transmitted from the base unit and handset in all directions and may be intercepted . . . by anyone who is listening with a scanner, compatible cordless telephone, or other radio receiver").

Indeed, the cordless phone user was without protection. Oddly, however, Congress saw fit to protect other wireless communications, namely the cellular phone.

Nevertheless, technology, particularly technology in the telecommunications industry, did not come to an impasse after 1986. In fact, it raced at an ever increasing pace, ultimately producing yet another privacy crisis.[37] The 1994 privacy crisis was further fueled by the fact that in 1994 more than 55 percent of households in the United States had at least one cordless telephone.[38] Despite this figure, Congress had not yet amended the Federal Wiretap Act, and federal and state courts continued to caution those who made cordless telephone calls that they did so at "their peril."[39]

After considering the lack of protection for cordless telephone users, the 1991 Privacy and Technology Task Force found the following:

> [T]he cordless telephone, far from being a novelty item used only at "poolside," has become ubiquitous. More and more communications are being carried out by people [using cordless telephones] in private, in their homes and offices, with an expectation that such calls are just like any other telephone call.[40]

Recognizing the omnipresence of the cordless telephone, and the public's belief that a "telephone is a telephone,"[41] Congress amended the ECPA to extend privacy protections to cordless telephones on October 25, 1994.[42]

III. CASE LAW

A. Cases Interpreting Title III of the 1968 Act

Although the cordless telephone entered the marketplace shortly after Congress passed Title III,[43] the issue of whether Title III protected cordless

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See 18 U.S.C. § 2511(4)(b)(ii). Congress treated the phones differently since the cellular phone's technology was more complex, and therefore, more difficult to intercept. See Sen. Rep. No. 541, *supra* note 1, at 9, 12, *reprinted in* 1986 U.S.C.C.A.N. at 3563, 3566.

[37]H.R. Rep. No. 827, *supra* note 12, at 12, *reprinted in* 1994 U.S.C.C.A.N. at 3492.

[38]Karen O. Nielsen, *PCS: The Next-Generation POTS*, TELECOM STRATEGY LETTER, October 1994 at 37. "Cordless telephone penetration has risen from 36% of telephone households in 1991 to 55% in 1994." *Id.* With so many cordless phones in the United States, it is highly likely that at least one cordless phone is being used during any one phone conversation—and with no privacy.

[39]People v. Fata, 529 N.Y.S.2d 683 (1988); *see also* State v. Bidinost, No. 62925, 1993 WL 215454, at *9 (Ohio App. 8th Dist. June 17, 1993), *rev'd*, 644 N.E.2d 318 (Ohio 1994).

[40]H.R. Rep. No. 827, *supra* note 12, at 12, *reprinted in* 1994 U.S.C.C.A.N. at 3492.

[41]*A Telephone is a Telephone*, ST. PETERSBURG TIMES, June 10, 1990, at 12A.

[42]H.R. Rep. No. 827, *supra* note 12, at 30, *reprinted in* 1994 U.S.C.C.A.N. at 3510; *see also supra* note 6.

[43]*See* Timothy R. Rabel, *The Electronic Communications and Privacy Act: Discriminatory Treatment for Similar Technology, Cutting the Cord of Privacy*, 23 J. MARSHALL L.REV. 661, 666 (1990) (citing In re American Telecommunications Corp. and Elec. Indus. Assoc., 91 F.C.C.2d 362, 363 (1982)).

telephone communications did not arise until 1984 in the case of *State v. Howard*.[44] While tuning his AM/FM radio, Howard's neighbor intercepted the defendant's conversations.[45] Suspicious of illegal activity, the neighbor recorded Howard's subsequent conversations and informed the Kansas Bureau of Investigation (KBI).[46] After receiving the tapes from the informant, the KBI asked Howard's neighbor to continue recording.[47] Upon receiving the additional tapes, the KBI obtained a warrant to search Howard's residence.[48] Consequently the KBI confiscated certain narcotic drugs at the defendant's home and charged Howard with possession of cocaine and conspiracy to sell marijuana.[49]

In construing Title III, the Kansas Supreme Court concluded that the statute should not be interpreted literally, when doing so would lead to absurd conclusions.[50] The court avoided absurdity, in its opinion, by concluding that the term "wire communication" did not apply to the radio portion of the cordless telephone communication. The court added that this was the obvious conclusion since anyone tuning in his or her favorite radio show could possibly intercept a cordless telephone conversation.[51] The court agreed that cordless telephone conversations were "oral communications," but nevertheless, were not protected unless the user had a reasonable expectation of privacy.[52] According to the Kansas court Howard did not have a reasonable expectation of privacy because the manual accompanying the cordless telephone informed readers how the phone operated.[53]

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[44] 679 P.2d 197 (Kan. 1984). As demonstrated by the following cases, the Federal Wiretap Act empowers a person whose communications have been illegally intercepted to commence a civil action against the violator. *See* Edwards v. Bardwell, 632 F. Supp. 584 (M.D. La. 1986). The Act also serves to exclude any evidence that is illegally obtained by an informant or a law enforcement official. *See* United States v. Hall, 488 F.2d 193 (9th Cir. 1973).

[45] 679 P.2d at 198.

[46] *Id.*

[47] *Id.*

[48] *Howard*, 679 P.2d at 198.

[49] *Id.* at 198-199.

[50] *Id.* at 205.

[51] *Howard*, 679 P.2d at 206.

[52] *Id. See supra* notes 21 and 26 and accompanying text.

[53] *Id.* The court's holding, that a purchaser of a cordless phone cannot have a reasonable expectation of privacy if a manufacture advises the purchaser that the nature of a cordless phone lends itself to interception, suggests that purchasers actually read the owner's manual. It is highly unlikely that one needs to read or will read instructions before using a telephone, cordless or otherwise.

When faced with a similar case in *State v. DeLaurier*,[54] the Rhode Island Supreme Court also refused to interpret the Federal Wiretap Act literally.[55] The court concluded that cordless telephone conversations were not "wire communications," and that while they were "oral communications," the cordless telephone user did not exhibit a reasonable expectation of privacy.[56] Unlike the court in *Howard*, the Rhode Island court went beyond the oral/wire analysis. It also concluded that a ordinary AM radio could not possibly be an interception "device" as defined in 18 U.S.C. § 2510(4).[57]

The first federal court to decide the extent of Title III's protection prior to the ECPA was the Eighth Circuit in *Tyler v. Berodt*.[58] The *Tyler* case involved a cordless telephone interception by another cordless telephone.[59] Relying substantially on *DeLaurier*, *Howard* and a federal district court case involving an automobile radio-telephone,[60] the *Tyler* court held that a cordless telephone conversation was protected under federal law only if it qualified as an "oral

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[54] 488 A.2d 688 (R.I. 1985).

[55] *Id.* at 693. The *DeLaurier* court noted the following:

> It follows that if a mechanical application of a statutory definition produces an absurd result or defeats legislative intent, this court will look beyond mere semantics and give effect to the purpose of the act. The effect of defining defendant's broadcasts as 'wire communication' would produce two results, both of which we find to be contrary to the intentions of Title III. The first would be that law enforcement authorities would find it necessary to obtain a court order to listen to the A.M. radio .... Second, ... the failure to obtain such an order could conceivably lead to liability for both civil and criminal sanctions.

Id. at 694 (citations omitted).

[56] *Id.* at 693.

[57] *DeLaurier*, 488 A.2d at 693. Pursuant to section 2510(4), "intercept" means "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device." *Id.* Apparently the court ignored 18 U.S.C. § 2510(5): "electronic, mechanical, or other device" means "*any* device or apparatus which can be used to intercept a wire, oral or electronic communication ...." (emphasis added).

[58] 877 F.2d 705 (8th Cir. 1989).

[59] *Id.* at 706.

[60] *See* Edwards, 632 F. Supp. 584 (M.D. La. 1986). The *Edwards* court held that when either end of the communication is conducted on a radio telephone, that communication is an "oral communication." *Id.* at 588. The court concluded, however, that the interception of the oral communication did not violate the Federal Wiretap Act since there could be no reasonable expectation of privacy in a communication which was, "broadcast by radio in all directions to be overheard by countless people who have purchased and daily use receiving devices or who have another mobile radio telephone tuned to the same frequency." *Id.* at 589.

communication accompanied by justifiable expectations of privacy."[61] Setting forth no new rationale, the court stated that as a matter of federal law the defendants did not have a justifiable expectation of privacy.[62]

The *Tyler* court also observed that two other issues may arise in this context. The court intimated that, a caller who uses a landline telephone and speaks to a person using a cordless telephone would remain protected under Title III. Although the court did not expand on this observation, or offer any support for its conclusion, the history of the Federal Wiretap Act provides adequate support. As held in *Katz*, a person using a traditional telephone undoubtedly has reasonable expectation of privacy.[63] The caller's expectation then remains reasonable even if she calls a cordless telephone user unless, of course, the caller knows that the person is using a cordless telephone. That caller, therefore, may bring a civil action under Title III against any person who intentionally intercepts the cordless communication.[64] The court also suggested that a manufacturer may be held civilly liable for failing to provide adequate warnings.[65]

B. Cases Interpreting the ECPA

As demonstrated through *Hall*, *DeLaurier*, and *Tyler*, both federal and state courts found that cordless telephone communications were neither "wire communications," nor "oral communications" in which a caller exhibited a reasonable expectation of privacy before the enactment of the ECPA.[66] By enacting the ECPA, Congress affirmed the decisions of these courts, and clarified that the radio portion of cordless telephone communications were neither "wire" nor "electronic" communications.[67] After Congress enacted the

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[61] *Tyler*, 877 F.2d at 706.

[62] *Id.* at 707.

[63] *See supra* notes 21-26 and accompanying text.

[64] *Tyler*, 877 F.2d at 707, n.2. "We note that persons using a standard telephone to speak to a cordless telephone user are generally thought to be protected, because such a person has no reason to know his or her words are being broadcast form the cordless phone user's base unit to a handset." *Id. But see* In re Askin, 47 F.3d 100 (4th Cir.), *cert. denied*, Askin v. United States, 116 S. Ct. 382 (1995) (holding that the Federal Wiretap Act does not protect landline or cellular users when it is the radio portion of a cordless telephone communication that is intercepted); *accord* McKamey v. Roach, 55 F.3d 1236 (6th Cir. 1995).

[65] *Id.*

[66] "[T]he emerging view is that cordless telephone transmissions were not 'wire communications' even before the 1986 amendment." *Tyler*, 877 F.2d at 706.

[67] "That cordless telephone conversations are not 'wire communications' was made clear by the 1986 amendment to Title III, 18 U.S.C. § 2510(1) which provided that such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit . . . ." People v. Fata, 529 N.Y.S.2d at 683, 685 (1988).

ECPA, however, federal and state courts continued to examine whether the cordless telephone communication was an "oral communication" protected by federal and constitutional law.

In *People v. Fata*, the Rockland County Court determined that a cordless telephone communication may be an "oral communication," but that its user did not exhibit a reasonable expectation of privacy.[68] Adopting Justice Harlan's concurring opinion in *United States v. Katz*, the court stated that a reasonable expectation of privacy only arises when the user has an actual subjective expectation of privacy, which society deems reasonable.[69] Finding a cordless telephone communication no different than an announcement over a loudspeaker, the *Fata* court reasoned that the defendant's expectation could not be reasonable given the extensive use of the cordless telephone and the common understanding about how they operate.[70] Judge Nelson stated that "[t]hose who use cordless telephones do so at their peril."[71] While "cordless telephones are a common and convenient form of communication," [] "they are hardly devices which can assure privacy."[72]

The *Fata* court's interpretation of "oral communication" strikingly resembles those interpretations found in decisions prior to the ECPA. Just as the *Hall*, *DeLaurier*, and *Tyler* courts had earlier concluded, the *Fata* court determined that although a cordless communication may fit within the definition of an "oral communication," the expectation of the cordless telephone user could not possibly be reasonable.

Federal courts, in contrast, were unwilling to include cordless telephone communications within the definition of "oral communication" under the ECPA. In *United States v. Carr*,[73] the defendant's neighbor witnessed some peculiar behavior, which caused the neighbor to suspect drug dealing.[74] After the neighbor reported the illicit behavior, officers conducted warrantless surveillance and intercepted the defendant's cordless conversations.[75] The *Carr* court held that the cordless conversations were not "oral communications."[76]

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[68] *Id.* at 686. The *Fata* court used a Fourth Amendment analysis to determine whether the defendant's "oral communication" was protected under the ECPA. Congress intended the judiciary to interpret the reasonable expectation component of the "oral communication" definition in accordance with principles enunciated in *Katz*. *See* S. Rep. No. 1097, *supra* note 26, at 89-90, *reprinted in* 1968 U.S.C.C.A.N. at 2178; *see also DeLaurier*, 488 A.2d at 694.

[69] *Fata*, 529 N.Y.S.2d at 686.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] 805 F. Supp. 1266 (E.D. N.C. 1992).

[74] *Id.* at 1267 n.2.

[75] *Id.*

[76] *Id.* at 1272.

Consequently, the officers were permitted to intercept the cordless conversations without obtaining a warrant.

The *Carr* court adopted the at-your-own-risk rationale applied in *Fata*, but also thoroughly investigated the legislative history of the ECPA, holding that "by definition" a cordless communication is not an "oral communication."[77] The court explained that an "oral communication" is one carried by sound waves (an "actual untransmitted voice communication"), rather than by radio waves.[78] As a result, the radio portion of the cordless communication was deemed not an "oral communication." By adopting this definition of "oral communication" the *Carr* court completely excluded cordless communications from the ECPA, thereby precluding the need to determine whether the user had a reasonable expectation of privacy.[79]

In *United States v. Smith*, the court further analyzed the *Carr* court's narrow interpretation of the term "oral communication."[80] The *Smith* court similarly noted that the very definition of "oral communication" limits the definition to "any oral communication uttered by a person."[81] Using the *Carr* court's rationale, the *Smith* court reasoned that it was not Smith's actual utterances that his neighbor intercepted, but rather radio waves.[82] The *Smith* decision also made it unequivocally clear that the ECPA does not apply to cordless telephone communications.[83]

Although the *Smith* court interpreted the definition of "oral communication" in a highly restrictive manner, the court still considered whether Smith had a reasonable expectation of privacy.[84] The court's consideration, however, was

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[77] *Carr*, 805 F. Supp. at 1272.

[78] *Id.*; *see also* S. Rep. No. 541, *supra* note 1, at 13, *reprinted in* 1986 U.S.C.C.A.N. at 3567. Because the part of the cordless communication that is intercepted is carried by radio waves, a cordless communication, by definition, is not an oral communication. When a user speaks into the handset, the telephone reduces the sound waves into radio waves. Subsequently, those radio waves are transmitted to the base unit. During this transmission, a scanner, radio or another cordless telephone can intercept the radio waves. *Id.* at 1266.

[79] *Id.*

[80] 978 F.2d 171 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1620 (1993).

[81] *Id.* at 175.

[82] *Id.*

[83] *Id.* at 177. The legislative history of the ECPA clearly indicates that the term "oral communications" does not include cordless telephone conversations. "Lacking this sort of illuminating legislative history, cases dealing with the pre-1986 version of Title III all focused on the 'justified expectation of privacy' requirement found in the definition of oral communication." *Smith*, 978 F.2d at 77.

[84] *Id.*

not triggered by the ECPA, but rather by the Fourth Amendment.[85] To establish that the interceptions were a violation of the Fourth Amendment, the court stated that the government must first have significantly intruded upon a reasonable expectation of privacy in such a way that the act can be called a search.[86] Second, the defendant must show that the search was unreasonable.[87]

Precedent dictates that a person has a reasonable expectation of privacy during a personal conversation.[88] Nonetheless, the *Smith* court stated that a person can minimize this expectation to a point where it is no longer reasonable.[89] In effect, the court concluded that a caller waives his right to privacy under the Fourth Amendment when he knowingly exposes the communication to the public by using a technology that is so easily intercepted.[90]

Although the *Smith* court was unwilling to find a reasonable expectation of privacy in that case, it intimated the possibility of protection under the right circumstances. The court recognized that the earlier decisions of *Hall*, *DeLaurier*, and *Tyler* were decided when cordless technology was "primitive."[91] In each of those cases, and in the legislative history of the 1986 Act, the courts and Congress refused to protect cordless telephone communications because they were made on telephones so easily intercepted. Therefore, the court stated, "it should be obvious that as technological advances make cordless communications more private at some point such communication will be entitled to Fourth Amendment protection."[92]

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[85] *Id.* "Now that Congress has made it clear that 'oral communication' does not include cordless telephone conversations, our analysis must proceed differently. Whether the user of a cordless telephone has a reasonable expectation of privacy is now only relevant for Fourth Amendment purposes." *Id.* at 177.

[86] *Smith*, 978 F.2d at 176.

[87] *Id.*

[88] *Id.*; *see also supra* notes 21-26 and accompanying text.

[89] *See* United States v. Burns, 624 F.2d 95 (10th Cir.), *cert. denied*, 449 U.S. 954 (1980) (holding that there was no reasonable expectation of privacy for a loud conversation in a hotel room that could be heard in adjoining rooms).

[90] *Id.*

[91] Judge Johnson stated that "[t]oday's cordless phones are different from the models at issue in Howard and DeLaurier." *Smith*, 978 F.2d at 179.

[92] *Id.* at 180. The *Smith* court stated the following:

> When faced with a motion to suppress intercepted cordless communications, a trial court must do more than simply conclude that a defendant had no expectation of privacy because he used a cordless phone; instead, the trial court must be prepared to consider the reasonableness of the privacy expectation in light of all the particular circumstances and the particular phone at issue.

C. State Court Decisions Finding Protection for Cordless Telephone Users

After the *Smith* decision, courts in states with statutes similar to the Federal Wiretap Act or with statutes based on the federal act, interpreted their statutes to include cordless telephone communications within the meaning of either a "wire" or "oral communication." Indeed in both *State v. McVeigh*[93] and *State v. Bidinost*,[94] the Supreme Courts of Connecticut and Ohio, respectively, ignored previous state and federal court decisions, and held that a cordless communication was a "wire communication." Those state courts based their decisions on interpretations that had once been deemed as absurd by the *Howard* and the *DeLaurier* courts. In fact, the *Bidinost* case more closely resembled a 1973 Fifth Circuit decision which dealt with a radio telephone.[95]

In *United States v. Hall*, a Tucson housewife intercepted the defendant's radio telephone conversations on her eight-band megacycle radio.[96] After the housewife reported the conversations to a public safety agency, the agency conducted warrantless interceptions of the defendant's conversations.[97] The Fifth Circuit held the search inadmissible since the agency had intercepted a "wire communication." Relying on the legislative history of the 1968 Act, the court reasoned that a "wire communication includes all communications carried by a common carrier, in whole or *in part*, through our Nation's communications network."[98] Based upon this indicia of congressional intent, the court concluded that when part of a communication is carried to or from a landline telephone, the entire conversation is a wire communication, and a search warrant is required.[99] The court itself realized that classifying a conversation between a mobile and a landline telephone as a wire communication produced an absurd result. Nevertheless, the court determined that Congress's definition of a "wire communication" necessitated that conclusion.[100]

In a similar fashion, the Supreme Court of Ohio recently held that Ohio Revised Code § 2933.52(A) (hereinafter Ohio Wiretap Act), which prohibits the purposeful interception of wire or oral communications through the use of an

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[93]620 A.2d 133 (Conn. 1993).

[94]644 N.E.2d 318 (Ohio 1994).

[95]*See* United States v. Hall, 488 F.2d 193 (9th Cir. 1973).

[96]*Id.* at 194. Some of those calls were transmitted to a land-line telephone, i.e., a conventional wire telephone.

[97]*Id.* at 195.

[98]*Id.* at 197 (emphasis added); *see also* S. Rep. No. 1097, *supra* note 27, at 89, *reprinted in* 1968 U.S.C.C.A.N. at 2178.

[99]*Hall*, 488 F.2d at 196-197.

[100]The *Hall* court noted that since these conversations were intercepted by an ordinary radio receiver and not by a phone tap, they should naturally be afforded no more protection than those occurring between two radio transceivers. *Id.*

interception device, applies to the interception of cordless telephone communications.[101] The *Bidinost* case, inter alia, involved the interception of a cordless telephone by a baby monitor. In that case, the Bidinosts had a cordless telephone and their neighbors, the Crippens, owned a baby monitor.[102] The Crippens' baby monitor was unplugged by their children, and consequently, the monitor served as a receiver, enabling the Crippens to intercept the Bidinosts' cordless telephone communications.[103] Once the Crippens became aware of the monitor's receiving capacity, the Crippens, suspicious that the Bidinosts had sexually molested their children, called the county prosecutor to inform her of their monitor's capacity.[104] The prosecuting attorney instructed the Crippens to record any subsequent conversations received over the monitor. Following these orders, Maria Crippen recorded the Bidinosts' cordless telephone communications.[105]

The Ohio Supreme Court held that these interceptions were unlawful under the Ohio Wiretap Act on the grounds that the cordless telephone communications were "oral" and "wire" communications. In determining that the cordless telephone communication was a "wire communication,"[106] the Supreme Court of Ohio, with the exception of *United States v. Hall*, rationalized in a way uniformly rejected by every state and federal court. The court determined that since the incoming message travels through the telephone lines to the cordless telephone base unit, cordless telephone communications are made, *in part*, through the use of communication facilities aided by wires. Therefore, the court concluded that a cordless telephone communication is a wire communication.[107]

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[101] *See* State v. Bidinost, 664 N.E.2d 318, 328 (Ohio 1994). Ohio Revised Code Annotated § 2933.52 (Anderson 1993) provides in pertinent part the following: "(A) No person purposely shall do any of the following: (1) Intercept, attempt to intercept or procure any other person to intercept or attempt to intercept any wire or oral communication."

[102] *Bidinost*, 664 N.E.2d at 326.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] The Ohio Wiretap Act defines a "wire communication" as "any communication that is made in whole or in part through the use of facilities for the transmission of communications by the aid of wires or similar methods of connecting the point of origin of the communication and the point of reception of the communication." OHIO REV. CODE ANN. § 2933.51(A) (Anderson 1993).

[107] *Bidinost*, 664 N.E.2d at 327-28. Unlike its predecessors in other jurisdictions, including United States v. Hall and State v. McVeigh, who applied and interpreted nearly identical statues, the Ohio court found that its state's wiretap statute was not ambiguous. *Id.* at 328-29.

In finding that the cordless telephone communication was an "oral communication,"[108] the Ohio court reasoned that "human speech" is not limited to face-to-face human speech, as the definition refers to "any human speech."[109] The court dismissed the State's argument that Maria Crippen had heard and recorded radio waves, stating that Maria Crippen had heard and recorded people talking on a cordless telephone.[110]

Interestingly, the court distinguished the Ohio Wiretap Act from the Federal Wiretap Act. The court determined that the Ohio statute does not require a caller to exhibit a reasonable expectation of privacy. Given the fact that the Ohio Court of Appeals for the Eighth District devoted its entire opinion to this issue,[111] this conclusion was not only completely unexpected, but seemingly implausible. Afterall, the origin of the term "oral communication" lies in the Supreme Court's holding in *Katz* (an oral communication is not protected under the Fourth Amendment unless the caller exhibits a reasonable expectation of privacy); therefore, the requisite reasonable expectation of privacy would seem innately connected to any definition of an "oral communication."[112]

Despite the court's awkward interpretation, the court reached the appropriate conclusion. The court stated that "we seriously question the proposition that people communicating on cordless telephones have no legitimate expectation of privacy. Fundamental rights should not be sacrificed on the altar of advancing technology."[113]

Unlike the Ohio court, the Connecticut court was unable to apply its state's wiretap statute without referring to the statute's legislative history. In *State v. McVeigh*, police officers intercepted the defendant's cordless telephone communications using a Bearcat scanner.[114] The court ruled that the

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[108]The Ohio Revised Code defines an "oral communication" as "any human speech that is used to communicate by one person to another person." OHIO REV. CODE ANN. § 2933.51(B) (Anderson 1993).

[109]*Bidinost*, 664 N.E.2d at 327.

[110]*Id.* The State may have wished that it argued this matter differently. On its face the State's argument suggests that people can hear and record radio waves. This of course is not a valid statement. A more effective argument is as follows: an oral communication is one carried by sound waves, not radio waves. A baby monitor acting as a receiver intercepts the radio portion of the cordless telephone, i.e., the transmission carried by radio waves from the hand set to the base unit. The cordless telephone communication carried by sound waves. The court's holding is also problematic. It ignores what is being intercepted (radio waves), and focuses merely on what is heard once received and reconstructed.

[111]*See* State v. Bidinost, No. 62925, 1993 WL 215454, at *8-10 (Ohio Ct. App. June 17, 1993).

[112]*See supra* note 68.

[113]State v. Bidinost, 644 N.E.2d 318, 328-329 (Ohio 1994).

[114]State v. McVeigh, 620 A.2d 133, 135 (Conn. 1994).

warrantless surveillance constituted illegal behavior under Connecticut's Wiretap Act.[115] In holding as it did, the Connecticut court focused on a small, albeit significant portion of the statute's language: "Wire communication means any communication made in whole or in part [over the telephone lines]."[116] Finding this language ambiguous, the court referred to the legislative history of the statute. Upon review of the history, the court determined that the focus of the statute is the complete protection of any communication that travels in whole or in part through the telephone lines.[117] Because cordless telephone communications are carried in part by the telephone lines, the court concluded that it was irrelevant that the officers intercepted the conversations as they were broadcast over FM radio waves.[118]

III. DEFINING A CORDLESS TELEPHONE COMMUNICATION

Having examined the history of the Federal Wiretap Act and case law interpreting the Act, it remains unclear what, in fact, a cordless communication is under the Federal Wiretap Act. When Congress extended protection to cellular phones in 1986 it noted in the legislative history of the ECPA that these communications would now be defined as "wire communications."[119] Congress' failure to do so for cordless telephones has left many wondering what exactly a cordless communication is—wire, oral, electronic or none of the above. Before attempting to determine what kind of communication a cordless telephone is, it is necessary to address the different stages of a cordless telephone communication.

Caller Y makes a telephone call to caller X.[120] The call is transmitted from Y's handset to his base unit. The portion of the communication that travels from the hand set to the base unit is carried by radio waves, and is therefore deemed the radio portion of the cordless telephone communication.[121] From the base unit the communication is transmitted over wires, as if caller X were calling caller Y.[122] It is indisputable that this portion of the cordless telephone communication is a "wire communication."[123] Unfortunately this settled aspect does not assist us in our task, as this portion of the communication is never intercepted by other cordless telephones, radios, baby monitors, and scanners.

115*Id.*

116CONN. GEN. STAT. § 54-41a (West 1994) (emphasis added).

117*McVeigh*, 620 A.2d at 142-43.

118*Id.* at 142-45.

119*See* S. Rep. No. 541, *supra* note 1, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 3566.

120For the purposes of this discussion, caller X is using a landline, i.e., traditional telephone, and caller Y is using a cordless telephone.

121S. Rep. No. 541, *supra* note 1, at 12, *reprinted in* 1986 U.S.C.C.A.N. at 3566.

122*Id.*

123*Id.*

The debate that surrounds cordless telephone communication concerns the radio portion.

A. Wire Communication

By adopting the judicial analyses of the *Bidinost*, *McVeigh*, and *Hall* courts, one must inevitably conclude that radio portion of the cordless communication is a "wire communication" under the Federal Wiretap Act. Like the Ohio and Connecticut provisions, federal statute defines a "wire communication" as "any aural transfer made in whole or *in part* through the use of the facilities for the transmission of communications by the aid of wire. . . ."[124] As noted in *Bidinost*, a plain reading of this language encompasses cordless telephone communications within the definition of a "wire communication" since the cordless telephone communication is made "in part" through the use of communication facilities aided by wires.[125] The *Hall* court recognized that this conclusion is further supported by the legislative history of Title III.[126]

On the other hand, in *Howard*, a case decided prior to the enactment of the ECPA, the court limited its interpretation of the definition of "wire communication" to include only the wire portion of the cordless communication.[127] Nevertheless, it becomes clear that these courts would have decided that the radio portion of the cordless communication was a "wire communication," if such a conclusion did not lead to absurd results, i.e., obtaining a warrant to listen to an AM/FM radio.[128] As the *Smith* court so correctly observed in 1992, in an age where it is increasingly more difficult to intercept cordless telephone communications because of developing technology, it is not likely that the same absurd results envisioned by those courts will continue to arise.[129]

Nevertheless if the courts adopt an ad hoc approach, the certainty in this prediction may inevitably disappear. For example, if the case involves an easily intercepted conventional cordless telephone, like the telephones in *Howard*, etc., where the potential for absurd results still exist, the court may find no protection for a cordless telephone under the definition of a "wire communication." The Florida Supreme Court has recently noted the problems

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[124] 18 U.S.C. § 2510(1) (1994).

[125] *See supra* notes 104-05 and accompanying text.

[126] *See supra* notes 96-97 and accompanying text.

[127] State v. Howard, 679 P.2d 197, 204 (Kan. 1984).

[128] *Id.*

[129] *See supra* notes 91 and 92 and accompanying text; *see also* Mozo v. State, 632 So.2d 623, 634 (Fla. 1994) (stating "[w]ith the change in technology, cordless phones are now nearly as secure as traditional phones . . . ."). *But see* State v. Bidinost, 644 N.E.2d 318 (Ohio 1994).

that may arise if courts decide to use technology as a gauge to decide cases.[130] Judge Anstead stated the following:

> [I]n addition to cordless telephones becoming more secure, technology has also provided easier means of intercepting traditional telephones. . . . [W]e would be naive to believe the government does not possess the technology to intercept most communications with relative ease. Indeed, if an "ease of interception" standard were applied there would be virtually no private communications, by wire-based telephone or otherwise, that would be protected from the government's use of advanced technology to intercept private communications. It could even be argued that with this rough parity in ability to intercept, traditional telephones should be treated like cordless telephones, with no reasonable expectation of privacy, rather than cordless telephones being treated more like traditional telephones, with an expectation of privacy. For obvious reasons, this concept was rejected in *Katz*.[131]

This matter will be quickly resolved however, if courts refuse to distinguish between old and new cordless telephones and apply the Federal Wiretap Act to all cordless telephones.

B. Electronic Communication

If a cordless communication is a "wire communication" then by process of elimination, it is not an "electronic communication."[132] The 103rd Congress did remove the cordless telephone exclusion from section 2510(12), but the said section continues to exclude any "wire or oral communication."[133] Oddly, if one studies the language of this section, it becomes apparent that a cordless telephone communication could neatly fit within the definition of "electronic communication."

First, the Federal Wiretap Act defines an "electronic communication" as "any transfer of signs, signals, data . . . *sounds* or intelligence transmitted in whole or in part by a wire, *radio* or photo optical system. . . ."[134] One could reasonably interpret "sounds" to include the human voice, and further find that this sound is transmitted in part by a wire system and in part by a radio system.[135]

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[130] *Mozo*, 632 So. 2d 623.

[131] *Id.* at 634-635.

[132] An "electronic communication" does not include "(A) [a]ny wire or oral communication." 18 U.S.C. § 2510(12) (1994).

[133] *Id.*

[134] *Id.* (emphasis added).

[135] At least one state legislature has expressly included a cordless communication within the definition of "electronic communication." Alaska defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio. . . or photo

Second, although Congress has addressed cordless telephones and electronic communications separately, and never as two of the same,[136] Congress reported in the legislative history of the ECPA that, in general, "a communication is an electronic communication protected by the [F]ederal wiretap law if it is not carried by sound waves and cannot fairly be characterized as containing the human voice."[137] Since the intercepted portion of a cordless telephone communication is carried by radio waves, courts may determine that a cordless telephone communication is an electronic communication.

C. Oral Communications

The definitions of "wire" and "electronic" communications had at one time expressly excluded the radio portion of the cordless telephone communication. In contrast, the definition of an "oral communication" has never included such an exclusion.[138] Nevertheless, federal and state courts, with the exception of *Bidinost*, have uniformly refused to protect cordless telephone communications under this definition.[139]

The Federal Wiretap Act defines an "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication."[140] As noted in *Howard*, *DeLaurier*, *Fata* and *Tyler*, a cordless telephone communication may be an "oral communication" if the user has a reasonable expectation of privacy.[141] It is clear from the Supreme Court's holding in *Katz* that a person has a reasonable expectation of privacy while conversing on a telephone. Does a person, however, reduce his expectation of privacy to unreasonable levels when he speaks on a cordless telephone? In answering this question, the *Fata* decision relies on the ease of interception standard.[142] Accordingly, because a cordless telephone communication could be intercepted by nearly any receiving device when the New York court decided *Fata*, the court ruled that the caller did not have a reasonable

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optical system, including a cellular or cordless telephone communication . . . ." ALASKA STAT. § 42.20.300 (1994).

[136]In the legislative history of the 1994 Act, Congress set forth the purpose of the new law, declaring that the ECPA protections were extended to *cordless phones* and certain data communications. "In addition, the bill increases the protection for transactional data on *electronic communications* services. . . ."

[137]*See* S. Rep. No. 541, *supra* note 1, at 14, *reprinted in* 1986 U.S.C.C.A.N. at 3568.

[138]*See* 18 U.S.C. § 2510 (1984).

[139]See *supra* part III.

[140]18 U.S.C. § 2510(2) (1994).

[141]*See supra* notes 51, 56, 61, 68 and accompanying text.

[142]*See supra* note 70 and accompanying text.

expectation.[143] Cordless telephones today, however, are less likely to be intercepted.[144] As the ease of interception decreases, an individual's reasonable expectation of privacy will justifiably increase to a level of reasonableness.[145] Therefore, if a court were to adopt the judicial analyses of those courts today, it is very possible that a court would find that the Federal Wiretap Act protects cordless telephone users under its definition of oral communication since its user, presumably, would have a reasonable expectation of privacy.

That presumption may be rebuttable given the fact that all persons may not use a newer cordless telephone. Once again the conventional/new generation distinction arises. Will courts protect all cordless communications? Unfortunately neither the 1994 Act, nor its legislative history, provide a clear answer.

As earlier noted, the 1994 amendment merely removes the cordless telephone exclusion. The language that expressly extends protection to cordless phones is found in the legislative history of the 1994 Act.[146] Nonetheless, even if courts turn to the legislative history of the Federal Wiretap Act, it may not find a clear congressional intent to protect all cordless phones. First, although the legislative history of the 1994 Act states that the protection of the ECPA is extended to cordless phones, it does not state that *all* cordless phones are protected.[147]

Secondly, the legislative history of the 1994 Act further states that Congress decided to extend ECPA protection after examining a wide array of communications, media, including "the newer generation of cordless phones" (phones not easily intercepted).[148] If one reads this legislative history in conjunction with the legislative history of the ECPA, which specifically states that Congress did not extend Title III protection to cordless phones because they are so easily intercepted, it appears that there is no protection for conventional cordless telephones.

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[143] *Id.*

[144] *See supra* notes 2-4 and accompanying text.

[145] *See supra* notes 90 and 92 and accompanying text.

[146] *See supra* note 137.

[147] The word *all* seems to be necessary. In Hancock v. Train, 426 U.S. 167 (1976), the Supreme Court held that a federal agency within the state of Kentucky did not have to pay state permit fees for operation in that state under the Clean Air Act. 42 U.S.C. § 1857 (1969) provided, in pertinent part, the following:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting . . . in the discharge of air pollutants, shall be subject to, and comply with Federal, State, interstate and local requirements.

426 U.S. at 171-72. Consequently, Congress amended section 1857(f) to include *all* requirements. *See* 42 U.S.C. § 7418 (1988).

[148] H.R. Rep. No. 827, *supra* note 12, at 12, *reprinted in* 1994 U.S.C.C.A.N. at 3492.

Nevertheless, Congress' willingness to protect cordless phones appears to have come only after those phones were equipped with anti-interception devices. For this same reason, persons who use the newer generation of cordless telephone will likely have a reasonable expectation of privacy. In fact, the *Smith* court addressed the possibility of protecting cordless telephone communications under the Fourth Amendment by applying this very rationale.[149] The *Smith* court, however, was unwilling to extend ECPA protection to the cordless telephone communications since the legislative history of the ECPA specifically states that a cord-less telephone communication is not an oral communication.[150]

If courts rely on the *Smith* court's analysis and the legislative history of the ECPA, then it is likely that courts will not interpret the definition of "oral communication" to include cordless communications. If the analysis, however, shifts from what is actually intercepted (radio waves) to what is ultimately acquired (sound waves—recorded voice), then courts may include all cordless communications within the definition of an oral communication.[151] Unless, of course, courts perpetuate the technological distinction among old and new telephones in determining whether a reasonable expectation of privacy exists.

IV. LEGISLATION AND TECHNOLOGY

With all the uncertainty that surrounds the Federal Wiretap Act, it becomes evident that there must be a more effective way to legislate in this area of the law. State legislatures may provide the answers.

In Alaska[152] and New Jersey, the legislatures have expressly included a cordless telephone communication into the definition of "electronic communication" and "wire communication" respectively.[153] In Minnesota, the legislature chose not to include cordless communications in the definitions; however, the legislature did provide, although unclearly, that the inadvertent interceptions of cordless telephone communications are legal, but that "persons acting under color of law" may not intercept cordless telephone communications without a warrant.[154]

149*See supra* notes 89 and 90 and accompanying text.

150*See* S. Rep. No. 541, *supra* note 1, at 13, *reprinted in* 1986 U.S.C.C.A.N. at 3567.

151State v. Bidinost, 644 N.E.2d 318, 327 (Ohio 1994).

152*See supra* note 134.

153The New Jersey statute provides, in pertinent part, "wire communication includes any electronic storage of such communication, and the radio portion of a cordless telephone handset and the base unit. . . ." N.J. REV. STAT. ANN. § 2A:156A-2 (West 1994).

154The Minnesota statute states as follows: "It is not unlawful . . . for a person not acting under color of law to intercept the radio portion of a cordless telephone communication . . . if the initial interception of the communication was obtained inadvertently." MINN. STAT. ANN. § 626A.02 (West 1995).

Perhaps most clearly, Arkansas, California and Tennessee have not attempted to place cordless telephone communications into any of their statutes' preexisting definitions, but rather have defined those cordless telephone communications separately and distinctly. For instance, the Arkansas Code states that "[i]t shall be unlawful for a person to intercept . . . a communication that utilize[s] the electromagnetic spectrum frequencies of forty-six to forty-nine megahertz generally used by cordless telephone technology and eight hundred forty to eight hundred eight megahertz generally used by cellular telephone technology. . . . ." [155] However, even in a statute as clear as this, the danger of the statute becoming outdated or obsolete tomorrow still exists when the legislature uses such narrow language.[156] As previously noted, cordless telephone technology now uses 900Mhz.[157] This statute protects only communications that utilize the spectrum of frequencies ranging from forty-six to forty-nine.

Consider then the California statute,

> (a) Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cordless telephones . . . between any cordless telephone and landline telephone or between a cordless telephone and a cellular telephone shall be punished. . . ."[158]

In this statute, the legislature was careful not to use technical terms, and at the same time clearly protected cordless telephone communications.

From any of these examples, which were written prior to the 1994 Act, Congress could have clearly and expressly protected the cordless telephone user. Instead it chose to muddle the answer by simply removing the ECPA exclusion, leaving behind a statute with a history of interpretations that have not protected the cordless telephone user.

VI. CONCLUSION

Cordless telephone technology continues to develop and to pervade homes and businesses throughout the United States. Presently, however, that technology is not homogeneous. Cordless telephone technology ranges from the very primitive to the cutting edge. Congress has indeed removed the cordless telephone exclusion from the Federal Wiretap Act, but a study of past

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[155] ARK. CODE ANN. § 5-60-120 (Michie 1995).

[156] One commentator has stated: "Technology moves on. It may take the legislature years to hammer out the definitive expressions of its wishes in an area, only to have a new technological development render the statute meaningless, or at least not as comprehensive as intended." Elinor Schroeder, *On Beyond Drug Testing: Employer Monitoring and the quest for the Perfect Worker*, 36 U. KAN. L.REV. 869, 895 (1988).

[157] *See supra* notes 2-4 and accompanying text.

[158] CAL. PENAL CODE § 632.6 (West 1995).

case law and convoluted legislative history reveals that all cordless telephone users may not be protected. Had Congress adopted legislation found in states such as California or Arkansas, the individual's right to privacy under the Federal Wiretap Act might not be as vulnerable as it is today. Nevertheless, the vagaries of Congress have left the answer to judicial interpretation, and so the question remains, will the technology of the phone serve as a guide for courts in determining whether an individual has a reasonable expectation of privacy? If courts do incorporate technology into their decision making process, discrimination under the law will undoubtedly occur and protection fade. Instead, courts should endeavor to safeguard the individual's right to privacy by including all cordless telephone communications within the meaning of the Federal Wiretap Act.

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