UNAUTHORIZED ACCESS TO WEB-BASED E-MAIL: RECOVERY UNDER THE STORED COMMUNICATIONS ACT AFTER *VAN ALSTYNE V. ELECTRONIC SCRIPTORIUM LTD.*, 560 F.3D 199 (4TH CIR. 2009)

Kory R. Watson*

I. INTRODUCTION

Since the commercial explosion of the world-wide web in the mid-1990s, much has changed in this interconnected electronic world.[1] Most notable for the discussion of this Note is the birth and thriving culture of communication over the internet. The success of the internet spawned various forms of electronic communications including chat rooms, forums, and e-mail. Today, the world-wide web is replete with websites that facilitate web-based e-mail communication, also known as webmail. Webmail is accessed via a web browser and is, therefore, completely independent from any e-mail software. This functionality allows users to retrieve and manage their e-mail from anywhere they can access a computer or, in some cases, a mobile phone. Common webmail providers include Hotmail, Yahoo! Mail, AOL, and Gmail. In addition to their accessibility, these services are free and have become very popular in the last decade. According to a study by Comscore in July of 2009, these four webmail providers serve 226.4 million users in the United States.[2] At a population of 310 million,[3] this represents approximately 73.5% of the population of the United States.[4] Consequently, there is a demand for the protection and privacy of this enormously trendy communication technology.

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1. J. R. Okin, The Information Revolution: The Not-For-Dummies Guide to the History, Technology, and Use of the World Wide Web 318–20 (2005).
2. Erick Schonfeld, Gmail Nudges Past AOL Email in the U.S. to Take No. 3 Spot, TechCrunch (Aug. 14, 2009), http://www.techcrunch.com/2009/08/14/gmail-nudges-past-aol-email-in-the-us-to-take-no-3-spot/.
3. U.S. POPClock Projection, U.S. Census Bureau, http://www.census.gov/population/www/popclockus.html (last revised Dec. 22, 2010).
4. Some users may have multiple accounts, other users may be inactive, etc.

Pre-dating the webmail communication boom was great Congressional foresight in the creation of the Stored Communications Act (SCA).[5] This 23-year-old statute provides the people of the U.S. protection and privacy in these webmail communications. In *Van Alstyne*,[6] the Fourth Circuit Court of Appeals reviewed the damages provision of the SCA,[7] interpreting it in a way no other court had before. *Van Alstyne* was decided in the context of an employer-employee relationship in which personal webmail of the employee was accessed by the employer.[8] It is well settled that unauthorized access to and obtainment of personal webmail is a violation under the SCA.[9] As a result, the heart of this case lies in interpreting the language of the SCA to determine the burden of proof for recovery of compensatory and punitive damages.[10] To aid its interpretation, the court analogized the SCA with a provision of the Privacy Act,[11] a statute the United States Supreme Court interpreted in *Doe*.[12]

Ultimately, the Fourth Circuit Court of Appeals affirmed in part the decision of the lower court, holding that the employer violated the SCA through unauthorized access to the employee's personal webmail and was, therefore, subject to punitive damages, attorney fees, and costs without the employee having to show any actual damage from the violation.[13] The court reversed the lower court's award of statutory damages, requiring that the employee must show some actual harm.[14]

The Fourth Circuit Court of Appeals improperly interpreted the Stored Communications Act by analogizing it to a completely distinguishable statute, ultimately achieving an absurd result. Part II of this Note provides background information on the relevant statutes, legislative history, and case law necessary for a thorough analysis. The background begins in subsection A by examining the controlling statutory language and purpose of the SCA while subsection B investigates *Doe v Chao*, a U.S. Supreme

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5. Stored Wire and Electronic Communications and Transactional Records Access, 18 U.S.C. §§ 2701–2712 (2006).
6. Van Alstyne v. Elec. Scriptorium Ltd., 560 F.3d 199 (4th Cir. 2009).
7. 18 U.S.C. § 2707(c) (2006).
8. *Van Alstyne*, 560 F.3d at 202.
9. *See* Fischer v. Mt. Olive Lutheran Church, Inc., 207 F. Supp. 2d 914, 925–26 (W.D.Wis. 2002) (observing that defendant's access to plaintiff's Hotmail account, coupled with obtainment of e-mails, would be a violation of the SCA); Power Boot Camp v. Warrior Fitness Boot Camp**,** 587 F. Supp. 2d 548, 555–56 (S.D.N.Y. 2008) (recognizing that a violation of the SCA occurs when an e-mail is obtained without authorization while it is in electronic storage on a service provider's system such as Hotmail or Gmail). *See also* United States v. Councilman, 418 F.3d 67, 79 (1st Cir. 2005) (holding that e-mail is electronic communication under the ECPA).
10. *See Van Alstyne*, 560 F.3d at 204–09.
11. 5 U.S.C. § 552a(g)(4)(A) (2006).
12. Doe v. Chao, 540 U.S. 614, 615 (2004).
13. *Van Alstyne*, 560 F.3d at 209.
14. *Id*. at 208.

Court case that analyzed a statute containing language nearly identical to that of the SCA. The Fourth Circuit substantially relied on *Doe* in the *Van Alstyne* decision, and a discussion of *Doe* is, therefore, imperative to a complete understanding of *Van Alstyne*. Subsection C observes the line of trial court cases that have taken a different position in interpreting the SCA. In Part III there is a detailed exposition of the *Van Alstyne* case with subsection A presenting an overview of the facts and procedural history, while subsection B explains the holding. Part IV provides an analysis explaining why the court reached an improper interpretation of the SCA. Subsection A addresses the court's incomplete analysis of the difference in language between the SCA and the Wiretap Act, as well as its misuse of a common law analogy to the SCA. Subsection B explains the court's failure to recognize the ambiguity present in the SCA, and subsection C exposes the court's error in its analogy of the SCA to the Privacy Act. Finally, subsection D suggests the poor policy resulting from the court's interpretation.

II. BACKGROUND

To aid in the comprehension of the *Van Alystne* opinion, it is important to understand some background information. First, relevant legislative history of the SCA and the controlling statutory language are discussed. Next, the U.S. Supreme Court decision in *Doe* interpreting a similarly worded statute is explored. Finally, a line of cases making the proper interpretation of the statutory damages provision in the SCA is explained.

A. The Stored Communications Act

Prior to the adoption of the Electronic Communication Protection Act of 1986 (ECPA),[15] the United States Code provided no protection for stored communications in remote computing operations and large data banks that stored e-mails.[16] Congress concluded that "the information [in these communications] may be open to possible wrongful use and public disclosure by law enforcement authorities as well as unauthorized private parties."[17] In response, Congress added Title II, known as the Stored

15. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).
16. United States v. Councilman, 418 F.3d 67, 80 (1st Cir. 2005).
17. S. REP. NO. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597.

Communications Act (SCA), to the ECPA to protect potential intrusions on individual privacy.[18]

Under the SCA, it is an offense when a person "intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains . . . access to a wire or electronic communication while it is in electronic storage. . . ."[19] In addition to criminal penalties, the SCA also authorizes private causes of action:

> [A] person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity . . . which engaged in that violation such relief as may be appropriate.[20]

The SCA further provides that, "appropriate relief includes—(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c); and (3) a reasonable attorney's fee and other litigation costs reasonably incurred."[21]

The disputed language appears under the damages subsection 2707(c). This language reads as follows:

> The court may assess as damages . . . the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, *but in no case shall a person entitled to recover receive less than the sum of $1,000*. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney['s] fees determined by the court.[22]

This statutory language enacted twenty-three years ago created the framework for protection of today's stored communications. In *Van Alstyne*, it is clear there was a violation of the SCA,[23] but the remedy the plaintiff was entitled to is not as certain. The following subsection will examine an interpretation the Supreme Court gave to a similarly worded damages provision in *Doe*.

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18. *Councilman*, 418 F.3d at 81.
19. 18 U.S.C. § 2701(a) (2006).
20. 18 U.S.C. § 2707(a).
21. 18 U.S.C. § 2707(b).
22. 18 U.S.C. § 2707(c) (emphasis added).
23. *See* cases cited *supra* note 9.

B. Comparable Statutory Language Examined in *Doe v. Chao*

The U.S. Supreme Court delivered a majority opinion of six justices holding that the damages provision in the Privacy Act required a plaintiff to prove some actual damages before recovering the statutory damages provided for in the Act.[24] The remaining justices filed an exhaustive dissent.[25] The damages clause of the Privacy Act and the majority and dissenting opinion in *Doe* will be briefly examined in the following three subsections:

1. The Privacy Act

The Privacy Act was passed to safeguard an individual's personal privacy in records maintained by federal agencies.[26] To effectuate the goal of keeping records secure, the Privacy Act subjects Federal Agencies to civil liability. The Privacy Act provides that "[w]henever any agency . . . (D) fails to comply with any other provision of this section . . . in such a way as to have an *adverse effect* on an individual, the individual may bring a civil action against the agency . . . ."[27] The Privacy Act then describes the civil action liability for agencies:

> [If] the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—(A) 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; and (B) the costs of the action together with reasonable attorney fees as determined by the court.[28]

Accordingly, a plaintiff may bring an action against an agency if (1) it failed to comply with the Privacy Act, (2) its failure to comply had an adverse effect on the plaintiff, and (3) it acted in an intentional or willful manner in its refusal or failure to comply.[29] Like the issue in *Van Alstyne*, however, it is not as clear whether a claimant is automatically entitled to the $1,000 statutory damages by proving the required elements of the civil action, or whether a claimant must prove some actual damages first. The following discussion of *Doe* addresses this issue.

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24. Doe v. Chao, 540 U.S. 614, 627 (2004).
25. *Id*. at 627–43.
26. Privacy Act of 1974, Pub. L. No. 93–579, § 2(B), 88 Stat. 1896, 1896.
27. 5 U.S.C. § 552a(g)(1) (emphasis added).
28. 5 U.S.C. § 552a(g)(4) (emphasis added).
29. *See Doe*, 540 U.S. at 624.

2. Procedural History

The plaintiff Doe sued the Department of Labor (DOL) under the Privacy Act for disclosing his social security number after he provided it on an application for benefits with the Federal Government.[30] The district "court accepted [plaintiff's] uncontroverted evidence of distress on learning of the improper disclosure, granted [the plaintiff] summary judgment, and awarded $1,000 in statutory damages under [the Privacy Act]."[31]

The DOL appealed and the Fourth Circuit Court of Appeals reversed, holding that the statutory damage award was only available to plaintiffs who suffered actual damages.[32] The Fourth Circuit reasoned that the plaintiff "had not raised a triable issue of fact about actual damages, having submitted no corroboration for his claim of emotional distress, such as evidence of physical symptoms, medical treatment, loss of income, or impact on his behavior."[33] The Supreme Court granted plaintiff's petition for certiorari to answer the question of whether some actual damages must be proven before a plaintiff may receive the statutory damage award under the Privacy Act.[34]

3. The Majority Opinion

The Supreme Court held that a plaintiff cannot qualify for statutory damages under the Privacy Act without showing proof of actual damages.[35] The majority reasoned that the "entitled to recovery" language relates back to the earlier part of the clause providing for "actual damages."[36] The Court explained that to hold otherwise would ignore the "actual damages" language.[37] Additionally, the Court stated that "if adverse effect of intentional or willful violation were alone enough to make a person entitled to recovery, then Congress could have conditioned the entire subsection g(4)(a) as applying only to 'a person entitled to recovery.'"[38]

Next and most importantly, the Court used legislative history unique to the Privacy Act to support its position. The Court observed that the Senate bill provided for general damages.[39] General damages are

30. *Id*. at 616–17.
31. *Id*. at 617.
32. *Id*.
33. *Id*.
34. *Id*. at 618.
35. *Id*. at 627.
36. *Id*. at 620.
37. *Id*.
38. *Id*. at 621 n.2.
39. *Id*. at 622–23 (citing S. 3418, 93d Cong. § 303(c)(1) (1974)).

"compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved."[40] Congress, however, later removed the general damage language from the bill.[41] Therefore, the Court reasoned, Congress' deliberate intention was to eliminate any possibility of awarding damages without proof of actual harm.[42] Additionally, the Court explained that the "person entitled to recovery"[43] language was left over after the general damages language was removed.[44]

Finally, although Doe argued that the legislative history of the Electronic Communications Privacy Act provided for statutory damages without proof of actual harm, the Court refused to rely on legislative history of an act passed after the Privacy Act.[45] In sum, the heart of the majority opinion lies in the legislative and drafting histories, which both clearly support its reading of the Privacy Act to require proof of actual damages in order to recover statutory damages.

4. The Dissenting Opinion

Justice Ginsburg's dissenting opinion began with a textual analysis of the damages clause. She agreed with Doe that the phrase, "a person entitled to recovery," is "most sensibly read to include anyone experiencing an 'adverse effect' as a consequence of an agency's intentional or willful commission of a Privacy Act violation . . . ."[46] By applying the textual canon of statutory construction which requires words or phrases in a statute to be read in light of other relevant provisions, and construed consistently therewith, she explained that "[t]he Act's text, structure, and purpose warrant this construction."[47] She reasoned that the damages clause specifies the consequences only, and does not add a third liability-determining element.[48] She additionally suggested that "recovery" be interpreted using its proper dictionary meaning: "[a]n amount awarded in or collected from a judgment or decree."[49] She contended that giving recovery

40. BLACK'S LAW DICTIONARY 417 (8th ed. 2004).
41. *Doe*, 540 U.S. at 623.
42. *Id*.
43. 5 U.S.C. § 552a(g)(4)(A) (2006).
44. Doe, 540 U.S. at 622–23.
45. *Id.* at 626–27.
46. *Id.* at 628.
47. *Id.* at 628–31 (citing Davis v. Mich. Dept. of Treasury, 489 U.S. 803, 809 (1989)).
48. *Id.* at 629 (citing 5 U.S.C. § 552a(g)(4) ("[T]he United States shall be liable to the individual in an amount equal to the sum of—(A) 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 . . . .")).
49. *Id*. at 630 (citing BLACK'S LAW DICTIONARY 1280 (7th ed. 1999)).

this broader meaning allows the phrase to refer to "a claimant who suffers an 'adverse effect' from an agency's intentional or willful . . . violation,"[50] not the "actual damages"[51] provision.[52]

Justice Ginsburg then applied a second textual canon of statutory construction: a statute should be constructed in a way as to prevent rendering any clause, sentence, or word superfluous.[53] In applying this canon, she explained that the phrase, "a person entitled to recovery," has no meaning if it is simply old language left from the Senate bill as the majority claims.[54] If it were Congress' intent to remove general damages language, it could have "more rationally . . . written: 'actual damages . . . but in no case shall a person who proves such damages [in any amount] receive less than $1,000.'"[55] Further, she claimed, under the majority's interpretation, "'adverse effect' becomes superfluous, swallowed up by the 'actual damages' requirement."[56] Even more importantly, she noted, "it turns the phrase 'shall be liable' to 'may be liable,'" forcing the inquiry into whether actual damages can be proven.[57]

Next, Justice Ginsburg shifted from her textual analysis to the interpretations given to the statute in other contexts. She cited precedent to establish that the majority of the Federal Circuits that had addressed the same issue held that the Privacy Act authorizes a minimum $1,000 award that does not hinge on proof of actual damages.[58] Finally, Justice Ginsburg concluded her dissent with a quote from Justice Michael of the appellate court: "[t]he remedy of minimum statutory damages is a fairly common feature of federal legislation . . . . In contrast, I am not aware of any statute in which Congress has provide[d] for a statutory minimum to actual damages."[59]

Finally, Justice Breyer wrote an additional dissent citing a line of cases that interpret the requirement of an intentional and willful state of mind restrictively, essentially holding that a violation will only be found when the government's action is in bad faith.[60] Thus, Justice Breyer attempted to dispel the fear of inadvertent "liability based upon a technical, accidental, or good-faith violation of the statute's detailed provisions."[61]

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50. *Id*. (citing 5 U.S.C. § 552a(g)(1)(D), (g)(4)).
51. 5 U.S.C. § 552a(g)(4)(A) (2006).
52. *Doe*, 540 U.S. at 630.
53. *Id*. at 630–31 (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).
54. *Id*. at 631.
55. *Id*. at 630.
56. *Id*. at 631.
57. *Id*.
58. *Id*. at 631–33.
59. *Id*. at 641. (quoting Doe v. Chao, 306 F.3d 170, 195 (4th Cir. 2002) (Michael, J., dissenting)).
60. *Id*. at 642.
61. *Id*.

Therefore, he argued, the dissenting opinion's view that actual damages should not be required to recover statutory damages, "[will] not risk an injury to the public fisc."[62]

Accordingly, the *Doe* decision was very close and entailed very compelling arguments from both the majority and the dissenting justices. The language shared between the remedial provisions of the Privacy Act and the SCA is nearly identical. For that reason, the *Doe* decision is crucial to providing guidance in analyzing *Van Alstyne*. The next subsection of the background analyzes decisions regarding the same question that *Doe* covered, except in the context of the SCA.

C. Cases Interpreting the Remedial Provision of the Stored Communications Act

The district court decisions that are analyzed below wrestled with the main issue discussed in *Van Alstyne*, whether proof of actual damages is required under the SCA in order to recover statutory damages. The decisions offer guidance in interpreting the SCA's damages provision. Each of the following cases held that an individual bringing suit under the SCA does not have to prove that he suffered actual harm to recover statutory damages; he only has to show that he was aggrieved by the willful or intentional actions of a violator of the SCA.

1. Cedar Hills Associates v. Paget

In *Cedar Hills*, the plaintiff employer brought suit against a former employee defendant after the employee allegedly accessed 1,098 messages in his coworkers' e-mail account without authorization.[63] The court recognized *Doe* as having ruled on similar statutory language in the Privacy Act.[64] The court noted, however, that despite the similar statutory language, the legislative history dictated finding that statutory damages could be awarded without proof of actual damages under the SCA.[65] The court distinguished the two statutes because the legislative history of the "ECPA indicates that actual damages were to be included in a damage award, but not the exclusive award."[66] Additionally, the court recognized that the ECPA seeks to prevent invasions of privacy to e-mail, not just

62. *Id*. at 642–43.
63. Cedar Hills Assoc's. v. Paget, No. 04 C 0557, 2005 WL 3430562, at *1 (N.D. Ill. Dec. 9, 2005).
64. *Id*. at *3.
65. *Id*.
66. *Id*. (citing S. REP. NO. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597).

instances where a violator capitalizes from such activity.[67] The court denied the defendant's motion for summary judgment because it found the two statutes reasonably distinguishable.[68]

2. Freedman v. Town of Fairfield

In *Freedman*, the plaintiff filed for and received an amended judgment of $1,000, representing the statutory minimum under the SCA after the jury determined nominal damages in the amount of $1.00.[69] The defendants filed a motion for reconsideration of the amended judgment, arguing that under *Doe* the plaintiff must prove actual damages in order to receive the statutory minimum.[70] The court first observed that the dissent in *Doe* stated that the SCA is an example of a statute which permits recovery of statutory damages, regardless of proof of actual damages.[71] Next, the court concluded that because the majority in *Doe* declined to use the language and legislative history of the SCA to support its holding on the same issue regarding the Privacy Act, *Doe* is unconvincing authority.[72] Therefore, the court held that recovery under the SCA did not require proof of actual damages.[73]

3. In re Hawaiian Airlines, Inc.

A pilot brought suit against Hawaiian Airlines under the SCA for alleged unlawful access of a website he maintained while employed by the defendant.[74] The pilot determined that the defendant accessed the website by creating accounts for two employees who were authorized to access the site and logged in as those employees.[75] Plaintiff contended that the defendant gained unauthorized access to his website thirty-six times over a period of four months.[76]

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67. *Id*. ("[W]hile a subscriber to a computer mail system has authorization to access his portion of the facilities storage, an individual who accesses the storage of other subscribers without specific authorization would violate the ECPA." (citing S. REP. NO. 99–541, at 36 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3590)).
68. *Id*.
69. Freedman v. Town of Fairfield, No. 3:03CV01048, 2006 WL 2684347, at *1 (D. Conn. Sept. 19, 2006).
70. *Id*.
71. *Id*. at *3 (citing Doe v. Chao, 540 U.S. 614, 639 (2004) (Ginsburg, J., dissenting)).
72. *Id*.
73. *Id*.
74. *In re* Hawaiian Airlines, Inc., 355 B.R. 225, 227 (D. Haw. 2006).
75. *Id*.
76. *Id*.

In its decision, the court noted that "the statutory language is somewhat ambiguous."[77] The court distinguished the SCA from the Privacy Act because the SCA "explicitly states that a person aggrieved by a violation of the Act *may recover* and this recovery is not tied to actual damages or profits"[78] while The Privacy Act states that "the United States shall be liable to the individual in an amount *equal to* the sum of—(A) actual damages sustained by the individual . . . but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . . ."[79] Therefore, the Privacy Act's language requires a calculation for recovery based on further limiting references in the damages clause, while the SCA does not.

The court further relied on legislative history suggesting that "Congress assumed that a party aggrieved by a violation of the [SCA] could obtain the minimum statutory award without proving actual damages."[80] The court ultimately held that a party may obtain statutory damages under the SCA on a per-violation basis, thereby allowing multiplication of the $1,000 minimum statutory award without a showing of actual damages.[81] Each of the previous cases provide important background knowledge essential to understanding the holding in *Van Alstyne* discussed next.

III. EXPOSITION OF *VAN ALSTYNE v. ELECTRONIC SCRIPTORIUM*

The controversial decision in the *Van Alstyne* case involved the issue of whether actual proof of damages is necessary in a civil action to recover for intentional violations of the SCA.[82] The court held that a plaintiff must prove some actual damage in order to recover statutory damages under the SCA, but does not have to prove actual damage for recovery of punitive damages, attorney fees, or costs.[83]

A. Facts and Procedural History

Van Alstyne, the plaintiff, was employed by Electronic Scriptorium Ltd. (ESL) in January of 2001 to serve as the Vice President of Marketing.[84] ESL is a small data conversion company owned and operated by Edward

77. *Id*. at 230.
78. *Id*. (emphasis added).
79. 5 U.S.C. § 552a(g)(4) (2006) (emphasis added).
80. *Hawaiian Airlines*, 355 B.R. at 230–31 (citing S. REP. NO. 99-541, at 43(1986) ("[D]amages under [§ 2707(c)] includ[e] the sum of actual damages suffered by the plaintiff and any profits made by the violator as the result of the violation . . . with minimum statutory damages of $1,000[.]"), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597).
81. *Id*. at 232.
82. Van Alstyne v. Elec. Scriptorium Ltd., 560 F.3d 199, 201–02 (4th Cir. 2009).
83. *Id.*
84. *Id*. at 202.

Leonard.[85] ESL assigned Van Alstyne a company e-mail account, but she also used her personal America On Line (AOL) e-mail account to conduct business occasionally.[86] Following Van Alstyne's termination in March of 2002, she brought suit alleging sexual harassment, and claiming unpaid unemployment benefits, and unpaid commission.[87] Van Alstyne only prevailed on her claim for unemployment benefits.[88] ESL subsequently brought a separate action against Van Alstyne alleging several business torts.[89] During a deposition, Van Alstyne discovered that some of the e-mails ESL used as exhibits were taken from her AOL e-mail account.[90] Leonard ultimately produced copies of 258 e-mails he had taken and admitted to logging into Van Alstyne's private AOL e-mail account on numerous occasions.[91]

Upset by this revelation, Van Alstyne instituted an action against Leonard individually under the SCA.[92] Van Alstyne later amended her complaint by adding ESL as a defendant. Van Alstyne's claim for relief was limited to punitive damages and statutory damages under the SCA.[93] Defendants moved for summary judgment, relying on *Doe* "for the proposition that the SCA did not provide for statutory damages absent a showing that the plaintiff suffered actual damages."[94] Summary judgment was denied, and the case went to trial where a jury returned a verdict for Van Alstyne awarding her compensatory and punitive damages.[95] The total compensatory award of $175,000 was based on increments of the $1,000 statutory damage award for each violation of the SCA.[96] The trial court entered a final judgment, which additionally awarded Van Alstyne attorney fees and court costs.[97] Leonard and ESL appealed the award of statutory damages, punitive damages, attorney fees, and costs.[98]

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85. *Id*.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id.* at 202 n.1.
92. *Id*. at 202.
93. *Id*. at 203.
94. *Id*.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.

B. The Opinion of the Fourth Circuit

The two major issues addressed in *Van Alstyne* are (1) whether the plain language of 18 U.S.C. § 2707(c) unambiguously requires proof of actual damages as a prerequisite to recovery of statutory damages and (2) whether proof of actual damages is required under 18 U.S.C. § 2707(c) before an award of punitive damages, attorney fees, and costs.[99]

1. Actual Damage Is Required for Recovery of Statutory Damages

The court held the trial court erred in permitting the jury to award statutory damages to Van Alstyne under the SCA without a showing of actual damages.[100] In its analysis, the court first discussed the main reasons for its holding and then addressed Van Alstyne's arguments.

The court reached its holding by heavily relying on the decision in *Doe*, the case in which the same issue was addressed with a nearly identical statutory provision of the Privacy Act.[101] Simply because the Privacy Act has very similar language, the court adopted the Supreme Court's interpretation and applied it to the SCA.

Next, the court reasoned that Congress has shown an ability to enact statutes that clearly award statutory damages without proof of actual damages.[102] The court referenced the Wiretap Act, which was amended by the ECPA.[103] The Wiretap Act provides:

> In any other action under this section, the court may assess as damages whichever is the greater of— (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.[104]

The court reasoned that because Congress amended the Wiretap Act to unambiguously allow a plaintiff to recover minimum statutory damages with the same piece of legislation that created the SCA, it would have done the same for the SCA if that was its intention.

After establishing its position, the court addressed Van Alstyne's arguments. Van Alstyne first argued that the structure of the SCA dictates a

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99. Id. at 201–02.
100. *Id*. at 208.
101. *Id*. at 206.
102. *Id*. at 205–06.
103. *Id*.
104. 18 U.S.C. § 2520(c)(2) (2006).

different result than that reached in *Doe*.[105] Van Alstyne cited numerous district court decisions to support that position.[106] Van Alstyne also claimed that "any 'person aggrieved' may 'recover' from the violator."[107] Using the same reasoning as the court in *Doe*, the court explained that "a person aggrieved may recover appropriate relief, which encompasses damages *as defined and limited by subsection (c)*."[108] The court reasoned that the "entitled to recover" phrase "refer[s] back to the beginning of *that* sentence, that is, a person who 'suffered' actual damages[,]" just like in *Doe*.[109] The court then concluded that Van Alstyne was attempting to use circular logic to support her claim.[110]

Secondly, Van Alstyne argued that the legislative history of the SCA requires the court to take a different approach than the decision in *Doe*.[111] Van Alstyne attempted to convince the court that proof of actual damages should not be required to recover statutory damages according to the following Senate Report statement: "damages under the [SCA] 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 (c) with minimum statutory damages of $1,000."[112] The court, however, dismissed this "mere mention of 'statutory damages' in the legislative history . . ." because it believed the statutory language was plain and unambiguous.[113] Again the court referred back to the Wiretap Act, quoting language from its legislative history: "[t]he court may assess damages consisting of whichever is the greater of (A) the sum of the plaintiff's actual damages and any profits the violator made as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day or $10,000."[114] The court explained again that, unlike the SCA, the Wiretap Act's explanatory language in its legislative history clearly establishes the right to statutory damages without proof of actual harm.[115]

Next, Van Alstyne argued that after examination of the common law roots of the SCA and the Privacy Act, the two statutes are

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105. *Van Alstyne*, 560 F.3d at 206.
106. *Id*. (citing *In re* Hawaiian Airlines, Inc., 355 B.R. 225, 227 (D. Haw. 2006); Freedman v. Town of Fairfield, No. 3:03CV01048, 2006 WL 2684347, at *1 (D. Conn. Sept. 19, 2006); Cedar Hills Assocs. v. Paget, No. 04 C 0557, 2005 WL 3430562, at *1 (N.D. Ill. Dec. 9, 2005)).
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*.
111. *Id*. at 207.
112. *Id*. (quoting S. REP. NO. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597).
113. *Id*.
114. *Id*. (quoting S. REP. NO. 99-541, at 27 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3581) (emphasis omitted).
115. *Id*.

distinguishable.[116] Van Alstyne contended that "unlike the Privacy Act, which the *Doe* Court found akin to defamation or invasion of privacy, the SCA is analogous to the common law of trespass and that, at common law, a trespass action did not require proof of actual damages."[117] The court disagreed with Van Alstyne's argument and stated that trespass to chattel, and not trespass to land, more closely parallels the SCA.[118] Because the common law of trespass to chattel requires some proof of actual harm for recovery, the court dismissed Van Alstyne's argument.[119]

Van Alstyne lastly argued that the "*Doe* Court implicitly concluded that the SCA permits an award of statutory damages without proof of actual damage."[120] The court again disagreed because this conclusion was made by the justices in the dissent of *Doe*.[121] It explained that the dissenting justices' interpretation of the SCA in *Doe* does not carry authoritative weight.[122] After concluding that recovery of statutory damages under the SCA requires some proof of actual harm, the court analyzed punitive damages, attorney fees, and costs.123

2. Actual Damage Is Not Required for Recovery of Punitive Damages, Attorney Fees, or Costs

The court affirmed the trial court's decision holding that proof of actual damages was not a prerequisite to the recovery of punitive damages.[124] For the second issue of punitive damages, the court used a plain-meaning approach.[125] It looked at only the language of the punitive damages clause, "[i]f the violation is willful or intentional, the court may assess punitive damages."[126] The court found the only limitation to obtaining punitive damages is that the violation of the SCA must be "willful or intentional."[127] Attorney fees and costs were analyzed next.

The court affirmed the trial court's decision holding that proof of actual damages was not a prerequisite to the recovery of attorney fees and costs.[128] The court's analysis of attorney fees and costs was identical to its

116. *Id*.
117. *Id*. (citing RESTATEMENT (SECOND) OF TORTS §§ 158, 163 (1965)).
118. *Id*. at 208. (citing RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965)).
119. *Id*.
120. *Id*.
121. *Id*.
122. *Id*.
123. *Id*. at 208–09.
124. *Id*. at 209.
125. *Id*.
126. *Id*. (quoting 18 U.S.C. § 2707(c) (2006)).
127. *Id*.
128. *Id*.

punitive damages analysis. It looked to the plain meaning of the attorney fees and cost provision: "In a civil action under this section, appropriate relief includes . . . (3) a reasonable attorney's fee and other litigation costs reasonably incurred."[129] The court concluded that attorney fees and costs were recoverable without proof of actual harm.[130]

In sum, *Van Alstyne* held that statutory damages under the SCA require a plaintiff to prove actual damages resulting from the defendant's violation of the SCA, while punitive damages, attorney fees, and costs only require proof of the violation.[131] The court, however, vacated all awards, remanding to the trial court for reconsideration of Van Alstyne's appropriate award in light of her lower degree of success without the statutory damages.[132] The court reasoned that the degree of Van Alstyne's overall success after appeal must be accounted for in the jury award.[133]

IV. ANALYSIS

The Fourth Circuit Court of Appeals improperly interpreted the Stored Communications Act by analogizing it to a completely distinguishable statute, ultimately achieving an absurd result. The following discussion will first address the shortcomings in the court's comparison of the language in the SCA and the Wiretap Act, as well as its misuse of a common law analogy to the SCA. Second, the analysis will focus on the court's failure to recognize the ambiguity present in the language of the SCA. Traditional rules of statutory construction will be applied to the SCA to bring to light its ambiguity. Next, the error in the court's analogy of the Privacy Act in *Doe* to the SCA in *Van Alstyne* will be scrutinized. Finally, the analysis suggests unsound repercussions that may result from the court's controversial holding.

A. The Court's Analysis Referencing the Wiretap Act and Common Law Is Unpersuasive

An analysis of the SCA's legislative history shows that the court's distinction of the SCA from the Wiretap Act is unconvincing. The SCA was modeled after a different statute, has a different structure, and was enacted with the same Congressional intent as the Wiretap Act.

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129. 18 U.S.C. § 2707(b) (2006).
130. *Van Alstyne*, 560 F.3d at 209.
131. *Id*. at 208–09.
132. *Id*. at 210.
133. *Id*. at 209. ("[T]he degree of the plaintiff's overall success goes to the reasonableness of a fee award . . . ." (quoting Farrar v. Hobby, 506 U.S. 103,114 (1992))).

Furthermore, the court's analysis of common law is misplaced because the SCA's language is not tied to any common law cause of action. Even if the cause of action under the SCA were to be logically analogized with a common law cause of action, it would not be trespass to chattel as the court suggested. The following subsections explain these arguments in more detail.

1. Explanation of the Different Language in the SCA and the Wiretap Act

One of the court's reasons for its holding was that Congress showed its ability to enact the Wiretap Act, which awards minimum statutory damages without proof of actual harm, in the same legislation that created the SCA. The court, however, did not adequately support its comparison of the SCA to the Wiretap Act. There are logical and legislatively supported explanations for the difference in the language between the Wiretap Act and the SCA. First, legislative history reveals that the difference in statutory structure and language occurred because the SCA was modeled after the Right to Financial Privacy Act (RFPA).[134] The RFPA provides:

> Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of—(1) $100 without regard to the volume of records involved; (2) any actual damages sustained by the customer as a result of the disclosure; (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.[135]

The language in subsection 1 of the RFPA provides a minimum remedy of $100 to customers for violations, without regard to proof of actual damages.[136] This is clear because actual damage is an additional means of recovery in subsection 2.[137] It is only consistent with the RFPA to infer that the drafters of the SCA also intended to provide for minimum statutory damages without proof of actual damages. Therefore, it follows

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134. S. REP. NO. 99-541, at 3 (1986) ("Title II of S. 2575 addresses access to stored wire and electronic communications and transactional records. It is modeled after the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq. . . . ."), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

135. 12 U.S.C. § 3417(a) (2006).

136. *See id.*

137. *See id.*

that because the SCA was modeled after the RFPA and not the Wiretap Act, different language was used to achieve the same result.

Next, an additional explanation for the different language is that under the Wiretap Act, the damages provision is two pronged, requiring a calculation of damages depending on the violation.[138] The provision providing for computation of damages reads:

> (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted . . . then the court shall assess damages as follows:
>
> > (A) If the person who engaged in that conduct . . . has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.
> >
> > (B) If, on one prior occasion, the person who engaged in that conduct . . . has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.
>
> (2) In any other action under this section, the court may assess as damages whichever is the greater of--
>
> > (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
> >
> > (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.[139]

Prong 1 provides for specific damages based on the type of violation, and Prong 2 provides for damages for any violation.[140] In contrast, the SCA only provides one damages provision for any violation of the SCA.[141] Because the statutory structure of the damages provision in the Wiretap Act is more complex, different language was used to make the computation of damages more clear.

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138. 18 U.S.C. § 2520(c) (2006).
139. *Id*.
140. *Id*.
141. 18 U.S.C. § 2707(c) (2006).

Alternatively, the difference in language between the Wiretap Act and the SCA could simply be the result of inconsistent draftsmanship. To hold that this difference was meaningful would be to infer that Congress intended to treat violations of the SCA different from violations of the Wiretap Act. This inference is incorrect and misplaced given Congress' intention in enacting the ECPA**,** which created the SCA. The goal in enacting the ECPA was to update the law to account for the recent innovations in technology.[142] Congress recognized the law's protection of voice communication under the Wiretap Act, but noted, "[t]his statutory framework appears to leave unprotected an important sector of the new communications technologies."[143] Congress observed that "the disclosure of the contents of messages over [electronic mail] are probably not regulated or restricted."[144] Congress intertwined its intentions to protect emerging forms of transient communication from interception and stored communication from unauthorized access.[145] Therefore, instead of differentiating between remedies for general violations of the Wiretap Act and the SCA, Congress intended to extend the same protection from the Wiretap Act to the SCA.

The foregoing analysis shows that regardless of how clear Congress' intention was in providing for minimum statutory damages in the Wiretap Act, it should have no bearing on the interpretation of the SCA. Although the ECPA amended the Wiretap Act and created the SCA, its legislative history shows Congress had common goals for both and that the SCA was modeled after the RFPA.

2. Misplaced Analogy to Common Law

The court should have dismissed Van Alsytne's argument analogizing the SCA to a common law action. There is no evidence in the statutory language or legislative history of the SCA that supports such an argument. Instead of dismissing the unsubstantiated claim, the court disagreed with Van Alstyne's argument that the proper common law analogy to the SCA was trespass.[146] The court decided that trespass to chattel "more closely mirrors the SCA."[147] Unfortunately, the court did not explain how it made its decision; it only stated in a footnote that "the common law of trespass does not aid Van Alstyne's argument."[148] Therefore, the court said it did

142. H.R. REP. NO. 99-647 at 17–19 (1986).
143. *Id*. at 17.
144. *Id*. at 18.
145. *See id*. at 17–19.
146. Van Alstyne v. Elect. Scriptorium Ltd., 560 F.3d 199, 207–08 (4th Cir. 2009).
147. *Id*.
148. *Id*. at 207 n.4.

not need to decide the precise common law analogue for the SCA.[149] In explaining its opinion, however, the court continued as though it held that the common law analogue was trespass to chattel, and because trespass to chattel requires proof of actual harm for recovery, the analogy supported its interpretation.[150] Unfortunately, this analogy is misplaced.

In the context of unauthorized access to webmail, a violator of the SCA could simply open an e-mail and read it. The original copy would still be accessible and could even be marked so that it appeared as if it had not been opened. Trespass to chattel generally requires the chattel be impaired, the possessor be deprived of the chattel, or that harm is caused to the possessor.[151] Under no circumstances would this violation of the SCA constitute a violation of the common law of trespass to chattel. Additionally, chattel is defined as, "a physical object capable of manual delivery. . . ."[152] An electronic e-mail is hardly a physical object capable of manual delivery. Although a piece of computer hardware technically contains the e-mail message, a violator of the SCA does not engage in physical movement of that hardware. In sum, the court should have dismissed Van Alstyne's common law analogy argument because there is no support for it in the statute or its legislative history. Instead, the court made an unsupported assertion that a common law analogue to the SCA's cause of action is trespass to chattel.

B. The Fourth Circuit's Decision Is Not Consistent with Canons of Statutory Construction

For the purposes of its analysis, the court held the plain language in section 2707(c) of the SCA is unambiguous.[153] It stated in its opinion, however, "Congress, if it wished the result that Van Alstyne presses for, could have written a simpler, unambiguous statute."[154] Therefore, by its own admission, the court implied acknowledgement of the ambiguity in the SCA. Because the court should have held that the statute was ambiguous, canons of statutory construction will aid in the analysis to illustrate the correct interpretation that should have been reached in *Van Alstyne*.

First, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented,

149. *Id*.
150. *Id*. at 207–08.
151. *See* RESTATEMENT (SECOND) OF TORTS § 218 (1965).
152. BLACK'S LAW DICTIONARY 251 (8th ed. 2004).
153. *Van Alstyne*, 560 F.3d at 206.
154. *Id*. at 205.

no clause, sentence, or word shall be superfluous, void, or insignificant.'"[155] In applying this canon to the language of the SCA, as construed by the *Van Alstyne* court, the "person aggrieved" term in section 2707(a) is rendered superfluous. The Fourth Circuit's interpretation of the SCA requires a plaintiff to prove that he (1) is a person aggrieved, (2) is effected by an intentional or willful violation of the Act, and (3) has suffered actual damages from the violation.[156] Requiring a plaintiff to prove actual damages, however, makes the need for the plaintiff to prove that he was aggrieved unnecessarily. If a plaintiff can prove he was damaged as the result of a violation, he most certainly was aggrieved.

Additionally, under the court's theory in *Van Alstyne*, the phrase "a person entitled to recover"[157] would have to be interpreted as meaning "a plaintiff who proved actual damages." This result is required because the court held the statutory language, "a person entitled to recover,"[158] specifically refers to "a person who 'suffered' actual damages."[159] The court dismissed the more reasonable interpretation advanced by Van Alstyne.[160] Van Alstyne argued that "a person entitled to recover" can be given effect by interpreting that the phrase refers to the preceding section 2707(a).[161] Section 2707(a) provides that a "person aggrieved" by a knowing or intentional violation of the SCA may recover from that violator.[162] Van Alstyne's interpretation of the statute gives effect to every word and renders no word, phrase, or clause void or insignificant.[163] In addition, Van Alstyne's interpretation is most reasonable because the same reference to "a person" is used in both subsection 2707(c) and subsection 2707(a). Subsection 2707(c) states "[t]he court may assess . . . the sum of the actual damages suffered by the *plaintiff* . . . but in no case shall a *person* entitled to recover receive less than the sum of $1,000."[164] If the "person entitled to recover" language of subsection 2707(c) was intended by Congress to refer to a plaintiff who can prove actual harm as the *Van Alstyne* court suggests, it could have more reasonably used the term "plaintiff" instead of "person." After all, Congress used the term "plaintiff" in the same sentence to refer to one who has suffered actual damages, not

155. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).
156. *Van Alstyne*, 560 F.3d at 209.
157. 18 U.S.C. § 2707(c) (2006).
158. *Id*.
159. *Van Alstyne*, 560 F.3d at 206.
160. *Id*.
161. *Id*. (citing 18 U.S.C. § 2707(a)).
162. *See* 18 U.S.C. § 2707(a).
163. It should be noted that part of the damages clause is rendered superfluous with any interpretation because of an amendment discussed later. *See* discussion *infra* Part IV.C.4.
164. 18 U.S.C. § 2707(c) (emphasis added).

the term "person."[165] Therefore, the court erred in dismissing Van Alstyne's more reasonable interpretation.

A second applicable canon of statutory construction is the whole act rule: "in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . ."[166] In the SCA, the elements of liability are clear and explicit in the cause of action provision: "a *person aggrieved* by any violation of [the SCA] . . . in which the conduct constituting the violation is engaged in with a *knowing or intentional state of mind may*, in a civil action, *recover* from the person . . . which engaged in that violation such relief as may be appropriate."[167] Appropriate forms of relief are listed under section 2707(b).[168] One of those forms of relief is "damages under subsection (c) . . . ."[169] Thus, the damages provision encompasses compensatory and punitive damages in one section.[170] By requiring proof of actual damages for recovery of statutory damages, as the court in *Van Alstyne* did, a separate and higher burden is imposed.[171] Punitive damages are not subject to the higher burden, and instead may be assessed when the "violation is willful or intentional."[172] The "willful or intentional" state of mind requirement is already an element required for relief, set forth in section 2707(a).[173] Again, section 2707(a) specifically requires that "the violation is engaged in with a *knowing or intentional state of mind* . . . ."[174] Although the term "knowing" is used instead of "willful," these two terms may be used interchangeably in defining liability in civil actions.[175] Therefore, the punitive damages provision adds no new elements of proof. This is strong evidence that Congress intended for section 2707(a) to provide the only elements that must be proven for a person to recover.[176] Under this interpretation, it is inconsistent and unreasonable in light of the statutory structure to imply further limitations on recovery of damages under section 2707(c).[177] The *Van Alstyne* court found a condition on the

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165. *Id*.
166. Stafford v. Briggs, 444 U.S. 527, 535 (1980) (quoting Brown v. Duchesne, 60 U.S. 183, 194 (1857)).
167. 18 U.S.C. § 2707(a) (emphasis added).
168. 18 U.S.C. § 2707(b).
169. *Id*.
170. 18 U.S.C. § 2707(c).
171. Van Alstyne v. Elect. Scriptorium Ltd., 560 F.3d 199, 208 (4th Cir. 2009).
172. 18 U.S.C. § 2707(c).
173. *See* 18 U.S.C. § 2707(a).
174. *Id*. (emphasis added).
175. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007) ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well . . . .").
176. 18 U.S.C. § 2707(a).
177. 18 U.S.C. § 2707(c).

receipt of statutory damages by looking merely to the damages clause, instead of interpreting Congress' intent from the statute's overall organization.

For the foregoing reasons, the court in *Van Alstyne* misinterpreted the SCA. Applying traditional canons of statutory construction to the ambiguous language of the SCA clearly shows the court in *Van Alstyne* reached an absurd result. The court should have accepted Van Alstyne's argument and allowed her to recover statutory damages under the SCA without proof of actual damage.

C. The Court Erred in Analogizing the Privacy Act to the Stored Communications Act

The Privacy Act is distinguishable from the SCA in a number of different ways. As a result of their differences, restraint should have been used before the court blindly compared the two statutes. First, the SCA contains permissive language with respect to the calculation of damages while the Privacy Act's comparable language is mandatory. Second, the SCA allows a cause of action against anyone except for the United States, while the Privacy Act's cause of action is solely against United States administrative agencies. Next, the SCA provides for punitive damages, while the Privacy Act does not. Finally, the legislative and drafting histories of each are completely different. A closer look at these four distinctions is conducted in the following subsections.

1. Permissive Versus Mandatory Language

The Privacy Act mandates that "the United States *shall be liable* to the individual in the amount equal to the sum of—(A) actual damages sustained by the individual. . . ."[178] As emphasized, the statute specifically requires that courts analyze and award actual damages. Therefore, the Court's holding in *Doe* regarding the Privacy Act, which required a plaintiff to show some actual damage to recover statutory damages, is reasonable because of the mandatory analysis of actual damages. If the court is required to analyze actual damages, it is consistent to use that analysis to determine entitlement to statutory damages.

According to the language of the SCA, a "court *may assess* as damages . . . the sum of the actual damages suffered by the plaintiff."[179] Unlike the Privacy Act, the SCA includes permissive language allowing the

178. 5 U.S.C. § 552a(g)(4) (emphasis added).
179. 18 U.S.C. § 2707(c) (emphasis added).

court discretion in analyzing actual damages. Both statutes state, "but in no case shall a person entitled to recover receive less than the sum of $1,000" immediately after the phrase providing for actual damages.[180] Therefore, statutory damages must be awarded if the plaintiff is entitled to recover them under both statutes, but under the SCA entitlement to actual damages is discretionary. As a result, it is inconsistent to require a plaintiff to prove actual damage in order to recover statutory damages because the court is not required to award actual damages. Discretionary language is used, and should be given effect. Allowing a plaintiff to recover statutory damages without proof of actual damage gives effect to the discretionary language. If the court does not have to assess actual damages suffered by the plaintiff, it should not be required to find actual harm as a condition to awarding statutory damages that must be assessed without discretion.

Accordingly, the court in *Van Alstyne* erred in analogizing the SCA to the Privacy Act. The discretionary language, referenced above in the SCA, creates an important distinction from the Privacy Act. The court's analysis in *Van Alstyne* failed to consider this distinction. As a result, its interpretation creates an illogical damage analysis.

2. Increased Liability for Everyone, Instead of Solely for Agencies of the United States

The Privacy Act was enacted "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies. . . ."[181] One way it achieves this goal is by imposing liability on federal agencies that fail to comply with the Act when that failure results in an adverse effect on an individual.[182] Therefore, the means of recovery is strictly against the United States.[183] In contrast, the section 2707(a) of SCA provides for liability against any person or entity *except* the United States.[184] This difference is an important distinction between the two statutes.

If the Court in *Doe* had not interpreted the Privacy Act to require a plaintiff to prove actual damages in order to recover statutory damages, it would have essentially been imposing greater liability upon the United States. Arguably, law suits would be able to go forward more easily without a showing of actual damages, and the Court's interpretation would subject the Federal Government to more lawsuits requiring it to pay out

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180. *Id*. S*ee also* 5 U.S.C. § 552a(g)(4)(A)).
181. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896.
182. 5 U.S.C. § 552a(g)(1)(D).
183. 5 U.S.C. § 552a(g)(4).
184. 18 U.S.C. § 2707(a) (2006).

minimum statutory damages. Although not specifically stated, the majority may have been erring on the side of caution and assuming that Congress did not want to open itself up to depletion of the public treasury.

Section 2707(a) of the SCA expressly excludes liability against the United States and, therefore, is clearly distinguishable from the Privacy Act. There is no risk for exposing the Federal Government to liability and burdening the public treasury. Therefore, the *Van Alstyne* court erred in analogizing the SCA to the Privacy Act because the Court in *Doe* may have based their decision on this key distinction in the Privacy Act.

3. Alternative Means of Recovery

The comparable language in the Privacy Act should not be analogized to the SCA because the means for recovery are different. Under the Privacy Act, the sole provision for recovery is compensatory damages.[185] On the other hand, the SCA provides for compensatory damages and punitive damages in the same clause.[186]

If the Privacy Act included a punitive damages provision like the one in the SCA,[187] the policy behind the decision the *Doe* Court made would have been different. According to *State Farm*, when awarding punitive damages "courts must ensure that the measure of [punitive damages] is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[188] By applying *Doe*'s holding to the SCA, as the court in *Van Alstyne* did, punitive damages are available without showing proof of actual damages, but compensatory damages are not. As a result, a plaintiff who cannot prove actual harm will be entitled to no compensatory damages. Under *State Farm*, if a plaintiff recovers no compensatory damages, they may not be able to recover punitive damages.[189] This interpretation of the statute is absurd because plaintiffs who are not harmed by violations of the SCA may never be able to recover more than attorney fees and costs.[190] The court in *Van Alstyne* should have addressed this issue, but it did not. In ruling the way that it did, the *Van Alstyne* court has sent a message to Congress that an untested, legitimate compensatory reward scheme has been ignored.

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185. 5 U.S.C. § 552a(g)(4).
186. 18 U.S.C. § 2707(c).
187. *Id*.
188. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).
189. *See id.*
190. 18 U.S.C. § 2707(b).

4. Incomparable Legislative and Drafting History

In *Doe*, the Court invoked inferences based on the drafting history of the Privacy Act to explain its confusing language.[191] The Court discovered that there were two versions of the same bill, the Senate bill providing for actual and generalized damages, and the House bill providing only for actual damages.[192] When the two houses of Congress compromised on one bill, an ambiguous nightmare of a statute was born. The explanation the majority gave for the resulting language was the strongest part of its analysis. The majority explained that in order for Congress to compromise, the "general damages" language was removed, thus revealing its intent to eliminate generalized damages.[193] The SCA's drafting history is much different than that of the Privacy Act, and therefore, the two statutes cannot be analogized to address the same issue as the court did in *Van Alstyne*.

Unlike the Privacy Act, there was no change of language during the drafting process of the SCA that hints at Congress' intent with respect to statutory damages. The ambiguous damages clause went unchanged through both chambers: "The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff . . . as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000."[194]

Although the drafting history provides no evidence of Congressional intent, it is important to note that the damages clause of the SCA quoted above has changed since enactment. The damages clause, section 2707(c), was amended in 1996 by the by the Intelligence Authorization Act for Fiscal Year 1997 (IAA).[195] The damages clause now reads as follows:

> The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff . . . as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney['s] fees determined by the court.[196]

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191. Doe v. Chao, 540 U.S. 614, 622–23 (2004).
192. *Id*.
193. *Id*. at 623.
194. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, sec. 201, § 2707(c), 100 Stat. 1848, 1866.
195. Intelligence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-293, sec. 601, § 2707(c), 110 Stat. 3461, 3469–70 (1996).
196. 18 U.S.C. § 2707(c) (2006).

The IAA added recovery of punitive damages, attorney fees, and costs to the damages clause. Interestingly enough, attorney fees and litigation costs were already provided for in the relief clause.[197] Drawing an inference from the amendment is further complicated by the fact that the amendment to the SCA was minuscule in comparison to the overall magnitude and complexity of the IAA. This could explain the redundant insertion of attorney fees and costs into the damages clause. Therefore, it is difficult to ascertain the true purpose behind this amendment; the only instructive evidence is the House Conference Report which states the purpose for the change was "to allow courts to award punitive damages . . . for violations of [the SCA]."[198]

The amendatory history of the SCA shows that Congress likely intended to deter violations of the SCA because of the addition of punitive damages. After all, punitive damages are inherently aimed at retribution and deterrence.[199] Therefore, the most logical inference that can be drawn from this history is that Congress intended for the $1,000 statutory damages to remedy plaintiffs for isolated and undetected intrusions that may not have caused harm. Congress then later concluded that statutory minimum damages of $1,000 were not enough to deter repetitive or egregious invasions of privately stored communications that did not cause actual harm. Instead of increasing the minimum statutory damages, which would unfairly remedy a plaintiff for isolated and undetected intrusions that did not cause harm, Congress provided for punitive damages to deter repetitive or egregious invasions to privately stored communications. It is illogical, as the *Van Alstyne* court held, for Congress to provide punitive damages as the only means of recovery for a plaintiff who could not prove actual damages. This interpretation leaves some legitimate plaintiffs, who have suffered invasions of privately stored communications, without a remedy.

In sum, the *Van Alstyne* court erred in closely following the Supreme Court's decision in *Doe*. The SCA is a much different statute than the Privacy Act. The SCA's language, means of recovery, and legislative history are critically different. Therefore, unlike the Privacy Act, the SCA should be interpreted to provide plaintiffs with minimum statutory damages of $1,000 without requiring them to prove actual harm.

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197. 18 U.S.C. § 2707(b) ("In a civil action under this section, appropriate relief includes—(1) such preliminary and other equitable or declaratory relief as may be appropriate; (2) damages under subsection (c); and (3) a reasonable attorney's fee and other litigation costs reasonably incurred.").

198. H.R. REP. NO. 104-832, at 38 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 3996, 4003.

199. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

D. The Decision Is Not Based on Sound Public Policy

Congress passed the SCA to protect personal privacy in electronically stored communications. Requiring plaintiffs to prove actual damages creates a barrier for to the plaintiff's recovery of mandatory statutory damages. The statute provides that "the court may assess . . . the sum of the actual damages . . . but *in no case shall* a person entitled to recover receive less than the sum of $1,000."[200] Therefore, under the interpretation that the court in *Van Alstyne* gives to the SCA, a plaintiff who proves a violation was made willfully and intentionally, but caused no actual harm, would not be entitled to recover the mandatory statutory damages, but possibly could recover punitive damages. This reading of the SCA results in an absurd outcome. An individual's privately stored communications could be illegally accessed by a hacker, but only a few times for non-commercial gain, thus unlikely creating any actual harm to the individual and probably not rising to the level of egregious conduct that could allow recovery of punitive damages. Logic and policy demand that the mandatory statutory damages award had to be intended to protect the public against feeble violations of personal privacy in electronically stored communications that result in no actual harm.

A counter-argument may be advanced that by allowing plaintiffs to bring SCA claims without requiring proof of actual damages, an increase in SCA litigation may occur and, thereby, impede commerce. This argument, however, has no considerable weight. The plaintiff must still prove that a defendant knowingly or intentionally violated the SCA.[201] This eliminates any concern for fear of accidental liability. For example, consider a scenario where an employee's webmail password is stored on an employer's computer. Because the password is stored, anyone who uses the computer is automatically logged into the employee's webmail account if that webmail provider's website is visited. If another employee, or the employer, accidentally opened the employee's webmail, they would not be liable under the SCA because those actions would not be willful or intentional. Therefore, unnecessary and unfair litigation would not result from allowing a plaintiff to recover minimum statutory damages under the SCA without showing proof of actual damage because the plaintiff still must prove the defendant acted intentionally or willfully.

200. 18 U.S.C. § 2707(c) (emphasis added).
201. 18 U.S.C. § 2707(a).

V. CONCLUSION

By failing to find the obvious ambiguity in the damages provision of the SCA, the court in *Van Alstyne* neglected crucial evidence in the legislative history supporting the interpretation advanced by the plaintiff. Instead of relying on Congress' clearly stated intent, the court adopted the Supreme Court's interpretation of the Privacy Act, a completely distinguishable statute from that of the SCA. In doing so, the Court ignored Congress' intention of having an updated and uniform law to account for changes in technology. Furthermore, the decision has left vulnerable one of the internet's most popular means of communication. As a result of the holding in *Van Alstyne*, unfortunate webmail users are not as likely to recover any meaningful damages for inconsequential invasions of privacy to their stored communications. Accordingly, the court in *Van Alstyne* erred by not allowing recovery of statutory damages under the SCA without proof of actual harm.