

12-1-97

To: Faculty Senators

From: Gregory L. Hassler
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Date: 11/20/97 1:05pm
Subject: AAUP Report Re: Electronic Communications

Thank you for providing our faculty senators with a copy of the AAUP's Report on Academic Freedom and Electronic Communications (June 1997). In our ongoing efforts to balance necessary interests, it becomes critical to consider as much relevant information as possible.

Section 9, Points 1, 3, and 4, of the document contain significance for me. The issue appears to embrace the extent to which --if at all--an "electronic communication service provider" (i.e., government in this instance) may legally intercept communications flowing through its system. It may prove helpful for the University community, as it ruminates on this issue, to consider the applicability of the Electronic Communications Privacy Act of 1986 (18 U.S.C. 2510 et. seq.) Specifically, the federal statute's exceptions to the general prohibition against the service from intercepting messages (see, e.g., 18 U.S.C. 2511(2)(g)(i) (electronic communication readily accessible to general public); 18 U.S.C. 2511(2)(a)(i) and (3)(b)(ii)-(iii) (necessary to service or to protect the rights or provider of the provider of the service). My (very tentative) research timidly reveals only one reported case involving a privacy claim brought against a computer communications service provider (see *Stern v. Delphi Internet Services Corp.*, 626 N.Y.S. 2d 694 (N.Y.Sup.Ct. 1995). The service provider prevailed in that action.

Another case arguably germane to this discussion becomes the U.S. Supreme Court's decision in *O'Connor v. Ortega* (480 U.S. 709)(1987) which tailors employer intrusions to a "standard of reasonableness under all the circumstances" (at 726).

I further find AAUP's analogization of "e-mail" and "sealed envelopes through the physical mail system" privacy interests to be somewhat contrived. Given the profound differences between the two media of transmission, I remain skeptical that rules applicable to one could be pragmatically applied to the other. For instance, the sender of a sealed envelope does so without a provider service "intermediary." Yet, there may well be circumstances in which the analogy becomes attractive. For example, query whether the government may "intercept" (without consent) a sealed envelope in non-exigent circumstances (i.e., government has reasonable good faith cause to suspect that an employee uses official state envelopes for personal business (mass mailings for faculty widget production)).

Once again, I sincerely appreciate the opportunity to review and comment upon the AAUP's Report in this important area. It provides a provocative and useful basis for continued discussion.

CC: Ben, Toi