epic.org

April 17, 2012

The Honorable Eric Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

1718 Connecticut Ave NW
Suite 200
Washington DC 20009
USA
+1 202 483 1140 [tel]
+1 202 483 1248 [fax]
www.epic.org

Dear Attorney General Holder:

Over a three-year period, Google, Inc., deployed hundreds of cars on roadways across the United States, outfitted with digital cameras and Wi-Fi receivers, to capture both images available from public roadways and the private communications of Internet users. Google's "Street View" program, has given rise to numerous investigations and lawsuits, but none have adequately determined whether Google's conduct violated the federal Wiretap Act.

This week, the Federal Communications Commission announced that it will fine Google $25,000 for obstructing an investigation concerning Google Street View and federal wiretap law. However, by the agency's own admission, the investigation conducted was inadequate and did not address the applicability of federal wiretap law to Google's interception of emails, usernames, passwords, browsing histories, and other personal information.

Given the inadequacy of the FCC's investigation and the law enforcement responsibilities of the Attorney General, EPIC urges the Department of Justice to investigate Google's collection of Wi-Fi data from residential Wi-Fi networks.

Background

The Wiretap Act criminalizes the intentional interception of any wire, oral, or electronic communication.[1] Wi-Fi transmissions constitute electronic communications and are thus governed by the provisions of the Act.[2] The Attorney General has jurisdiction to enforce federal criminal laws, such as the Wiretap Act.[3]

Beginning in May 2007 Google deployed vehicles equipped with digital cameras and other devices to capture images in designated location in thirty countries around the world. Using hidden Internet receivers Google "Street View" vehicles also collected a vast amount of data from users of private Wi-Fi networks in homes and businesses. Google collected MAC addresses (the unique device ID for Wi-Fi hotspots), network SSIDs (the user-assigned network ID name)

[1] 18 U.S.C. § 2511(1)(a).
[2] *See id.* § 2510(12).
[3] *See generally* 18 U.S.C. Pt. 1, Ch. 1.

tied to location information for private wireless networks, and Wi-Fi "payload" data, which included emails, passwords, usernames and website URLs.[4]

Privacy and law enforcement agencies around the world investigated Google's conduct. Data protection authorities in France, South Korea, New Zealand, the United Kingdom, Canada, and Spain found that Google's Wi-Fi interception violated applicable data protection laws.[5] The Privacy Commissioner of Canada determined that Google violated Canadian data protection law by secretly intercepting "full names, telephone numbers, and addresses of many Canadians . . . . complete email messages, along with email headers, IP addresses, machine hostnames, and the contents of cookies, instant messages and chat sessions."[6] Similarly, the French data protection authority fined Google 100,000 euros for the interception of private data, citing the "established violations and their gravity, as well as the economic advantages Google gained," as reasons for the highest fine it has ever levied.[7] Thirty-eight attorneys general have expressed concern about possible violation of state and federal wiretap law by Google.[8]

After repeated denials, Google's interception of Wi-Fi payload data was revealed and plaintiffs in many states filed suit, alleging violations of the federal Wiretap Act, 18 U.S.C. §§ 2510-2522, the California Business and Professional Code, and various state wiretap statutes. This multidistrict litigation was assigned to the District Court for the Northern District of California in August 2010. Google argued that the Wiretap Act prohibitions should not apply to its interception of Wi-Fi payload data because the networks were unencrypted and thus were systems "configured so that such electronic communication is readily accessible to the general public."[9] The District Court rejected Google's argument and held that unencrypted wireless network communications are not exempt from protection under the Wiretap Act.[10] As the court explained, "that a network is unencrypted does not render that network readily accessible to the general public and serve to remove the intentional interception of electronic communications from that network from liability under the ECPA."[11]

---

[4] *See WiFi Data Collection: An Update*, Google Blog (May 14, 2010), http://googleblog.blogspot.com/2010/05/wifi-data-collection-update.html.

[5] *See* EPIC, *Investigations of Google Street View*, https://epic.org/privacy/streetview/.

[6] Office of the Privacy Comm'r of Canada, PIPEDA Report of Findings No. 2011-001, Google Inc. WiFi Data Collection (2011), http://www.priv.gc.ca/cf-dc/2011/2011_001_0520_e.asp.

[7] CNIL, *Google Street View : CNIL pronounces a fine of 100,000 Euros*, Mar. 21, 2011, http://www.cnil.fr/english/news-and-events/news/article/google-street-view-cnil-pronounces-a-fine-of-100000-euros/.

[8] Press Release, Connecticut Attorney General's Office, CT Attorney General Seeks Additional Information On Google Street View Snooping, Announces 38 States Have Joined Multistate Investigation, July 21, 2010, http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=463406.

[9] 18 U.S.C. § 2511(2)(g)(i).

[10] *In re Google Inc. Street View Electronic Commn'c*, 794 F. Supp. 2d 1067, 1079 (N.D. Cal. 2011), *appeal docketed, Ben Joffe v. Google*, No.17483 (9th Cir Oct. 17, 2011).

[11] *Id.* at 1084. *See also* Br. *Amicus Curiae* Electronic Privacy Information Center Supp. Appellee Urging Affirmance, *In re Google Inc. Street View Electronic Commn'c*, 794 F. Supp. 2d 1067 (N.D. Cal. 2011), *appeal*

EPIC wrote to the FCC in May of 2010 and urged the Commission to undertake an investigation. EPIC explained that, but for the efforts of German data protection authorities, Google's Wi-Fi interception might never have been revealed, and that Google's actions "could easily constitute a violation of Title III of the [Wiretap Act]."[12]The FCC Director of Consumer and Regulatory Affairs acknowledged that Google's behavior "clearly infringes on consumer privacy."[13] The FCC Chairman further told members of Congress that the Commission had opened an investigation that "seeks to determine whether Google's actions were inconsistent with any rule or law within the Commission's jurisdiction."[14]

Recently, the Federal Communications Commission released an interim report in which the agency fined Google $25,000 for the company's obstruction of an FCC investigation started in 2010.[15] The FCC found that Google impeded the investigation by "delaying its search for and production of responsive emails and other communications, by failing to identify employees, and by withholding verification of the completeness and accuracy of its submissions."[16] However, the agency admitted that it did not conduct an adequate investigation. Rather than review the contents of payload data intercepted by Google in the United States, the FCC relied on Google's own statements.[17] Much of the information uncovered by the FCC's investigation was redacted, and Google's obstruction prevented the agency from determining the merits of the underlying substantive issue: whether Google's interception of Wi-Fi communications violated the Wiretap Act.[18] Finally, the FCC ignored legal precedent holding that the contents of unencrypted Wi-Fi networks were protected by the Wiretap Act.[19]

Request for Investigation

---

docketed, Ben Joffe v. Google, No. 17483 (9th Cir Mar. 30, 2012), *available at* https://epic.org/amicus/google-street-view/.

[12] Letter from Marc Rotenberg, Executive Director, Electronic Privacy Information Center, to Julius Genachowski, Chairman, Federal Communications Commission, May 18, 2010, https://epic.org/privacy/cloudcomputing/google/EPIC_StreetView_FCC_Letter_05_21_10.pdf.

[13] Joel Gurin, Consumer View: Staying Safe from Cyber Snoops, FCC Blog, June 11, 2010, http://reboot.fcc.gov/blog?entryId=493624.

[14] Letter from Julius Genachowski, Chairman, Federal Communications Commission, to Representative Tom Graves, June 22, 2011, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308300A1.pdf.

[15] Fed Commc'n Comm'n, Google, Inc., File No. EB-10-IH-4055 (2012) (Notice of Apparent Liability for Forfeiture), http://transition.fcc.gov/DA-12-592A1.pdf.

[16] *Id.* at 21.

[17] *Id.* at 13.

[18] *Id.* at 23.

[19] *In re Google*, 794 F. Supp. 2d 1067 (N.D. Cal. 2011), *appeal docketed, Ben Joffe v. Google*, No.17483 (9th Cir Oct. 17, 2011)

In light of the Attorney General's law enforcement responsibilities and the inadequate responses of the other federal enforcement agencies, EPIC urges the Department of Justice to investigate the extent of Google's interception of private Wi-Fi data in the United States.

We look forward to hearing from you as soon as possible.

Sincerely

Marc Rotenberg,
EPIC Executive Director

Alan Butler, EPIC Appellate Advocacy Counsel
David Jacobs, EPIC Consumer Protection Fellow
Electronic Privacy Information Center
1718 Connecticut Ave. NW Suit 200
Washington, DC 20009
202-483-1140 (tel)
202-483-1248 (fax)

Cc:

Senator Patrick Leahy, Chairman, Senate Judiciary Committee
Senator Charles Grassley, Ranking Member, Senate Judiciary Committee
Senator Al Franken, Senate Judiciary Committee
Senator Tom Coburn, Senate Judiciary Committee

Senator John D. Rockefeller, Chairman, Committee on Commerce, Science, and Transportation
Senator Kay Bailey Hutchison, Ranking Member, Committee on Commerce, Science, and Transportation
Senator John Kerry, Committee on Commerce, Science, and Transportation
Senator Jim DeMint, Committee on Commerce, Science, and Transportation

Congressman Lamar Smith, Chairman, House Judiciary Committee
Congressman John Conyers Jr., Ranking Member, House Judiciary Committee
Congressman James Sensenbrenner, House Judiciary Committee,
Congressman Mel Watt, House Judiciary Committee,

Congressman Fred Upton, Chairman, House Energy and Commerce Committee
Congressman Henry A. Waxman, Ranking Member, House Energy and Commerce Committee
Congresswomen Mary Bono Mack, House Energy and Commerce Committee
Congressman G.K. Butterfield, House Energy and Commerce Committee