

## TABLE OF CONTENTS

Special Coverage – 1  
Hill Update – 2  
Article Summary – 3  
Notable Quotes – 5  
Social Highlights – 7

### SPECIAL COVERAGE – SECRECY CASE

Judge James Robart of the 9th Circuit ruled this week, upholding Microsoft's First Amendment claim, but holding that Microsoft lacks standing to assert Microsoft customers' Fourth Amendment rights. The decision is generally very strong on the First Amendment issue, and provides a clear path forward for the case.

*"We're pleased this ruling enables our case to move forward toward a reasonable solution that works for law enforcement and ensures secrecy is used only when necessary."*

– [Brad Smith, president and chief legal officer, Microsoft](#)

#### **The Seattle Times** [U.S. judge allows Microsoft challenge of government gag orders to proceed](#)

A federal judge has allowed Microsoft's challenge of U.S. government secrecy orders attached to searches of emails and other electronic files to proceed, but dismissed a portion of the technology giant's lawsuit. Microsoft sued the Justice Department last year, arguing that the gag orders often applied to search warrants for its customers' data were overly broad and unconstitutional. The company said the orders, which sometimes prevent Microsoft from notifying customers that the government came calling, violated the company's First Amendment rights to discuss government conduct, as well as its customers' Fourth Amendment protections from unreasonable search and seizure.

#### **Politico** [Court backs Microsoft suit over surveillance gag orders](#)

A federal judge currently in the spotlight for blocking President Donald Trump's executive order banning immigration from seven Muslim-majority countries is now questioning the constitutionality of secrecy orders that accompany government surveillance demands. U.S. District Court Judge James Robart issued a 47-page opinion Thursday allowing Microsoft to proceed with a lawsuit claiming a First Amendment violation when the government restricts internet providers from notifying subscribers about requests for their data.

#### **The Verge** [Microsoft's lawsuit against government gag orders will move forward](#)

Microsoft's lawsuit against the Department of Justice will continue, according to a ruling today from Western Washington District Court. The ruling is a crucial early hurdle for Microsoft's case, which argues that the government's gag-ordered searches of Microsoft accounts violates the constitutional right to free speech. "Microsoft brings this case because its customers have a right to know when the government obtains a warrant to read their emails, and because Microsoft has a right to tell them," the company argued in its initial complaint. In the same ruling, the judge declined to uphold Microsoft's

# VFI Executive Briefing

## A weekly roundup of technology news

### February 6 – 10, 2017

Fourth Amendment case against the gag-ordered searches, finding that the precedent involved was too significant to be overturned at the district level.

- **@marciahofmann:** [court lets Microsoft move forward w/ 1st Am challenge to open-ended gag orders accompanying demands for user info, but bounces 4th Am claim](#)
- **@MikeScarcella:** [Seattle judge James Robart keeps alive Microsoft case challenging government nondisclosure orders re: customer data](#)

## HILL UPDATE

### The Hill [Hatch meets with major tech firms, will release 'innovation agenda'](#)

Sen. Orrin Hatch (R-Utah) met this week with major tech firms including Apple and Amazon and will release an "innovation agenda" next week at a Capitol Hill event, a Republican aide confirmed to The Hill. Hatch also met with Oracle, Cisco and Qualcomm, the aide said. In the meetings, which Politico first reported on, discussion topics included intellectual property protection reform, data privacy and high-skilled immigration. At the end of January, Hatch met with Tim Cook during his tour of Capitol Hill when the Apple CEO also met with Ivanka Trump, Jared Kushner and Sens. Mark Warner (D-Va.) and Rob Portman (R-Ohio).

### Bloomberg [Focused Patent, Copyright Bills Are on House Agenda](#)

The House Judiciary Committee will advance bills to update copyright law and curb patent litigation abuses this year, committee chairman Robert W. Goodlatte said Feb. 1, but only after it deals with more pressing issues, including immigration policy. Goodlatte (R-Va.) said the panel will push for targeted solutions to intellectual property issues in the 115th Congress, rather than wholesale rewrites of laws.

### TechCrunch [A bill requiring the government to obtain a warrant to search your email just flew through the House](#)

The U.S. House of Representatives voted to pass the Email Privacy Act on Monday, generating coverage from several outlets. Coverage noted that the bill is expected to once again face resistance in the Senate. Additional articles included below.

- **GeekWire:** [The U.S. House just passed an act requiring a warrant to search your old email](#)
- **Associated Press:** [House Passes Bill Updating Email Privacy Protections](#)
- **Politico:** [Morning Tech: Email Privacy Act Heads To Senate](#)
- **Wired** [Passing the Email Privacy Act Has Never Been More Urgent](#)

# VFI Executive Briefing

## A weekly roundup of technology news

### February 6 – 10, 2017

## ARTICLE SUMMARY

### **Wall Street Journal** [Microsoft Broadens Patent Protection for Cloud Customers](#)

Microsoft Corp. on Wednesday broadened the patent-lawsuit protection it offers its cloud-computing customers, aiming to keep intellectual-property litigation from curtailing the adoption of its Azure service. The program, called Microsoft Azure IP Advantage, provides uncapped indemnification coverage—payment for legal costs—to customers using open-source technology incorporated into Azure services, such as Hadoop, a tool used to analyze large amounts of data. Microsoft already provides such a service for Azure customers developing apps using Microsoft technology.

### **The Verge** [Judge says Google has to hand over emails to FBI even if they're kept abroad](#)

The Verge reported about Magistrate Thomas Rueter's ruling ordering Google to turn over emails stored abroad. Rueter [ordered Google](#) to comply with two Stored Communications Act (SCA) search warrants to produce foreign-stored emails. Coverage emphasized that the judge's ruling stands in opposition to the precedent established in Microsoft's warrant case, and increases the pressure for legislative or judicial clarity around the ability of U.S. law enforcement to request access to data stored abroad.

### **Financial Times** [Virtual sovereignty can help govern our data](#)

The Financial Times published an op-ed by Immuta Chief Privacy Officer Andrew Burt, in collaboration with former Microsoft Chief Research and Strategy Officer Craig Mundie, calling for a new legal framework governing access to data. Using Microsoft's warrant case as an example of the problems caused by current legal models, Burt and Mundie call for a new "virtual sovereignty" framework that ties data protections to the locations of users

### **The Hill** [FBI official: No immediate changes to encryption policy under Trump](#)

The Hill reported on comments made by FBI General Counsel James Baker indicating that the new administration will not make any immediate policy changes regarding law enforcement access to encryption. Speaking during a panel event at the Center for Strategic and International Studies, Baker said there is no planned change to encryption policy at this moment, and suggested that Congress pass legislation requiring tech companies to be more transparent about how they collect and store private data and whether that data is encrypted. Relatedly, [The Hill](#) published an article summarizing a new [Center for Strategic and International Studies report on encryption](#) which found that "the risk to public safety created by encryption has not reached the level that justifies restrictions or design mandates."

### **Axios** [How the surveillance state could grow under Trump](#)

Axios summarized several ways the Trump administration and Congress could expand government surveillance powers in 2017. The outlet lists multiple legal and regulatory actions the government might undertake, including the expansion of Executive Order 12333, reauthorization of Section 702 of FISA, and potentially rolling back reforms outlined in the USA Freedom Act.

### **Ars Technica** [Former judge wants to head patent office, says he'll "Make Patents Great Again"](#)

Who's the director of the US Patent and Trademark Office at the moment? It's a tougher question to answer than you'd think. A patent blog that closely watches USPTO internal politics, IP Watchdog, raised

# VFI Executive Briefing

## A weekly roundup of technology news

### February 6 – 10, 2017

the question earlier this week. Reports last month from Politico and The Hill indicated that Michelle Lee, a former Googler who was appointed in 2014 and is favored by the tech sector, would stay on under the administration of President Donald Trump. Those reports, published right around Trump's inauguration, seem much less reliable now. IP Watchdog reports that Lee continues to be seen on the 10th floor of the Madison building, where the USPTO director's office is. Yet others continue to advocate for themselves, and on February 3, Lee canceled a scheduled speaking appearance in San Francisco. Since at least February 6, the Commerce Department's website has listed the position of USPTO Director as "vacant".

#### **New York Times** [Intel, in Show of Support for Trump, Announces Factory in Arizona](#)

SAN FRANCISCO — Intel, the world's largest computer chip manufacturer, will invest \$7 billion to finish a factory in Arizona, adding 3,000 jobs, the company's chief executive said on Wednesday after meeting with President Trump at the White House. The completion of the factory, which will complement two other Intel semiconductor plants in Chandler, Ariz., had been under consideration for several years. Standing beside Mr. Trump in the Oval Office, Brian Krzanich, Intel's chief executive, said the company had decided to proceed now because of "the tax and regulatory policies we see the administration pushing forward."

#### **The Washington Post** [New York Court of Appeals to hear argument in 'In re 381 Search Warrants' case](#)

The Washington Post published an op-ed by George Washington University Professor Orin Kerr arguing that Facebook would have a stronger case if it argued it has "a procedural due process right to object to the warrant." He also noted that Facebook's lawsuit, unlike Microsoft's warrant case, argues that SCA warrants under Section 2703(a) should be treated as a subpoena rather than warrant.

#### **Wall Street Journal** [Fear of Crackdown on H-1B Program Causes Rift Between Silicon Valley, Indian Tech Firms](#)

WASHINGTON—Silicon Valley technology firms, worried about their ability to bring foreign workers to the U.S. under President Donald Trump, are distancing themselves from Indian outsourcing firms, which are heavy users of the same visa program that U.S. tech firms rely on. U.S. tech companies hope that any new restrictions on the H-1B visa program, which provides visas for highly skilled foreign workers, will be directed at the Indian firms and that U.S. tech companies can escape with more minimal changes to their practices. "I'm supportive of an executive order that would close H-1B loopholes to prevent those few companies from abusing the program for cost-cutting and outsourcing that negatively impact American jobs," GoDaddy Inc. Chief Executive Blake Irving said.

#### **Wired** [The Next Big Blue-Collar Job Is Coding](#)

WHEN I ASK people to picture a coder, they usually imagine someone like Mark Zuckerberg: a hoodied college dropout who builds an app in a feverish 72-hour programming jag—with the goal of getting insanely rich and, as they say, "changing the world." But this Silicon Valley stereotype isn't even geographically accurate. The Valley employs only 8 percent of the nation's coders. All the other millions? They're more like Devon, a programmer I met who helps maintain a security-software service in Portland, Oregon. He isn't going to get fabulously rich, but his job is stable and rewarding: It's 40 hours a week, well paid, and intellectually challenging. "My dad was a blue-collar guy," he tells me—and in many ways, Devon is too.

# VFI Executive Briefing

## A weekly roundup of technology news

### February 6 – 10, 2017

#### **Wired** [Passing the Email Privacy Act Has Never Been More Urgent](#)

IT'S SAFE TO say that any digital privacy bill written more than three years before the invention of the World Wide Web is probably due for an overhaul. But the Electronic Communications Privacy Act has persisted intact for more than three decades, including its anachronistic loophole that allows the warrantless collection of emails from US citizens. Now, in its second attempt in two years, Congress is poised to reform the most outdated elements of ECPA. With Trump's incoming Justice Department, that reform seems more urgent than ever. On Monday evening, the House of Representatives unanimously passed the Email Privacy Act, a bill that would reform ECPA were it to become law. In particular, it would newly require government agencies to obtain a warrant before seizing a criminal suspect's online communications that are more than 180 days old. Under the ECPA's existing logic, those older communications are considered abandoned, and thus not subject to a reasonable expectation of privacy.

#### **Recode** [Will the Telecommunications Act get a much-needed update as it turns 21?](#)

The Telecommunications Act of 1996 turns 21 this year — today, in fact. Signed into law by President Bill Clinton on Feb. 8, 1996, it was the first major revision of telecommunications regulation since the passage of the original Communications Act of 1934, which established the Federal Communications Commission and gave it jurisdiction over broadcasting and telephony. To a large extent, the '96 Act was an attempt to update the regulation of a telephone industry that had been fundamentally changed with the 1984 breakup of the old Bell system. Its main thrust was to move away from the regulation of monopolies and toward the encouragement of competition within the telephone industry. The Act had little to say either about the internet or wireless phones. Of course, two decades is a long time in the world of technology, and telecom is vastly different today than it was then.

## Notable Quotes

*"Technology continues to evolve, making unrecoverable encryption easier for individuals to obtain and use. Furthermore, any U.S. policy on encryption might set a precedent that other countries would be tempted to follow. While the debate thus far has pitted privacy and individual security against the critical task of stopping criminals and terrorists, there may be technical and policy solutions that can balance national security and public safety with protection of privacy, civil liberties, and a functioning global Internet ecosystem."*

– [The Center of Strategic and International Studies report on encryption](#)

*"We are particularly pleased that [the Email Privacy Act] does not carve out civil agencies from the warrant requirement, which would have expanded government surveillance power and undermined the very purpose of the bill. For these reasons, we support [the proposed bill] and urge the committee to move the bill forward without any amendments that would weaken the protections afforded by the bill."*

– [Coalition letter from 60 companies, trade groups and privacy advocates in support of the Email Privacy Act](#)

## VFI Executive Briefing

### A weekly roundup of technology news

#### February 6 – 10, 2017

*“Whether border agents demand usernames and passwords to social media accounts or access apps, such searches can lead to private communications. Such practices violate human rights norms around free speech and privacy for foreigners and implicate the constitutional rights of Americans.”*

– [Sophia Cope, staff attorney, Electronic Frontier Foundation](#)

*“The [Investigatory Powers] we're fighting threaten our right to protest and to express ourselves freely, our free press, privacy and cybersecurity. But with so much public support behind us, we're hopeful we will be able to persuade our courts to restrain the more authoritarian tendencies of this government and its surveillance regime.”*

– [Emma Norton, legal officer, Liberty](#)

*“The case highlights just how easy it is for U.S. intelligence agencies to access Europeans’ data once it is transferred to the United States. And it highlights also just how few meaningful remedies are available in the United States to those who want to challenge NSA surveillance, whether they are Europeans or Americans. The fact that few individuals receive notice of surveillance, combined with the U.S. government’s repeated use of standing doctrine and the state secrets privilege to block court review, has put redress almost entirely out of reach.”*

– [Patrick Toomey, staff attorney, and Neema Singh Guliani, legislative counsel, American Civil Liberties Union](#)

*“How Trump and his appointees, as well as allies of law enforcement and the intelligence community in Congress, talk about surveillance over the next year will culminate in the reauthorization of Section 702 of the Foreign Intelligence Surveillance Act later this year.”*

– [David McCabe, reporter, Axios](#)

*“[ECPA reform] is long overdue. The 1986 law came before the cloud, data analytics and web email. Reform would send a signal globally how the U.S. is leading in the field and sends a signal to consumers that they can trust services. Increasing trust is always helpful to business.”*

– [Craig Albright, legislative vice president, BSA | The Software Alliance](#)

*“In the recent 2nd Circuit litigation over the Microsoft Ireland warrant, providers argued that these orders were warrants while the government saw them as akin to subpoenas. In this case, the providers see the orders as akin to subpoenas while the government insists that they are warrants. I think they’re both right in a sense. Section 2703(a) orders themselves are warrants, but that there needs to be a separate legal authority to also bind providers to assist with their execution — an assistance which is in the nature of a subpoena (whether of the All Writs Act in federal court or an analogous authority in state court).”*

– [Orin Kerr, law professor, George Washington University](#)

# VFI Executive Briefing

## A weekly roundup of technology news

### February 6 – 10, 2017

*"[The Email Privacy Act] will fix a constitutional flaw in ECPA, which currently purports to allow the government to compel a provider to disclose email contents in some cases without a warrant, in violation of the Fourth Amendment. The Email Privacy Act ensures that the content of our emails are protected in the same way that the Fourth Amendment protects the items we store in our homes."*

– [Richard Salgado, director of information security and law enforcement matters, Google](#)

*"Fixing this framework is as necessary for individuals, who seek to protect their privacy, as it is for governments, who may seek access to that data ... The faster governments and tech companies establish a lasting solution, the faster these companies can go back to doing what they are good at — focusing on innovation instead of how best to implement outmoded laws."*

– [Andrew Burt, chief privacy officer, Immuta, and Craig Mundie, former chief research and strategy officer, Microsoft](#)

*"The next big encryption-related legal fight will not necessarily play out in public, though, notes [EFF staff attorney Andrew Crocker]. The government could try to obtain a court order that prevents a company from speaking about a request by arguing that secrecy is necessary to stop a terrorist attack, for example. Pressuring Apple in public did not work out that well for the FBI because Apple was able to garner public support and the backing of privacy and civil liberties advocacy groups including the EFF."*

– [Mike Orcutt, associate editor, MIT Technology Review](#)

## Social Highlights

- [@BSA: Need to start convo on #encryption NOW, outside of particular event, to see if we can come together on a solution @victoriaespinel #CSISLive](#)
- [@BSA: James Baker, General Counsel for @FBI: "The FBI supports #encryption." #CSISLive panel](#)
- [@GuardianUS: US border agents could make refugees and visa holders give social media logins](#)
- [@TechCrunch: Passwords for social media accounts could be required for some to enter country](#)
- [@ACLU: The ACLU is in Dublin, Ireland, today defending the right to privacy for Europeans and Americans](#)
- [@Imbrowlee1: Thought your data was safe outside America after the Microsoft ruling? Think again. Search warrant much?](#)
- [@RepStefanik: The ECPA was written in 1986--I look forward to supporting this bill to make sure our laws keep pace with 21st Century technologies.](#)
- [@TechCrunch: Google told to hand over foreign emails in FBI search warrant ruling](#)
- [@techreview: Should the U.S. government and law enforcement get exceptional access to encrypted information?](#)
- [@theosint: "The magistrate judge disagrees with the Second Circuit's Microsoft-Ireland warrant case"](#)