

# Man gets OK to sue wife over hacking

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POSTED December 15, 2016 2:23 PM



Richard A. Posner



Diane S. Sykes

A federal appeals court Wednesday revived a lawsuit accusing a woman of violating the Wiretap Act by secretly forwarding her estranged husband's e-mails to her own account.

The 7th U.S. Circuit Court of Appeals acknowledged that Congress probably didn't expect the statute to be used as "a tactical weapon in a divorce proceeding."

But the allegations Barry Jay Epstein leveled against his wife "technically fall within the language of the [a]ct," Judge Diane S. Sykes wrote in the majority opinion.

The Wiretap Act, she wrote, bars the intentional interception of any wire, oral or electronic communication.

Several other federal appeals courts have held that the act prohibits only contemporaneous interceptions — in other words, interceptions that occur while the e-mails are in transit, Sykes wrote.

The 7th Circuit, she wrote, "noted this trend" in *United States v. Szymuszkiewicz*, 622 F.3d 701 (7th Cir. 2010), but did not rule on the matter at that time.

"We do not need to take a position today," Sykes wrote.

Even if the act covers only contemporaneous interceptions, she wrote, Epstein has stated a claim against his wife.

The time stamps on e-mails sent to and from Epstein's account do not foreclose the possibility that the messages were intercepted at the time they were transmitted, Sykes wrote.

In a concurring opinion, Judge Richard A. Posner agreed that Paula Epstein violated the Wiretap Act "under the existing understanding" of the statute if she searched her husband's computer without his permission.

But if the court had been asked, Posner wrote, he would have held that the act does not prohibit wiretaps that are likely to obtain evidence of a crime.

In Paula Epstein's case, the crime that was revealed was her husband's serial infidelity, Posner wrote.

He noted that adultery is still a crime in Illinois and 19 other states.

"We might compare Mrs. Epstein to a bounty hunter — a private person who promotes a governmental interest," Posner wrote.

"She has uncovered criminal conduct hurtful to herself, and deserves compensation, such as a more generous settlement in her divorce proceeding."

The court overturned U.S. District Judge Thomas M. Durkin's decision to dismiss Barry Epstein's claims against his wife.

Nejla K. Lane of Lane Keyfli Law Ltd. argued the case before the 7th Circuit on behalf of Barry Epstein.

Lane said the 7th Circuit's ruling could turn out to be a landmark in privacy law.



She said intercepting a spouse's e-mails is akin to opening a sealed letter addressed to someone else.

Unless permission has been granted from the appropriate person, both actions constitute an invasion of privacy, Lane said.

She denied that the e-mails found in her client's personal and business accounts were evidence that he was unfaithful to his wife.

Barry Epstein's e-mails to other women were just "friendly communications or maybe flirting," Lane said.

Scott A. Schaefer of Brotschul Potts LLC, who argued the case on behalf of Paula Epstein, declined to comment.

Barry Epstein is a financial reporting expert and litigation consultant with Russell Novak & Co. LLP. Paula Epstein is a librarian.

The Epsteins were married in 1970. In 2011, Paula Epstein filed for dissolution of marriage in Cook County Circuit Court.

During discovery in the still-pending divorce case, Barry Epstein asked for all documents supporting his wife's accusation that he was guilty of adultery.

In response, Paula Epstein produced copies of e-mails between her husband and several women.

Barry Epstein then filed his suit in federal court under the Wiretap Act.

He alleged his wife must have surreptitiously placed a "rule" on his e-mail accounts that caused his work and personal messages to be automatically forwarded to her own account.

He alleged Paula Epstein's divorce lawyer, Jay A. Frank of Aronberg Goldgehn Davis & Garmisa, also violated the act.

Barry Epstein appealed after Durkin threw out the suit.

The 7th Circuit upheld Durkin's decision to dismiss the Wiretap Act claim against Frank.

The court held Frank did not "disclose" the contents of the e-mails in violation of the statute.

"The disclosure theory fails because Barry already knew the contents of the intercepted e-mails and indeed invited their disclosure by requesting them in discovery in the divorce action," Sykes wrote.

Also, she wrote, Barry Epstein's complaint does not include any allegations in support of the assertion that Frank used the e-mails for an improper purpose.

Sykes acknowledged the complaint alleges Frank intended to use the e-mails to embarrass Barry Epstein and extract a favorable financial settlement for Paula Epstein.

"But the Wiretap Act does not prohibit inchoate intent," Sykes wrote.

Karen Kies DeGrand of Donohue Brown Mathewson & Smyth LLC argued the case before the 7th Circuit on behalf of Frank.

"I think the court made the right decision with regards to the claim against me and my law firm," Frank said.

Judge Daniel A. Manion joined the majority opinion.

The case is *Barry Epstein v. Paula Epstein, et al.*, No. 15-2076.

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