



## Lawsuit Challenges NSA Internet Dragnets

**The ACLU has set out on what could be a long and winding road in an effort to persuade the courts to curb the NSA's surveillance of American citizens. A similar effort failed in the past, but this case is bolstered by information gleaned from the Snowden leaks. "We now know more about government surveillance," said ACLU attorney Ashley Gorski. "We think that will make a difference in court."**

By John P. Mello Jr.

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The American Civil Liberties Union earlier this week filed a lawsuit seeking to stop the National Security Agency from indiscriminately snooping on United States Internet traffic.

Using a technique called "upstream" surveillance, the NSA does a spinal tap of the Internet's U.S. backbone, which carries the communications of millions of Americans, the ACLU explained in its complaint filed with a federal district court in Maryland.

"In the course of this surveillance, the NSA is seizing Americans' communications en masse while they are in transit," the complaint alleges, "and it is searching the contents of substantially all international text-based communications -- and many domestic communications as well -- for tens of thousands of search terms."

That kind of surveillance violates federal law, the First and Fourth Amendments and Article III of the Constitution, maintained the ACLU, which is representing in the lawsuit the Wikimedia Foundation, the National Association of Criminal Defense Lawyers, Human Rights Watch, Amnesty International USA, PEN American Center, the Global Fund for Women, The Nation magazine, The Rutherford Institute and the Washington Office on Latin America.

### **Second Bite of Apple**

This lawsuit is similar to one filed in the past involving NSA Director James R. Clapper and Amnesty International. That case was rejected by the U.S. Supreme Court. Backers of the latest lawsuit, however, believe their case has stronger legs than the previous litigation.

"Thanks to the Snowden disclosures and government acknowledgments over the last 18 months, we now know more about government surveillance than we did in Clapper v. Amnesty," explained Ashley Gorski, an attorney with the ACLU's National Security Project.

"That, for us, makes all the difference," she told the E-Commerce Times, "and we think that will make a difference in court as well."

In the Amnesty case, the Supreme Court ruled that the parties bringing the lawsuit lacked standing -- that is, they couldn't prove they were harmed by the behavior alleged in their complaint. The reason they couldn't prove harm was that they didn't know enough about what the NSA was doing to make the connection between harm and behavior.

"Prior to the Snowden revelations and the government acknowledgments, the public did not know anything at all about upstream surveillance -- least of all that the NSA was copying entire streams of Internet traffic and searching through them for information about its targets," Gorski said.

"That surveillance is far different from anything the Supreme Court considered in Amnesty," she added.

### **Messing With Internet's Library**

Revelations since the Amnesty decision appear to be undermining the underpinnings of that case.

"The Court did not understand and indeed was misled about the nature of the surveillance," said Julian Sanchez, a senior fellow at The Cato Institute.

Based on the Court's opinion, it did not understand that all international Internet traffic was being scanned for target information, regardless of whether the information was to or from a target, he told the E-Commerce Times.

"The Court believed that only communication to or from a target could be intercepted," Sanchez said.

The ACLU case also has a strong First Amendment component not found in the Amnesty case because of the NSA's surveillance of Wikipedia activity.

"Wikipedia is essentially the Internet's library," said Alan Butler, the appellate advocacy counsel at the Electronic Privacy Information Center.

"When the NSA is targeting Wikipedia, it's targeting people's library history," he told the E-Commerce Times. "There's a long history of strong First Amendment protections for such records."

### **Chilling Writers**

Another way NSA surveillance is harming First Amendment rights is by having a chilling effect on free expression, contended Katy Glenn Bass, deputy director of free expression programs at the PEN American Center.

PEN conducted two surveys of its U.S. and international members that showed the harm of mass surveillance on free speech, she noted.

"What we found in the surveys was that writers are extremely worried about mass surveillance and as a result of that fear, they are self-censoring themselves," Bass told the E-Commerce Times.

Surveillance also affects the way PEN itself does business. The organization communicates with writers around the world. In some cases, such communication is being conducted at great personal risk to those writers.

"We have to be more cautious," said Bass. "It's made us look into ways to secure our communications, which takes away time and resources away from our free expression advocacy."

Taking on the NSA won't be an easy task, as the Electronic Frontier Foundation knows. In an effort to pry information from the NSA, it brought *Jewel v. NSA* -- but it has been mired in the courts since 2008.

"These things can stretch out over a long period of time," said EFF Legal Fellow Andrew Crocker.

"There's all kinds of issues with the government claiming things are classified, and they have a 'state's secret privilege' that prevents the case from moving forward," he told the E-Commerce Times.

"There's all sorts of roadblocks in these lawsuits," Crocker added. "They're not quickly settled by any means."

The NSA did not respond to our request to comment for this story.