No. 11-17483

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN JOFFE, *et al.*,

Plaintiffs-Appellees,

v.

GOOGLE INC.,

Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of California, Case No. 5:10-MD-2184-JW
Hon. James Ware, U.S. District Judge

GOOGLE'S MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF ITS PETITION FOR REHEARING AND REHEARING EN BANC

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November 6, 2013

Petitioner Google Inc. ("Google") respectfully moves for leave to file the reply brief attached as Exhibit A in support of its Petition for Rehearing and Rehearing En Banc ("Petition"). In support of this motion, Google states as follows:

1. Google timely filed its Petition on September 24, 2013. Google's Petition raises two exceptionally important questions about the Wiretap Act.

2. First, Google seeks panel rehearing and/or rehearing en banc of the panel's holding that a "radio communication" for purposes of the Wiretap Act is limited to "predominantly auditory broadcast[s]." Op. 17. Rehearing of this ruling is warranted because the panel's novel interpretation cannot be squared with the Wiretap Act and will create significant uncertainty regarding the legality of widely used technologies.

3. Second, Google seeks panel rehearing and/or rehearing en banc of the panel's ruling that unencrypted Wi-Fi broadcasts, as "electronic communications," are not "readily accessible to the general public" under the ordinary meaning of that phrase. Op. 32-35. It was manifest error for the panel to reach this conclusion and rehearing is warranted because: (1) the issue was not presented in either the district court or this interlocutory appeal; (2) the ruling deprives Google of due process by resolving a contested factual issue as a matter of law before evidence was presented; (3) the evidence, once properly developed, will show that panel's factual determinations are erroneous; and (4) the

panel's erroneous holding casts serious doubt on the legality of everyday activities involving Wi-Fi networks.

4. On October 9, 2013, the Court directed Plaintiffs to file a response to Google's Petition.

5. Plaintiffs filed their Opposition ("Opp.") on October 30, 2013.

6. In opposing rehearing regarding the meaning of "radio communications," Plaintiffs make no real effort to defend the panel's holding. Instead, they offer mischaracterizations of Google's arguments and misguided policy arguments. A reply is warranted to correct Plaintiffs' assertions.

7. With respect to the panel's conclusion regarding the ready accessibility of Wi-Fi broadcasts, Plaintiffs concede that the panel had no basis to decide this factual question given the procedural posture of the appeal. Plaintiffs instead read the panel's opinion as offering merely a ruling on the "the sufficiency of Plaintiffs' pleadings." Opp. 16-17 n.4. Google's proposed reply brief explains why the Plaintiffs' concession confirms the need for rehearing to correct or clarify an opinion that appears to sweep far more broadly than the parties now agree was appropriate.

8. Counsel for Google contacted counsel for Plaintiffs to request their consent to the filing of a reply. Plaintiffs do not consent.

9. Google's reply brief will assist the Court in considering Google's Petition.

WHEREFORE, Petitioner Google Inc. respectfully requests that this Court enter an Order granting this Motion and accepting for filing Google's Reply in Support of its Petition for Rehearing and Rehearing En Banc, attached as Exhibit A.

DATED: November 6, 2013

Respectfully submitted,

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EXHIBIT A

TO

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MISCELLANEOUS

Brief of Amicus Curiae Information Technology & Innovation Foundation In Support Of Google's Petition For Rehearing And Rehearing En Banc, *Joffe v. Google Inc.*, Dk. 57-1 (9th Cir. Oct. 4, 2013) 6, 7-8

Plaintiffs' response to Google's petition confirms the need for rehearing.

First, Plaintiffs offer no defense of the panel's central holding, that the term "radio communication" refers only to "predominantly auditory broadcast[s]." Instead, Plaintiffs suggest that it does not matter how radio communication is defined so long as Wi-Fi transmissions are excluded. Plaintiffs' results-oriented approach cannot save the panel's ruling. Failing to correct the panel's demonstrably erroneous definition will undermine the Wiretap Act and cast a legal cloud over a host of established and emerging technologies.

Second, Plaintiffs concede that the panel had no basis to decide whether unencrypted Wi-Fi broadcasts are, in fact, "readily accessible to the general public." Plaintiffs insist, however, that the panel merely ruled on the sufficiency of their allegations. While Google agrees that the panel had no grounds to do more than that, its opinion must be revised to avoid a misunderstanding that would improperly foreclose factual development on remand and threaten serious consequences for many everyday activities involving Wi-Fi.

ARGUMENT

I. Plaintiffs' Inability To Defend The Panel's Definition Of "Radio Communication" Confirms The Need For Rehearing

Plaintiffs do not even try to defend the panel's holding that only a "predominately auditory broadcast" can qualify as a "radio communica-

tion" under the Wiretap Act (Op. 16-17). Plaintiffs acknowledge by their silence that the panel's definition is indefensible. They try to change the subject by distorting Google's arguments and warning of broader consequences unless the panel's decision is left intact. These efforts fail.

In its petition, Google identified a long list of *non*-predominately-auditory communications (including television and satellite broadcasts) that the Wiretap Act unquestionably classifies as "radio communications." Pet. 5-6. Plaintiffs' inability to give a cogent response to Google's showing confirms the panel's error. Plaintiffs claim that some of the communications Google listed are "incidental to or substantially similar" to an audio broadcast. Opp. 10. But that is not true even of the two examples that Plaintiffs mention (display-pager transmissions and video transmissions from field reporters) let alone of all the other listed communications, which Plaintiffs ignore. By highlighting these communications, Google does not "merely quibble with the precise contours of the meaning of 'radio communication.'" *Id.* Google's list directly undermines the panel's definition by showing that the Wiretap Act uses "radio communication" to cover radio-based transmissions regardless of whether they are "predominantly auditory."[1]

[1] Attacking the flimsiest of straw men, Plaintiffs say that not all "'scrambled or encrypted' communications are radio communications" and that the systems listed in 18 U.S.C. § 2511(2)(g)(ii) do not transmit *only* radio communications. Opp. 9-10. Google never made either of the assertions that Plaintiffs attack.

Plaintiffs' arguments about television broadcasts are particularly telling in this respect. The panel's holding was premised on the proposition that television broadcasts are not "radio communications" under the Wiretap Act. Op. 14-15. Google's petition demonstrated that this proposition is incorrect and that accepting it creates serious legal uncertainty that Congress wanted to avoid. Pet. 8-10. Plaintiffs do not defend the panel's reasoning—and, indeed, acknowledge that television broadcasts are "radio communications." Op. 7 n.3. Plaintiffs now try to sidestep the point, asserting that just because the panel was wrong, it does not mean Google is right. Opp. 12. But understanding how television broadcasts are actually classified by the Wiretap Act is fatal to the panel's interpretation. It confirms that the panel's narrowing of "radio communication" to "predominately auditory broadcasts" is wrong. Plaintiffs' concession thus confirms the need for rehearing to correct the critical error at the heart of the panel opinion.

Plaintiffs argue that Google's definition of "radio communication" is a "technical meaning" that should be disregarded. Opp. 11. As the petition explained, however, understanding "radio communication" to mean communications transmitted by radio waves is anything but a specialized definition. That was the only understanding that had ever been accorded to the term in any relevant context when the Wiretap Act was enacted and the only meaning it has had since then. Pet. 7-8 & Ad-

dendum A.[2] Plaintiffs offer no response. They cite no dictionaries or other authority to suggest that Congress had some other meaning in mind. Plaintiffs claim that Google's definition "pertains to a different area of law (here, communications law) than does the statute at issue (here, a privacy statute)." Opp. 11. That makes no sense. The name of the statute that enacted the relevant provisions is the "Electronic *Communications* Privacy Act" (ECPA) (emphasis added). As that title itself indicates, Congress saw these provisions as additions to the body of communications law, in which the term "radio communication" had the same established meaning it had in ordinary parlance.

Similarly misguided is Plaintiffs' reference to the panel's effort to distinguish "radio communication" from "communications by radio." Opp. 8. As a grammatical matter, these phrases are identical ("train travel," for example, means the same things as "travel by train"). It is not surprising, then, that for decades prior to the enactment of ECPA, Congress had expressly defined those terms as synonymous. 47 U.S.C. § 153(40) ("The term 'radio communication' or 'communication by radio'

[2] Plaintiffs claim that Google somehow waived this argument. Opp. 11 n.3. That plainly is not so. Google's briefs on appeal addressed at length the ordinary meaning of "radio communication" in communications law and elsewhere. Google, of course, could not have argued specifically against the panel's definition before seeking rehearing—as that novel definition had not been proposed by Plaintiffs, the District Court, or anyone else.

means ….”). If Congress wanted suddenly to give those phrases different meanings in the Wiretap Act, it would have said so.

Having largely ignored the panel’s definition of “radio communication,” Plaintiffs depart from that term altogether in suggesting, incorrectly, that granting rehearing will create real-world problems. Plaintiffs invoke the Fourth Amendment (Opp. 13-14), but, if anything, the Amendment (which does not apply here, since this case involves only private conduct) shows that it is unnecessary to distort the meaning of a criminal statute to address concerns about government overreaching.

Plaintiffs also repeat their claim that deciding in Google’s favor would cause email to lose its legal protection. Not so: email transmitted by Wi-Fi is protected by the Wiretap Act if it is transmitted over an encrypted network, as most email is today. That is fitting, as Congress understood that encryption would always ensure that radio-based transmissions would be free from interception. 18 U.S.C. § 2510(16)(A). Likewise, while Plaintiffs warn that the recipient of an email may vitiate the protection that the sender expected it to have, that risk is always present under the Wiretap Act. Whether a communication is transmitted via Wi-Fi *or any other means*, the Act’s single-party consent regime means that the actions of the recipient of the communication can render its interception lawful, regardless of the sender’s expectations.

II. Plaintiffs' Concession That The Panel Had No Basis To Hold That Unencrypted Wi-Fi Broadcasts Are Not "Readily Accessible" Under § 2511(2)(g)(i) Further Confirms The Need For Rehearing

Plaintiffs concede that, given the procedural posture of this appeal, the panel had no basis to decide the factual question whether unencrypted Wi-Fi transmissions (if they are not radio communications) are "readily accessible to the general public" under 18 U.S.C. § 2511(2)(g)(i).

Plaintiffs' concession confirms that rehearing is necessary to clarify the scope of the panel's ruling, both for the district court on remand and for parties and judges in other cases. There is a considerable risk that the panel's opinion, as written, will be misunderstood to hold that, as a matter of law, Wi-Fi transmissions are not readily accessible to the general public. *See* Br. of Amicus Curiae Information Technology & Innovation Foundation In Support Of Google's Petition For Rehearing And Rehearing En Banc 3-5 ("ITIF Amicus Br."). For example, in asserting that "Google cannot avail itself of the § 2511(2)(g)(i) exemption" (Op. 32-33), the panel expressly relied on factual assertions that were outside the pleadings. The panel claimed that "Wi-Fi transmissions are not 'readily' available because they are geographically limited and fail to travel far beyond the walls of the home or office where the access point is located." Op. 33. But the Complaint makes no such allegations. (Indeed, Plaintiffs did not raise this issue until the case was on appeal.)

Likewise, the panel's assertion that "most of the general public lacks the expertise to intercept and decode payload data transmitted over a Wi-Fi network" (Op. 34) goes well beyond anything Plaintiffs pleaded. The panel thus had no basis for relying on those (erroneous) assertions—particularly if it was merely ruling on "the sufficiency of Plaintiffs' pleadings" (Opp. 16-17 n.4).[3]

A broad reading of the panel's ruling could lead not only to a violation of Google's due process rights, but also to the criminalization of widely used network-analysis tools. Pet. 16-18; ITIF Amicus Br. 5-9. Plaintiffs acknowledge that so-called "packet sniffers" are used for legitimate purposes, but claim that they might still be allowed under a different Wiretap Act exception (§ 2511(2)(a)(i)). Opp. 14-15. Plaintiffs' reliance on this exception (which was not briefed before the panel or below) ignores how these tools work. Packet sniffers intercept not just the transmissions occurring across a targeted network, but those transmitted across *all* in-range networks. ITIF Amicus Br. 8 (explaining that "IT professionals performing their jobs might well capture packets not only from the corporate network, but also from other networks as well"). No matter how Plaintiffs try to get around the problem, therefore, the panel's ruling will "place standard IT practices at legal risk" and thereby

[3] As explained in Google's petition and in a supporting amicus brief, the panel's assertions about the distance that Wi-Fi signals travel and the difficulty of acquiring them are incorrect. ITIF Amicus Br. 9-15.

"*hamper* information security." *Id.* at 16.[4] Rehearing is required to avoid those consequences.

Because Google did not raise, in its request for interlocutory appeal or in its briefs before the panel, whether unencrypted Wi-Fi broadcasts should be considered "readily accessible to the general public" under the ordinary meaning of that phrase (Pet. 13), the most appropriate course here would be to strike Part B of the panel's opinion. At minimum, the opinion should be revised to make clear that the panel decided nothing more than that the (limited) allegations in Plaintiffs' Complaint met the applicable pleading standards, thereby leaving open all relevant factual issues for the parties to develop on remand.

CONCLUSION

For these reasons, Google's petition for rehearing and rehearing en banc should be granted.

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[4] Plaintiffs also gloss over the problems the panel's ruling would create for other everyday activities involving Wi-Fi, which rely on the fact that Wi-Fi devices, by design, receive the contents of communications traveling through the air around them. Pet. 17. Plaintiffs suggest that these acquisitions are irrelevant because Wi-Fi devices do not "process" and "store" such communications. Opp. 15. Beyond the debatable factual premise of Plaintiffs' claim, it is not clear why processing and storing would bear on the liability question, which under the Wiretap Act turns on whether the communications were "intercept[ed]," that is, had their contents acquired. 18 U.S.C. §§ 2510(4), 2511(1).

DATED: November 6, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-1 and 40-1(a), the attached reply in support of Google's petition for panel rehearing and rehearing en banc is proportionally spaced, has a typeface of 14 points or more, and contains 1,840 words.

s/ *Michael H. Rubin*
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9th Circuit Case Number(s): 11-17483

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 6, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michael H. Rubin
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