



If Telephone Company Liability is to be “Capped,” Damages Must be Fair to Plaintiffs and Proportionate to Defendants’ Resources in Order to Assure FISA’s Future “Exclusivity”

Proponents of full retroactive amnesty for telephone company defendants in the pending cases have argued that such extraordinary relief is necessary to avoid bankrupting the defendants and causing damage to the American economy. While EFF fully rejects this claim, it believes that this concern can be addressed in a far less draconian and radical fashion than unqualified amnesty by statutorily “capping” damages against the phone companies — whether in total, per action, per plaintiff, per day of violation, or some combination of these variables.

If damages caps are to be a component of Congress’ eventual legislation in this area, EFF believes that — whatever the means used to calculate them — the resulting damages available must be fair to plaintiffs and sufficient, given the resources of the defendant companies, to provide a meaningful disincentive to future violations of the many statutes from which the defendant companies now seek extraordinary relief. Absent such a disincentive, Congress’ efforts to assure the “exclusivity” of the new version of FISA now under debate will be seriously undermined because telephone carriers will have no reason not to respond favorably again in the future when another overreaching Executive asks them to violate multiple existing laws on the Executive’s claim of authority alone.

Fairness: In addition to making Constitutional claims, the pending cases are suits for the violation of at least four major statutes, including FISA itself, that impose specific duties upon telecommunications companies to safeguard their customers’ records and privacy from unlawful surveillance. (Others include the Wiretap, Communications, and Electronic Communications Privacy Acts.) Taken together, these would permit each plaintiff to recover statutory damages totaling a *minimum* of \$13,000. Other statutory options include the award of damages for *each day* of an ongoing violation, a method that would yield much larger awards given the almost six years of warrantless domestic surveillance at issue in the pending cases and the millions of Americans likely affected. Clearly, when it passed these several statutes Congress wanted to strongly discourage their breach and to provide courts with the tools to heavily penalize their violation.

Measured against both the severity of the penalties in existing law, and the enormous scope of the violation alleged in the pending cases, EFF strongly urges Congress — even while capping damages — to assure that tens of million of ordinary Americans are not sent the clear signal that their privacy is, quite literally, worth a pittance. Regrettably, the \$25 million damages cap suggested to date would send exactly that message, working out to literally less than the price of the \$0.41 stamp necessary to file forms to participate in the litigation for each affected American.

Proportionality: EFF has detailed elsewhere that the enormous corporate defendants in the pending cases have extraordinary financial resources. Given the need highlighted above to assure that no company in the future will again accede to the privacy-crushing demands of an overreaching Executive, the penalty assessed against them if liability is found in these cases must be proportionate to those resources. To put that in perspective, if Congress were to “cap” total damages at \$25 million, that sum would represent literally *a fraction of 1%* of the over \$3 billion in *net* income that AT&T *alone* realized in just the third quarter of 2007. In 2006, AT&T, Verizon and Sprint realized combined net income of \$15.6 billion and — during the years in which the defendant telephone companies were knowingly diverting millions of Americans’ domestic communications — just these three companies reported combined net income of *over \$72 billion an incredible 3,000 times \$25 million!*