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## Dear Yahoo: A Comment on In Re Yahoo Mail Litigation

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# DEAR YAHOO: A COMMENT ON *IN RE YAHOO MAIL LITIGATION*

*Nareen Melkonian\**

## I. INTRODUCTION

Email users might as well start addressing their emails to the email providers used by the individuals they correspond with. Like the plaintiffs in *In re Yahoo Mail Litigation*,<sup>1</sup> many email users do not know that email providers scan and collect their emails for various uses.<sup>2</sup> This scanning and collection of personal information is called information stockpiling, a practice feared by the creators and supporters of the privacy provision in article 1, section 1 of the California Constitution.<sup>3</sup> While there was a time people only feared the ability of the government to watch and record one's every move, that fear has now extended to the ability of private entities, like Yahoo, to do the same.<sup>4</sup>

The court in *In re Yahoo Mail Litigation* overlooked the threat that stockpiling poses on individual privacy and mechanically decided that individuals, like the plaintiffs in the case, do not have a legally protected privacy interest in their emails generally.<sup>5</sup> The court relied on the fact that the plaintiffs did not assert the specific content contained in the emails Yahoo scanned and collected.<sup>6</sup> However,

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1. 7 F. Supp. 3d 1016 (N.D. Cal. 2014).

2. *Id.* at 1021–23.

3. IAN C. BALLON, *E-COMMERCE & INTERNET LAW* § 26.97[2] (Thomson Reuters, 2d ed. 2014) [hereinafter *E-COMMERCE & INTERNET LAW*].

4. Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 *BERKELEY TECH. L.J.* 1085, 1087 (2002).

5. *In re Yahoo Mail Litigation*, 7 F. Supp. 3d at 1041–42.

6. *Id.*

“[i]nformational privacy is no longer simply a discrete question of controlling access to certain types of information, such as financial records, medical files, or telephone listings.”<sup>7</sup> The proponents of adding privacy to the California Constitution as an inalienable right specifically feared and wanted to prevent the collection and stockpiling of unnecessary information.<sup>8</sup> That fear has never been more real.<sup>9</sup>

This Comment analyzes the court’s holding in *In re Yahoo Mail Litigation*. While the court reached six different holdings, this Comment focuses solely on the holding regarding the plaintiffs’ claim alleging a violation of their constitutional right to privacy. Part II provides the facts of the case. Part III explains the reasoning of the court for each of its holdings, primarily its holding regarding the constitutional privacy claim. Part IV provides some pertinent history on the inalienable right to privacy in article 1, section 1. Part V elaborates on how and why the court reached an incorrect and detrimental holding. Lastly, Part VI concludes the Comment.

## II. STATEMENT OF THE CASE

Plaintiffs Cody Baker, Brian Pincus, Halima Nobles, and Rebecca Abrams, individually and on behalf of others (“Plaintiffs”), filed a Consolidated Class Action Complaint (“the Complaint”) against Defendant Yahoo!, Inc. (“Yahoo”) on February 12, 2014, in United States District Court for the Northern District of California.<sup>10</sup> Plaintiffs are a class of individuals living in the United States who—between October 2, 2011, and the filing of the case—do not have Yahoo email accounts, but have sent emails to or received emails from people with Yahoo email accounts.<sup>11</sup> At the time, Yahoo provides provided free email services to over 275 million users.<sup>12</sup> To generate revenue, Yahoo charges advertisers to advertise their products on Yahoo webpages.<sup>13</sup> According to Plaintiffs, advertisers

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7. Lin, *supra* note 4, at 1120.

8. E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2].

9. Kelsey Maxwell, *Online Behavioral Advertising: The Pros & Cons of Regulation & Suggestions for Adherence to California’s Constitutional Right to Privacy*, 19 NEXUS 51, 56 (2013/2014).

10. *In re Yahoo Mail Litigation*, 7 F. Supp. 3d at 1020.

11. *Id.* at 1021.

12. *Id.*

13. *Id.*

are willing to pay higher rates for targeted advertisements.<sup>14</sup> This incentivizes Yahoo to “scan and store email content to allow advertisers to target individuals based on certain personal characteristics.”<sup>15</sup>

Plaintiffs alleged that Yahoo intercepts, scans, and stores not only the incoming and outgoing emails of its own users, but also those of non-Yahoo users with whom its Yahoo users exchange emails.<sup>16</sup> Plaintiffs also alleged that Yahoo does this without the consent of any users.<sup>17</sup> However, when a person creates a Yahoo email account, he or she “agree[s] to the *Yahoo Terms and Privacy*” upon clicking on the “Create Account” button.<sup>18</sup> The phrase “Yahoo Terms” links to a page labeled “Yahoo Global Communications Additional Terms of Service for Yahoo Mail and Yahoo Messenger” (ATOS).<sup>19</sup> The term “Privacy” links to Yahoo’s “Privacy Policy.”<sup>20</sup>

The following are relevant excerpts from the ATOS agreement:

Yahoo’s automated systems scan and analyze all incoming and outgoing communications content sent and received from your account . . . including those stored in your account to, without limitation, provide personally relevant product features and content, to match and serve targeted advertising and for spam and malware detection and abuse protection . . . Yahoo *collects and stores* the data . . . you will not be able to opt out of this feature. If you consent to this ATOS and communicate with non-Yahoo users using the Services, you are responsible for notifying those users about this feature.<sup>21</sup>

The phrase “collects and stores” links to a page labeled “Yahoo Mail FAQ,” which “explains that Yahoo’s scanning technology ‘looks for patterns, keywords, and files’ in users’ emails.”<sup>22</sup> The FAQ page also states that Yahoo “may anonymously share specific objects from a message with a 3rd party to provide a more relevant

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1028–29.

19. *Id.* at 1021.

20. *Id.*

21. *Id.* at 1022 (emphasis added).

22. *Id.*

experience.”<sup>23</sup> Another policy that a Yahoo user agrees to upon creating an account is the “Yahoo Terms of Service” (TOS).<sup>24</sup> In relevant part, the TOS states the following: “You understand that through your use of the Yahoo Services you consent to the collection and use . . . of this information, including the transfer of this information to the United States and/or other countries for storage, processing and use by Yahoo and its affiliates.”<sup>25</sup>

The Complaint alleged that these Yahoo policies violate the Wiretap Act of the Electronic Communications Privacy Act (ECPA), the Stored Communications Act (SCA) of the ECPA, California’s Invasion of Privacy Act (CIPA), and article 1, section 1 of the California Constitution.<sup>26</sup> Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Yahoo filed a motion to dismiss Plaintiffs’ claims on March 5, 2014.<sup>27</sup> Plaintiffs filed an opposition on March 26, 2014, and the court decided the matter on August 12, 2014.<sup>28</sup>

The court reached six separate holdings: (1) the court granted, with prejudice, Yahoo’s motion to dismiss Plaintiffs’ Wiretap Act claim with respect to “scan[ning] and analyz[ing] emails for the purposes of providing personal product features, providing targeted advertising, detecting spam and abuse, creating user profiles, and sharing information with third parties”; (2) the court granted, without prejudice, Yahoo’s motion to dismiss “Plaintiffs’ Wiretap Act claim with respect to collecting and storing emails for future use”; (3) the court granted, with prejudice, Yahoo’s motion to dismiss Plaintiffs’ SCA claim with respect to “unauthorized access under [section] 2701(a)”; (4) the court denied Yahoo’s motion to dismiss Plaintiffs’ SCA claim with respect to “improper disclosure under [section] 2702(a)(1)”; (5) the court denied Yahoo’s motion to dismiss Plaintiffs’ CIPA claim; and finally, (6) the court granted, without prejudice, Yahoo’s motion to dismiss Plaintiffs’ article 1, section 1 claim.<sup>29</sup>

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23. *Id.* (internal quotation marks omitted).

24. *Id.* at 1021.

25. *Id.* at 1022.

26. *Id.* at 1020, 1023, 1026.

27. *Id.* at 1023.

28. *Id.*

29. *Id.* at 1042–43.

## III. THE COURT'S REASONING

A. *Wiretap Act Claim Pertaining to Scanning and Analyzing Emails Dismissed with Prejudice*

The Wiretap Act is violated when a “person intentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.”<sup>30</sup> Yahoo relied on a Ninth Circuit decision that a communication “must be accessed during transmission” to be “intercepted,” and claimed that the emails it intercepted were “in electronic storage and no longer in transit when [it] accessed them.”<sup>31</sup> The court rejected Yahoo’s argument because under Rule 12(b)(6) the court must accept all facts alleged by Plaintiffs in the Complaint as true, and Yahoo’s argument asks the court to do exactly the opposite by perceiving Plaintiffs’ allegations as false.<sup>32</sup>

The court relied on the consent exception of the Wiretap Act, which states that “[i]t shall not be unlawful . . . to intercept a wire, oral, or electronic communication . . . where one of the parties to the communication has given prior consent to such interception.”<sup>33</sup> The court reasoned that since Yahoo users need to agree to “at least the ATOS and Privacy Policy” upon creating their accounts, and since the ATOS explicitly notifies users that Yahoo will scan and analyze emails for the stated purposes, Yahoo users clearly consented to Yahoo’s conduct.<sup>34</sup> The pivotal portion of the Wiretap Act, which led the court to its holding, states that “only . . . one party to the communication [needs] to consent to an interception to relieve the provider of liability.”<sup>35</sup> The court concluded that since Yahoo obtained consent from its registered users, it did not violate the Wiretap Act by scanning and analyzing Plaintiffs’ emails for the stated purposes.<sup>36</sup> The court dismissed with prejudice, not allowing Plaintiffs to amend, because it believed that “additional allegations [could not] save Plaintiffs’ claim that there was no consent.”<sup>37</sup>

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30. *Id.* at 1026 (internal quotation marks omitted).

31. *Id.* at 1027; *see Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002).

32. *In re Yahoo Mail Litigation*, 7 F. Supp. 3d at 1027 (quoting *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008)).

33. *Id.* at 1026 (quoting 18 U.S.C. § 2511(2)(d) (2012)).

34. *Id.*

35. *Id.* at 1028 (citing 18 U.S.C. § 2511(2)(d) (2012)).

36. *Id.* at 1029–31.

37. *Id.* at 1030.

*B. Wiretap Act Claim Pertaining to Collecting and Storing Emails Dismissed Without Prejudice*

Plaintiffs contended that during a portion of the class period, the ATOS mentioned nothing about Yahoo collecting and storing users' email content; and that even after the ATOS was revised to contain a line about collecting and storing, it did not mention what Yahoo would do with that data in the future.<sup>38</sup> The court used a "reasonable user standard" to make its decision.<sup>39</sup> It reasoned that a "reasonable user would know that 'scanning and analyzing' requires Yahoo to collect and store the email content."<sup>40</sup> Thus, since Plaintiffs did not assert any reasons why scanning and analyzing does not require collecting and storing, a reasonable user is "on notice that Yahoo engages in collection and storage of email content."<sup>41</sup> The court further pointed out that throughout the class period the ATOS stated that "Yahoo 'store[s]' emails in users' accounts, which would have put the reasonable user on notice that Yahoo already stores at least some emails on its servers."<sup>42</sup>

As to the future use by Yahoo of the stored content, the court found that Yahoo's future uses would probably be the same as those stated in the ATOS.<sup>43</sup> The court felt that it had no reason to believe otherwise, especially since Plaintiffs did not assert what more they believed Yahoo would do with the stored content in the future.<sup>44</sup> The court dismissed Plaintiffs' Wiretap Act claim with respect to Yahoo's collection and storage of emails because it found that users consented to such conduct.<sup>45</sup> However, the court granted leave to amend in case Plaintiffs could "allege any other 'future use' they believe Yahoo would make of their email content."<sup>46</sup>

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38. *Id.*

39. *Id.* at 1028.

40. *Id.* at 1031.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

C. *SCA Claim Pertaining to Section 2701(a) Dismissed with Prejudice*

Plaintiffs asserted this cause of action as an alternative to the Wiretap Act claim, “in the event the Court concludes that Yahoo accesses [P]laintiffs’ emails after they have been delivered to the recipients and are thus in storage.”<sup>47</sup> However, Yahoo contended and Plaintiffs acknowledged that pursuant to sections 2701(c)(1) and 2701(c)(2) of the SCA, Yahoo, an electronic communications service provider, is immune from section 2701(a) violations when it accesses electronic communications stored on its own servers.<sup>48</sup> Since Yahoo was accused of that conduct exactly, the court found that Yahoo is immune from section 2701(a) liability and dismissed this claim with prejudice.<sup>49</sup>

D. *SCA Claim Pertaining to Section 2702(a)(1) Retained*

Section 2702(a)(1) of the SCA “prohibits Yahoo from *disclosing* the content of users’ emails to third parties,” which Plaintiffs claimed Yahoo did.<sup>50</sup> Plaintiffs alleged that Yahoo informs users in its Privacy Policy and FAQ page that it shares email content with third parties, and thus violates section 2702(a)(1).<sup>51</sup> Yahoo challenged this cause of action by arguing that Plaintiffs did not sufficiently plead facts with specificity as required by the Supreme Court in *Bell Atlantic Corp. v. Twombly*.<sup>52</sup> The court rejected Plaintiffs’ reliance on Yahoo’s Privacy Policy to show the sufficiency of their pleading, because the Privacy Policy notifies users that Yahoo discloses “record information” and not “contents.”<sup>53</sup> Per the SCA and Ninth Circuit decisions, “Plaintiffs must plausibly allege that Yahoo knowingly divulged the *contents* of a communication.”<sup>54</sup>

Yahoo’s FAQ page, however, does notify users that Yahoo discloses email content to third parties.<sup>55</sup> The court found that even though Plaintiffs did not need to assert exactly what content was

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47. *Id.* at 1032 (internal quotation marks omitted).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1033.

52. *Id.* at 1032–33.

53. 550 U.S. 544 (2007); *In re Yahoo Mail Litigation*, 7 F. Supp. 3d at 1034.

54. *In re Yahoo Mail Litigation*, 7 F. Supp. 3d at 1033 (emphasis added) (internal quotation marks omitted).

55. *Id.* at 1034.



shared or with who it was shared for their section 2702(a)(1) claim to survive Yahoo's motion to dismiss, Yahoo's FAQ page gave at least one example of the type of content shared with third parties.<sup>56</sup> The court also mentioned that Yahoo did not plead the consent exception for a section 2702(a)(1) violation as it did for a section 2701(a) violation.<sup>57</sup> Thus, the court denied Yahoo's motion to dismiss Plaintiffs' section 2702(a)(1) SCA claim for improper disclosure.<sup>58</sup>

#### *E. CIPA Claim Retained*

Plaintiffs allege that Yahoo violated section 631 of CIPA, the relevant part of which:

[M]akes it unlawful to use "any machine, instrument or contrivance" to intentionally intercept the content of a communication over any "telegraph or telephone wire, line, cable or instrument," or to read, attempt to read, or learn the "contents or meaning of any message, report, or communication while the same is *in transit* or passing over any wire, line or cable" without the consent of all parties to the communication.<sup>59</sup>

Yahoo made three arguments, all of which essentially relied on its contention that the emails it intercepted were in "electronic storage" and not "in transit."<sup>60</sup> As the court held in relation to the SCA claim, the court must take all of Plaintiffs' allegations as true and cannot consider arguments that contradict those allegations.<sup>61</sup> Thus, the court denied Yahoo's motion to dismiss Plaintiffs' CIPA claim.<sup>62</sup>

#### *F. California Constitution Article 1, Section 1 Claim Dismissed Without Prejudice*

Article 1, section 1 of the California Constitution "protects individuals from the invasion of their privacy by private parties."<sup>63</sup> Plaintiffs allege that Yahoo invaded their privacy, in violation of

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56. *Id.*

57. *Id.* at 1035.

58. *Id.*

59. *Id.* at 1036 (emphasis added) (quoting CAL. PENAL CODE § 631(a) (West 2011)).

60. *Id.*

61. *Id.*

62. *Id.* at 1037.

63. *Id.*

article 1, section 1, by scanning, storing, and disclosing the content of their emails.<sup>64</sup> A plaintiff bringing a cause of action under this section must satisfy three elements: “(1) [plaintiff has] a legally protected privacy interest; (2) [plaintiff has] a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constitut[es] a serious invasion of privacy.”<sup>65</sup> The two types of legally protected privacy interests under the California Constitution are informational privacy and autonomy privacy.<sup>66</sup> Although Plaintiffs did not specify, the court interpreted Plaintiffs’ claim as alleging an informational privacy interest—interest in a person’s “sensitive and confidential information.”<sup>67</sup>

To show that he or she had a reasonable expectation of privacy, a plaintiff must establish “an objective entitlement founded on broadly based and widely accepted community norms.”<sup>68</sup> Further, a plaintiff must have acted in a way that a person with an actual expectation of privacy would act.<sup>69</sup> Finally, to constitute a serious invasion of privacy, the defendant’s invasion must be “sufficiently serious” in its “nature, scope, and actual or potential impact.”<sup>70</sup> However, even after a plaintiff satisfies all three elements, a defendant may justify his or her invasion and escape liability by raising a “competing or countervailing” interest.<sup>71</sup>

Whether a plaintiff has a legally recognized privacy interest is a question of law that a court will decide at the outset of a case.<sup>72</sup> “Whether [a] plaintiff has a reasonable expectation of privacy in the circumstances and whether [a] defendant’s conduct constitutes a serious invasion of privacy,” however, “are mixed questions of law and fact.”<sup>73</sup> After considering all the undisputed facts, if a court finds that a reasonable expectation of privacy and a substantial impact on privacy interests do not exist, it may adjudicate the cause of action as a matter of law.<sup>74</sup>

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64. *Id.*

65. *Id.* (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 657 (Cal. 1994)).

66. *Id.* at 1039.

67. *Id.*

68. *Id.* at 1037 (quoting *Hill*, 865 P.2d at 655).

69. *Id.* at 1037–38.

70. *Id.* at 1038 (quoting *Hill*, 865 P.2d at 655).

71. *Id.*

72. *Id.*

73. *Id.* at 1038–39.

74. *Id.* at 1039.

Since the court was not sure whether Plaintiffs were claiming a privacy interest in their “emails generally” or in the “specific content” of the emails they sent to Yahoo users, it analyzed each scenario separately.<sup>75</sup> The court found that Plaintiffs’ claim, as it relied on the privacy interest in their emails generally, failed as a matter of law because “the California Constitution protects only the dissemination or misuse of *sensitive* and *confidential* information.”<sup>76</sup> The court explained that neither Plaintiffs cited, nor had it found, any case law that emails in general constitute sensitive and confidential information.<sup>77</sup> Thus, individuals do not have a legally protected privacy interest or reasonable expectation of privacy in their emails generally.<sup>78</sup> Rather, the California Supreme Court has held that an individual has a privacy interest in his or her email only if the email “include[s] content that qualifies under California law as ‘confidential’ or ‘sensitive.’”<sup>79</sup>

Further, the court found that Plaintiffs’ claim, as it relied on a privacy interest in the specific content of the emails they sent to Yahoo users, was “fatally conclusory.”<sup>80</sup> Plaintiffs’ allegation that their emails were “‘private’ without alleging any facts related to what particular emails Yahoo intercepted, or the content within the particular emails” was not sufficient to survive Yahoo’s motion to dismiss.<sup>81</sup> The court rejected Plaintiffs’ “stockpiling” argument, which contended that the constitutional right to privacy was created “to prevent government and business interests from collecting and stockpiling unnecessary information about us and or misusing information.”<sup>82</sup> The court held that the stockpiling argument alone was not enough to constitute an invasion of privacy under article 1, section 1.<sup>83</sup> Thus, the court dismissed this claim, but gave Plaintiffs leave to amend in case they may be able to plead facts regarding the specific content of emails.<sup>84</sup>

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75. *Id.* at 1040.

76. *Id.* at 1040–41 (internal quotation marks omitted).

77. *Id.* at 1040.

78. *Id.*

79. *Id.* at 1041.

80. *Id.*

81. *Id.*

82. *Id.* at 1041–42 (internal quotation marks omitted).

83. *Id.* at 1042.

84. *Id.*

#### IV. THE BIRTH OF CALIFORNIA'S CONSTITUTIONAL PRIVACY PROVISION

Originally, article 1, section 1 of the California Constitution did not list privacy as one of the inalienable rights guaranteed to California citizens, such as “enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, [and] happiness.”<sup>85</sup> In 1972, upon the proposal of the legislature, California citizens used the initiative process and added privacy as an inalienable right.<sup>86</sup> Assemblyman Kenneth Cory, who spearheaded the privacy initiative, was worried about the growing extent of the California government’s collection of people’s private information, which he viewed “as part and parcel of a shrinking orbit of privacy.”<sup>87</sup> Cory was also concerned about private businesses getting a hold of people’s private information.<sup>88</sup> The report of the Senate Judiciary Committee questioned whether the privacy provision extended to “corporations, criminal accused, public figures, wire taps and eavesdropping, etc.,” but never answered the question or defined the scope of the provision.<sup>89</sup>

In the 1994 case *Hill v. National Collegiate Athletic Association*,<sup>90</sup> however, the California Supreme Court clarified that the privacy provision in article 1, section 1 applies to both governmental and non-governmental entities.<sup>91</sup> Since article 1, section 1 does not address the scope of the privacy provision, the court relied on the intent of the voters, which was apparent in the official ballot pamphlet.<sup>92</sup> The court found that the authors of the arguments in favor of the privacy initiative “emphasized the capacity of both governmental and nongovernmental agencies to gather, keep, and disseminate sensitive personal information without checking its accuracy or restricting its use.”<sup>93</sup> Proponents of the privacy initiative were troubled by the ability of companies, such as credit card issuers

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85. J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 328, 416 (1992) (internal quotation marks omitted).

86. *Id.* at 328.

87. *Id.* at 418.

88. *Id.*

89. *Id.* at 426 (quoting REPORT OF SENATE JUDICIARY COMMITTEE ON ACA 51 (1972)).

90. 865 P.2d 633 (Cal. 1994).

91. *Id.* at 644; see HAROLD KAHN ET AL., CALIFORNIA CIVIL PRACTICE CIVIL RIGHTS LITIGATION § 6.7 (2d ed. 2003) (“Privacy is a right that may not be violated by anyone.”).

92. *Hill*, 865 P.2d at 641–42.

93. *Id.* at 642.

and insurance companies, to “collect[] and stockpile[] unnecessary information’ about individuals.”<sup>94</sup>

The California Supreme Court in *Hill* thus established the three elements necessary to state a claim under the privacy provision of article 1, section 1: “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.”<sup>95</sup> These elements were created to serve as a threshold—to filter out frivolous claims where the invasion of privacy is so minimal that the defendant does not even have to provide an explanation.<sup>96</sup> The court in *In re Yahoo Mail Litigation* found that the Plaintiffs did not satisfy the first two elements because they did not have a legally protected privacy interest in their emails generally and their expectation of privacy in such emails was unreasonable under the circumstances.<sup>97</sup>

It is difficult to swallow the court’s holding because Yahoo’s collection of a non-Yahoo users’ entire email history with Yahoo users is the opposite of a minimal invasion of privacy; it is exactly the type of practice the privacy provision is meant to prevent.<sup>98</sup> Holding that Yahoo may, without any justification, scan and store all emails between non-Yahoo users and Yahoo users, sends the message that the California judiciary is indifferent to the threat that the arbitrary scanning and collection of personal information poses on the inalienable right to privacy.<sup>99</sup>

## V. STOCKPILING IS A SERIOUS INVASION OF PRIVACY

It is understandable that a plaintiff who consents to the scanning and storing of his or her emails by a private party cannot later claim a

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94. E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2] (quoting *Hill*, 865 P.2d at 642); *see* Proposition 11 Ballot Argument, *in* PROPOSED AMENDMENTS TO CONSTITUTION 26–27 (Nov. 7, 1992).

95. *Hill*, 865 P.2d at 657.

96. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 812 (Cal. 1997); *see* *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1024 (N.D. Cal. 2012).

97. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1040 (N.D. Cal. 2014).

98. *See* E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2] (“Initiative proponents argued that [the provision] addressed concerns about ‘collecting and stockpiling unnecessary information’ about individuals, which typically cannot be reviewed and corrected, and ‘misusing information gathered for one purpose in order to serve other purposes or embarrass’ people.” (quoting *Hill*, 865 P.2d at 642)).

99. *See* CAL. CIV. CODE. § 1798.1 (West 2014) (“(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.”).

privacy interest in his or her emails generally. How is it acceptable, however, to say that an individual who has not consented to the scanning and storing of his or her emails also does not have a privacy interest in his or her emails generally? As pointed out previously, the three-element test created in *Hill* is meant to serve as a threshold to “weed out claims that involve so insignificant or de minimis an intrusion . . . as not even to require an explanation or justification by the defendant.”<sup>100</sup> By adjudicating Plaintiffs’ article 1, section 1 claim as a matter of law, the court decided that a company’s stockpiling of people’s personal information is insignificant.

The court was wrong in finding that Plaintiffs do not have a legally protected privacy interest in their emails generally because the fear of stockpiling was one of the main reasons the privacy provision was added to the California Constitution.<sup>101</sup> The court was also wrong in holding that Plaintiffs’ privacy expectations were not reasonable.<sup>102</sup> It is true that privacy expectations are generally lower on the Internet; however, the court’s holding only encourages further deterioration of privacy expectations on a platform—the Internet—that now governs almost every aspect of daily life.<sup>103</sup>

#### *A. Individuals Have a Legally Protected Privacy Interest in Their Emails Generally*

Under article 1, section 1 of the California Constitution, “all individuals have a right of privacy in information pertaining to them.”<sup>104</sup> It makes no sense to say that information stockpiling—one of the main reasons the inalienable right to privacy was created—is not sufficient to constitute a violation of that inalienable right.<sup>105</sup> The individuals behind the privacy initiative were specifically concerned about computer-generated data.<sup>106</sup> They worried about the “modern threat” of computers and technology, and did not want governmental or private entities creating “cradle-to-grave profiles on every

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100. *Low*, 900 F. Supp. 2d at 1024.

101. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1040; see E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2].

102. See *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1040.

103. See CAL. CIV. CODE § 1798.1; E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2].

104. CAL. CIV. CODE § 1798.1.

105. See E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2].

106. *Id.*

American.”<sup>107</sup> The “modern threat to personal privacy” that they feared was the state of technology in 1972, a time when email was not even part of that threat yet.<sup>108</sup>

An email can contain pretty much anything: buying preferences, business deals, photos, family correspondences, credit card information, current geographical location, intellectual property, etc.<sup>109</sup> The list goes on and on. By scanning, collecting, and storing non-Yahoo users’ emails with Yahoo-users, Yahoo gets its hands on all types of personal information.<sup>110</sup> Yahoo may then share that compiled information with third parties or transfer that compiled information to “other countries for storage, processing and use by Yahoo and its affiliates.”<sup>111</sup>

The court thought that this collection and sharing of people’s personal information was not “the dissemination or misuse of *sensitive* and *confidential* information.”<sup>112</sup> Imagine this: an insurance company buys thousands of dollars worth of data from Yahoo; you are a non-Yahoo user whose hundreds of emails were part of that sold data; you apply for life insurance online with the same insurance company; the company matches your data with your application; they discover that you love skydiving and speed-racing; they decide you are a high-risk individual and offer you life insurance at a much higher price.<sup>113</sup> Maybe you are okay with legitimate entities obtaining your personal information. But what if a hacker breaches Yahoo’s networks and obtains your information for illegal purposes,

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107. Hill v. Nat’l Collegiate Athletic Assoc., 865 P.2d 633, 645 (Cal. 1994) (internal quotation marks omitted).

108. *Id.*; see White v. Davis, 533 P.2d 222, 233 (Cal. 1975) (“[T]he moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.”); see also Doug Aamoth, *The Man Who Invented Email*, TIME (Nov. 15, 2011), <http://techland.time.com/2011/11/15/the-man-who-invented-email/> (stating that V.A. Shiva Ayyadurai, the first copyright holder for “EMAIL,” began building his system in 1978).

109. See Kalinda Basho, *The Licensing of Our Personal Information: Is It a Solution to Internet Privacy?*, 88 CALIF. L. REV. 1507 (2000).

110. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1022 (N.D. Cal. 2014).

111. *Id.*

112. *Id.* at 1039 (emphasis added).

113. See Maxwell, *supra* note 9, at 56–58 (“Companies that are in the business of collecting information about individuals (personally identifiable and non-personally identifiable) can sell this information to multiple entities that may use it in unexpected ways . . . Although this information may not be connected to a name, entities that collect data have myriads of statisticians analyzing the information they collect, and can get a very accurate description of the unknown person [from whom] information was collected.”).

such as identity theft?<sup>114</sup> The court found that non-Yahoo users, who never consented to such collection of their personal information, do not have a constitutional right to keep that information private.<sup>115</sup>

The court failed to realize the difference between a plaintiff's allegation that a defendant violated his or her constitutional right to privacy by accessing a few emails, versus an allegation that a defendant stockpiles hundreds or thousands of those emails.<sup>116</sup> The court compared Plaintiffs' case to another district court case in which a sports agent's former employer hacked his email account and read several emails.<sup>117</sup> The court emphasized the fact that the district court found that the sports agent had a protected privacy interest in those emails because they contained personal employment and financial information.<sup>118</sup> That case is not comparable to Plaintiffs' case. Information stockpiling is not a one-time read-through of individuals' emails; it is the "indiscriminate collection, maintenance, and dissemination of personal information."<sup>119</sup> Even the California legislature is worried about the magnified risk to individual privacy caused by stockpiling.<sup>120</sup> If courts do not impose strict limits on the maintenance and dissemination of personal information, entities like Yahoo will continue to use people's private information to develop even more detailed profiles on them.<sup>121</sup>

*B. The Court Assisted in Diminishing the Reasonable  
Expectation of Privacy in Emails*

Moreover, by finding that Plaintiffs' expectation of privacy was not reasonable, the court has encouraged the deterioration of privacy on the Internet.<sup>122</sup> As a practical matter, it is absolutely bizarre to believe that it is unreasonable for an individual sending an email to expect that email to remain private, when he or she has not otherwise

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114. *See id.* at 58.

115. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1040–41.

116. *See id.* at 1040.

117. *Id.* at 1040–41 (citing *Mintz v. Mark Bartelstein & Assoc. Inc.*, 906 F. Supp. 2d 1017, 1033–34 (C.D. Cal. 2012)).

118. *Id.* at 1041.

119. CAL. CIV. CODE § 1798.1.

120. *Id.*

121. *Id.*

122. *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1040; *see Hill v. Nat'l Collegiate Athletic Assoc.*, 865 P.2d 633, 655 (Cal. 1994) (“[T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant.”).



consented. Yahoo's mere statement to its users that they must notify non-Yahoo users with whom they email that their emails will be scanned and collected is not enough to negate privacy expectations.<sup>123</sup>

As stated previously, the reasonableness inquiry requires courts to "take into account any accepted community norms."<sup>124</sup> Thus, many companies faced with claims of privacy violations rely on the belief that expectations of privacy on the Internet are generally lower due to the "widespread use of cookies, lack of uniformity in the privacy practices of many online businesses, the volume of news reports decrying the lack of protection for information online, and opinion polls."<sup>125</sup> The court's holding supports this thought process and disincentivizes online companies from tailoring their practices in favor of individual privacy.<sup>126</sup>

Although the legislature is worried about the implications of extensive information gathering, it cannot keep up with technology concerns as quickly as courts can.<sup>127</sup> The fact that online companies are stockpiling and disseminating personal information, often without users' consent, should not render the expectation of privacy in emails or the Internet unreasonable.<sup>128</sup> Courts must treat individual privacy online in the same way they treat individual privacy offline.<sup>129</sup> The *Yahoo* court would not have reached the same holding if Plaintiffs were suing FedEx, for example, for unsealing, reading, and copying private letters. The difficult and almost impossible task

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123. See E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2] ("To negate privacy expectations, Internet vendors should make clear what they intend to do with information . . . [S]uch disclaimers should be sufficiently prominent so that any expectation of privacy in light of the disclosure would be unreasonable."); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at 1022 (quoting Yahoo's ATOS agreement).

124. *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 161 (2002) (internal quotations omitted); see *Hill*, 865 P.2d at 655 ("[C]ustoms, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.").

125. E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2].

126. *Id.*

127. See Ken Broder, *California Lawmakers Give Students Something Adults Lack: Online Privacy*, ALLGOV CAL. (Oct. 6, 2014), <http://www.allgov.com/usa/ca/news/controversies/California-lawmakers-give-students-something-adults-lack-some-online-privacy-141006?news=854445> ("[G]overnments are moving even slower to do something about it.").

128. See *id.*; see also Lin, *supra* note 4, at 1152 ("Washington and Vermont have rejected the 'reasonable expectation of privacy' standard that often hinders protection against pervasive technologies.").

129. Adam Cohen, *One Friend Facebook Hasn't Made Yet: Privacy Rights*, N.Y. TIMES, Feb. 18, 2008, [http://www.nytimes.com/2008/02/18/opinion/18mon4.html?\\_r=1&](http://www.nytimes.com/2008/02/18/opinion/18mon4.html?_r=1&).

of collecting personal paper records would definitely be a gross violation of one's informational privacy.<sup>130</sup> The easier electronic method of collecting should be treated no differently. Aside from relying on the reasonableness standard, companies also conveniently make the false argument that individuals do not have the desire to keep information private as they once did.<sup>131</sup> The court has further promoted this deceptive notion.<sup>132</sup>

## VI. CONCLUSION

As the prevalence of the Internet continues to grow and transactions and interactions on the Internet become even more common, more private information is at risk of being invaded.<sup>133</sup> The court in *In re Yahoo Mail Litigation* underestimated the gravity of information stockpiling and its negative implications on individual privacy. People must have a legally protected privacy interest in their emails generally, as preventing information stockpiling was one of the main purposes of the privacy initiative.<sup>134</sup> Further, the court's finding that the expectation of privacy in one's emails generally is unreasonable only advances the deterioration of the inalienable right to privacy.

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130. See Lin, *supra* note 4, at 1100.

131. Cohen, *supra* note 129 (giving the example of a Google lawyer stating that people "do not care about privacy the way they once did").

132. See Lin, *supra* note 4, at 1088 ("According to the Federal Trade Commission [in 2001] . . . ninety-two percent of Americans are concerned about threats to their personal privacy when they use the Internet and seventy-two percent are very concerned." (internal quotation marks omitted)).

133. See Maxwell, *supra* note 9, at 54.

134. E-COMMERCE & INTERNET LAW, *supra* note 3, § 26.07[2].

