

# Federal court in Ohio upholds e-mail privacy

December 15 2010, By DAN SEWELL , AP Business Writer

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(AP) -- A defense attorney said Wednesday he sees a federal court's opinion upholding e-mail privacy as groundbreaking and possibly helpful to his client, the founder of a company that sold male enhancement pills.

Lawyer Martin Weinberg said e-mail evidence should have been excluded from the government's case against Steven Warshak, who was convicted of fraud and other crimes related to his Ohio company. The company, Berkeley Premium Nutraceuticals Inc., sold products including Enzyte pills - known for their commercials featuring Smiling Bob, whose life improves after using them - and other herbal supplements promoted as treating a variety of health and personal conditions.

The Warshak case, in which investigators obtained 27,000 e-mails, has been closely watched by civil liberties advocates in the still-developing field of online privacy, and some said Tuesday's opinion was perhaps the strongest yet in protecting digital communications against unreasonable search and seizure.

The 6th U.S. Circuit Court of Appeals in Cincinnati threw out Warshak's 25-year sentence, saying the trial court didn't adequately explain how it arrived at a figure that more than \$400 million in losses resulted from deceptive ads, manipulating credit card transactions and refusing to accept product returns or cancel orders.

While upholding Warshak's conviction, the three-judge panel also said his constitutional rights were violated when investigators obtained his e-

mails without warrants. The court said that with so much of today's communication done electronically, citizens have a reasonable expectation of privacy just like with telephones and traditional mail.

"The Fourth Amendment must keep pace with the inexorable march of technological progress or its guarantees will wither and perish," Judge Danny J. Boggs, a Ronald Reagan appointee, wrote for the panel.

The opinion stated: "The police may not storm the post office and intercept a letter, and they are likewise forbidden from using the phone system to make a clandestine recording of a telephone call - unless they get a warrant, that is."

But the panel concluded that the e-mail evidence was allowable in the case because law enforcement officers believed they were following the law when seeking it from an Internet service provider.

Weinberg said that part of the ruling likely will be appealed in his effort to get Warshak's convictions thrown out.

"The extension of the Fourth Amendment to e-mails is a groundbreaking opinion that is of pivotal importance in terms of protecting privacy in the Internet age," Weinberg said.

He could ask the full court to hear the appeal and could appeal to the U.S. Supreme Court.

A U.S. attorney's spokesman said any formal response would come in court if a defense appeal is filed, but he said the 3-0 ruling didn't exclude the e-mail evidence.

"The court made it very clear that it believes that the agents acted in good faith," spokesman Fred Alverson said.

An official of the Washington-based advocacy group Center for Democracy and Technology said the ruling advanced an issue that high courts have been reluctant to confront.

"It is significant for stating what the average citizen would think is obvious - that the Constitution protects your private e-mail just like it protects your mail and phone calls," said Jim Dempsey, vice president for public policy.

An earlier three-judge panel in the 6th Circuit, which hears appeals for cases in Ohio, Michigan, Kentucky and Tennessee, ruled similarly in 2007 before Warshak's trial, saying investigators overstepped constitutional bounds. But the full court the next year rejected his constitutional claim on procedural grounds in a 9-5 vote.

Dempsey said it may be years before a Supreme Court ruling decisively defines the rules on digital communications, leaving businesspeople, consumers and government officials uncertain about an increasingly important issue.

The Tuesday ruling noted an "explosion" of such communication: "Lovers exchange sweet nothings, and businessmen swap ambitious plans, all at the click of the mouse button."

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Citation: Federal court in Ohio upholds e-mail privacy (2010, December 15) retrieved 26 April 2024 from <https://phys.org/news/2010-12-federal-court-ohio-e-mails-privacy.html>

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