

Interception and the Internet in Ireland

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1993



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- Meatloaf tops the charts
- Government Approves Condom Vending Machines
- Dáil Éireann passes a bill to decriminalise homosexuality
- Albert Reynolds elected Taoiseach
- “Internet” appears 18 times in *Irish Times*
- **Interception law last updated**



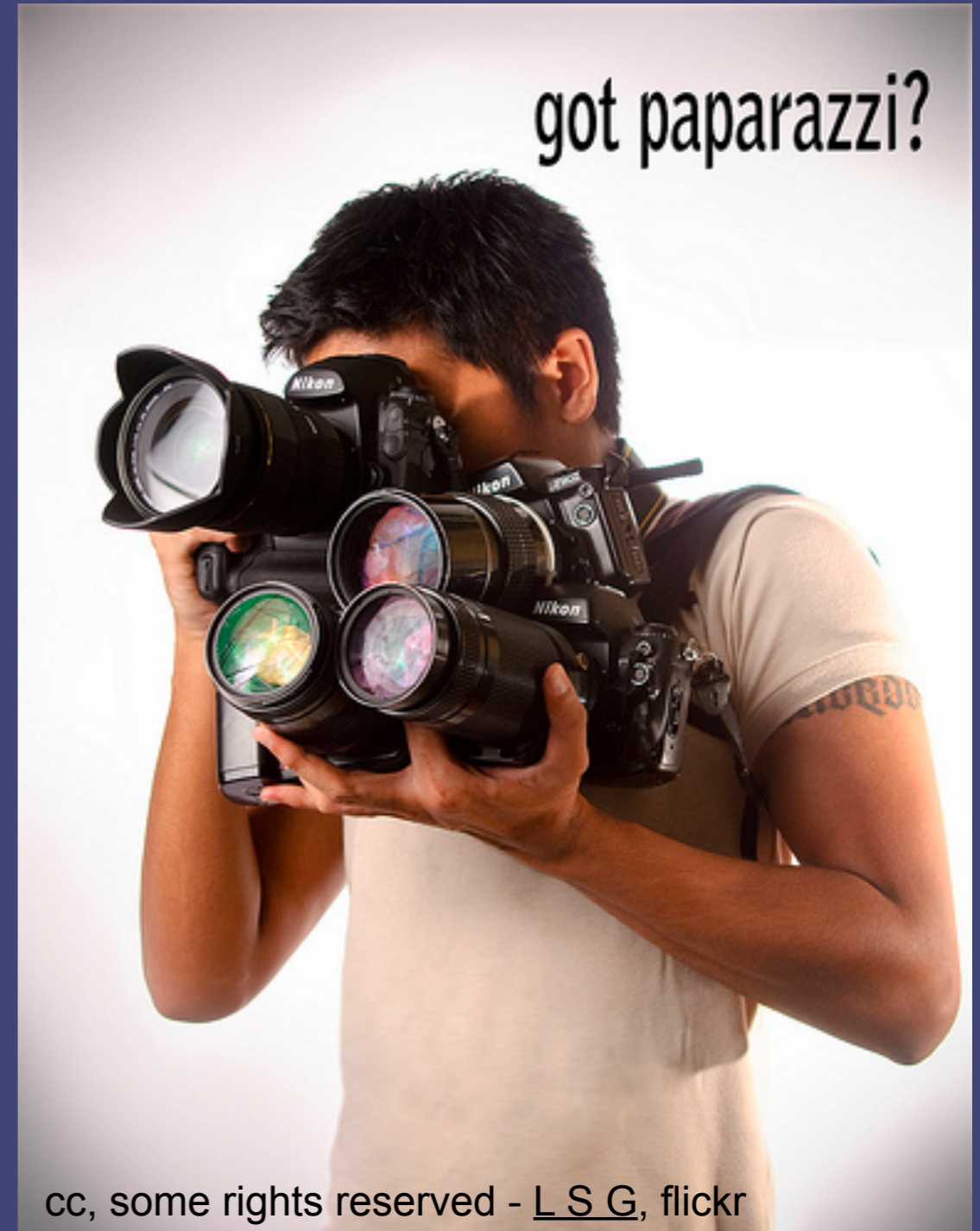
Summary

- Law on interception has not been reformed since 1993
- Law outdated and in breach of international obligations
- Judicial oversight is limited
- Forthcoming Criminal Justice (Cybercrime and Attacks against Information Systems) Bill offers opportunity for reform



Why Has Interception Been Overlooked?

- Public / legal debate conceptualises privacy as a media law issue
- Some media discussion of mass surveillance (data retention), little discussion of targeted surveillance
- Almost no caselaw considering interception
 - Using material for intelligence rather than prosecution purposes



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The International Legal Framework

- Article 8 ECHR

- (1) Everyone has the right to respect for his private and family life, his home and correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such *as is in accordance with the law and is necessary in a democratic society...*

- Covers public and private telecoms networks (*Halford v. UK*)



“In accordance with the law”?

- Law must be “**adequately accessible**” to the citizen, “**formulated with sufficient precision**” so as to provide “a measure of legal protection ... against arbitrary interferences by public authorities”

- *Malone v. UK* (1984)



“In accordance with the law”?

- Secret surveillance must be accompanied by **“adequate and effective guarantees against abuse”** including **effective supervisory control by an independent body**
 - *Klass v. Germany* (1978)



“In accordance with the law”?

- Should specify **“nature of the offences which may give rise to such an order ... a limit on the duration ... the procedure for drawing up the summary reports containing intercepted conversations ... circumstances in which recordings may or must be erased.”**

Mere administrative practices are insufficient

- *Kruslin v. France* (1990)



e-Privacy Directive (2002)

- Art. 5(1) - "Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services..."

In particular, they **shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications .."**



Domestic Law

- Interception prohibited by s.98, Postal and Telecommunications Services Act 1983
 - “A person who—
 - (a) intercepts or attempts to intercept ... telecommunications messages being transmitted by [*an authorised undertaking*] or who discloses the existence, substance or purport of any such message which has been intercepted or uses for any purpose any information obtained from any such message shall be guilty of an offence.”



Irish Law

- Safeguards provided by Interception of Postal Packets and Telecommunications Act 1993
 - Ministerial warrant required
 - Limitation to serious crime
 - Annual review by Designated Judge
 - Complaints Referee available



Limitations When Applied to the Internet?

- Covers only communications via “authorised undertakings”
 - Historical relic from days of Telecom Éireann
 - Excludes operators who do not need authorisations
 - webmail (e.g. Hotmail)
 - VOIP (e.g. Skype)
 - private networks (e.g. UCD)
 - private messaging (e.g. via bulletin boards)
- Limited to “messages being transmitted”
 - Stored voicemail, email, sms, etc. apparently not covered



Implications?

- Interceptions by private parties falling outside the scope of s.98 would not be prohibited
 - Violating Art. 5(1) e-Privacy Directive
- Police interceptions of material outside the scope of s.98 not subject to protections of 1993 Act
 - No ministerial warrant required
 - No judicial supervision
 - No requirement of proportionality
 - Not “in accordance with law” under Art. 8 ECHR
 - Not “legally authorised” under e-Privacy Directive
 - Possibly jeopardising admissibility?



Oversight

- One page annual report
- Limited to examination of Garda / Army records
- No review of telco. operations
- No statistics

REPORT OF THE DESIGNATED JUDGE PURSUANT TO SECTION 8(2) OF
THE INTERCEPTION OF POSTAL PACKETS AND
TELECOMMUNICATIONS MESSAGES (REGULATION) ACT 1993
AND THE CRIMINAL JUSTICE (TERRORIST OFFENCES) ACT 2005

1. Since taking up my appointment as Designated Judge on 30th December, 2007, I have kept the operation of the above Acts under review.
2. On 4th December, 2008, I attended at the headquarters of An Garda Síochána at "The Depot", Phoenix Park, Dublin, and later on the same date at the headquarters of the Army in McKee Barracks, Blackhorse Avenue, Dublin, and at the offices of the Department of Justice, Equality and Law Reform, St. Stephen's Green, Dublin.

In each of these locations, such documents and records pertaining to the operation of the above Acts, as were requested by me, were made available and were examined by me. I also spoke with the persons with responsibility for the operation of the above Acts in each location and all of my queries were answered to my satisfaction.
3. As a result of the foregoing, I am satisfied that there is compliance with the provisions of the above Acts.



Iarfhlaith O'Neill
5th December, 2008



Suggestion for Reform

- Government commitment to legislate for Cybercrime Convention (2001)
- Art. 3 requires parties to provide for an offence of illegal interception:
 - “to establish as criminal offences ... when committed intentionally, the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system ...”
- An ideal opportunity for wider reform?



Thank you

Questions or comments?

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