

U.S. court OKs border laptop searches

Electronic devices can be searched at border without warrant, court rules

Lawyers throughout North America are trying to come to grips with the fallout of a court decision in the United States that has opened the flood gates on more thorough border searches of electronic devices.

In *United States v. Romm*, a California court was confronted with a difficult case involving the search of data contained in a laptop held by an individual who attempted to enter Canada but was returned to the United States as an inadmissible person due to a previous criminal conviction.

The court was called upon to decide whether, absent a search warrant or probable cause, the contents of a laptop computer may be searched at an international border.

Worker surfed child porn

The defendant, Stuart Romm, connected to the Internet from a Las Vegas hotel room and visited websites containing images of child pornography. As he viewed the images online and enlarged them on his screen, his computer automatically saved copies of the images to his Internet cache.

Denied entry to Canada

Romm was attending a training seminar held by his employer in Las Vegas. When it ended, he flew from Las Vegas to Kelowna, B.C., on business. However, at the airport in British Columbia, Canada's Border Services Agency (CBSA) discovered Romm had a criminal history and directed him for further questioning. Romm admitted he had a criminal record and was currently on probation.

The CBSA agent asked Romm to turn on his laptop and briefly



LEGAL VIEW

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examined it. Several child pornography websites appeared in the laptop's Internet history. The CBSA agent asked Romm if he had violated the terms of his probation by visiting those websites, and Romm said yes. Romm was placed under detention until he could take the next flight to Seattle. At the same time, CBSA agents informed U.S. Customs in Seattle that Romm had been denied entry and probably had illegal images on his computer, a violation of his probation order.

Upon arrival at the Seattle-Tacoma Airport, Romm was interviewed by agents from Immigration and Customs Enforcement (ICE). The agents arranged for a preliminary forensic analysis of the laptop hard drive, which revealed 10 images of child pornography. When confronted with the evidence, Romm admitted he had downloaded the images and breached the terms of his probation. The officers conducted the investigation as a "border search" and never obtained a warrant to examine the data contained in the laptop.

At trial, Romm's defence counsel moved to suppress the evidence obtained through the bor-

der search of his laptop. However, the court denied that motion and Romm was convicted of possession of child pornography.

The legality of the search

The most important issue arising out of the facts of this case was the legality of the laptop search. The court held that the forensic analysis of Romm's laptop fell under the "border search" exception to the requirement to obtain a warrant. Under this exception, the government may conduct searches of persons entering the U.S. without probable cause, reasonable suspicion or a warrant, as previously held in *United States v. Montoya De Hernandez*.

The court also affirmed that, for the purposes of the Fourth Amendment of the U.S. Constitution protecting individuals from unreasonable search and seizure, an international airport terminal is the "functional equivalent" of a border. Thus, passengers disembarking from an international flight are subject to routine border searches.

The court rejected Romm's contention that the search was illegal and required a warrant because he never legally crossed the U.S.-Canada border.

The court held there is no authority for the proposition that a person who fails to obtain legal entry at his destination may freely re-enter the United States. On the contrary, he may be searched just like any other person crossing the border. The court further held that the border search doctrine is not limited to those cases where the searching officers have reason to suspect that the entrant may be carrying foreign contraband.

Instead, "searches made at the border are reasonable simply by virtue of the fact that they occur at the border," as the court previously held in *United States v. Flores-Montano*, quoting *United States v. Ramsey*. Thus, the court held that the routine border search of Romm's laptop was reasonable and a warrant was not necessary.

Decision sends 'shock waves'

The decision has sent shock waves through the legal profession in the U.S. and Canada, and has raised serious concerns about the limits of border searches made without warrants. Interestingly enough, the court in this case, based in San Francisco, is generally known for its liberal views, so this decision comes as somewhat of a surprise to legal observers.

While Romm deserves no sympathy for his actions, the decision may result in further searches of laptop data at U.S. borders and airports. Practitioners must be careful and advise clients concerning the risks involved in international travel, including the prospect that the data contained in laptops and electronic devices can be searched without a warrant at a U.S. port of entry.

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