

Privacy at risk

Can your laptop be searched at the border?

By Sergio Karas

Lawyers throughout North America are trying to come to grips with the fallout of a decision by the Ninth Circuit Court of Appeals of the United States, which held that computer devices and the data they contain can be thoroughly examined at the border. The rulings opened the floodgates to more thorough border-crossing searches.

probation and that possession of the images violated it. 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.

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However, even as the ink on that decision was beginning to dry, another opinion released by a court in the Central District of California, in the same Ninth Circuit, reached the opposite conclusion, adding to the confusion of an otherwise settled doctrine of border searches of persons and their goods.

In the first case, *U.S. v. Romm*, the defendant connected to the Internet from a Las Vegas hotel room and visited websites containing images of child pornography, of which his computer automatically saved copies on his "internet cache." When he flew from Las Vegas to Kelowna, B.C., on business, the Canada Border Services Agency (CBSA) discovered that he had a criminal history and directed him for further questioning.

The CBSA agent asked Romm to turn on his laptop and briefly examined it, finding several child pornography websites in the laptop "internet history." Romm admitted that he was on

analysis of the laptop hard drive by an expert using complex software tools, which revealed ten images of child pornography. The officers conducted the investigation as a "border search" and never obtained a warrant to examine the data contained in the laptop. Before trial, Romm's defense counsel moved to suppress the evidence obtained through the search of his laptop. The court denied that motion and convicted Romm, who appealed.

The Ninth Circuit Court of Appeals 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 United States without probable cause, reasonable suspicion or a warrant. The court also affirmed that, for the purposes of the Fourth Amendment, an international airport terminal is the "functional

equivalent" of a border. Therefore, passengers deplaning from an international flight are subject to routine border searches.

The decision of the Ninth Circuit Court of Appeals in *U.S. v. Romm* sent shockwaves through the legal profession in the United States and Canada, and has raised serious concerns about the limits of border searches conducted without warrants. While Romm deserves no sympathy for his actions, the decision may result in very thorough searches of electronic data at U.S. borders and airports.

In an October 2006 ruling in the Ninth Circuit, however, the Central District of California appears to have taken a different position. In *U.S. v. Arnold*, another case involving child porn found on a laptop owned by a person entering the U.S., the court held that Customs agents do not have free reign to search files on a laptop computer.

The court compared a search of the private information stored on a computer with a strip or body cavity search, ruling that electronic storage devices were an "extension" of the person, unique in its storage capabilities. "[E]lectronic storage devices function as an extension of our own memory," the court said. "They are capable of storing our thoughts, ranging from the most whimsical to the most profound.

"Therefore, government intrusions into the mind — specifically those that would cause fear or apprehension in a reasonable person — are no less deserving of Fourth Amendment scrutiny than intrusions that are physical in nature." The court concluded that such a border search must be based, at a minimum, on a reasonable suspicion.

The *U.S. v. Arnold* decision appears to be somewhat far-fetched and at odds with well-established jurisprudence on earlier decisions like *U.S. v. Flores-Montano* and *U.S. v. Ickes*.

Accordingly, practitioners must be careful and advise clients concerning the risks involved in international travel. They must add the prospect that the data contained in laptops and electronic devices can be searched without a warrant at a U.S. port of entry. ■

Sergio R. Karas is a Certified Specialist in Canadian Citizenship and Immigration Law by the Law Society of Upper Canada. He is current Vice-Chair of the Ontario Bar Association Citizenship and Immigration Section and co-Chair of the International Bar Association Immigration and Nationality Committee.