

# **PRIVACY AT RISK:**

## **LAPTOPS CAN BE SEARCHED AT THE BORDER**

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Lawyers throughout North America are trying to come to grips with the fallout of a decision by the 9<sup>th</sup> Circuit Court of Appeals of the United States. The opinion of the Court has opened the flood gates on more thorough border crossing searches of electronic devices.

In *U.S. v. Romm* 455 F.3d 990 (9th Cir. July 24, 2006). the court was confronted with a difficult case, which involved 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.

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". Based on forty images deleted from his internet cache and two images deleted from another part of his hard drive, he was convicted of knowingly receiving and knowingly possessing child pornography, in violation of U.S. law.

Romm had attended a training seminar held by his new employer in Las Vegas, Nevada. When the training seminar ended, he flew from Las Vegas to Kelowna,

B.C., on business. However, at the airport in B.C., Canada's Border Services Agency (CBSA) discovered that Romm had a criminal history and directed him for further questioning. At that time, Romm admitted that he had a criminal record and was currently on probation. The CBSA agent asked Romm to turn on his laptop and briefly examined it, when several child pornography websites appeared in the laptop "internet history". The CBSA agent asked Romm if he had violated the terms of his probation by visiting those websites, and Romm answered in the affirmative. Romm was placed under detention until he could take the next flight to Seattle, WA. However, 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 the Immigration and Customs Enforcement (ICE). The agents arranged for a preliminary forensic analysis of the laptop hard drive, which revealed ten images of child pornography. When confronted with the evidence, Romm admitted that he had downloaded the images and breeched 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, the U.S. government called three witnesses to testify about the forensic analysis of the hard drive in Romm's laptop, who described the use of different types of software to recover deleted files. The government also let evidence to show when the images were downloaded, viewed and deleted. Before trial, Romm's defense counsel moved to suppress the evidence obtained through the border search of his laptop. However, the court denied that motion. Romm was convicted of possession of child pornography and appealed the convictions.

The most important issue arising out of the facts of this case was the legality of the laptop search. The 9<sup>th</sup> Circuit Court of Appeal 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, as previously held in *United States v. Montoya De Hernandez*, 473 U.S. 531, 538, [1985]. The court also affirmed that, for the purposes of the Fourth Amendment of the United States Constitution protecting individuals from unreasonable search and seizure, an international airport terminal is the "functional equivalent" of a border. Thus, passengers deplaning 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, as he had

been denied entry to Canada. The court held that there is no authority for the proposition that a person who fails to obtain legal entry at his destination may freely reenter the United States: to the contrary, he or she 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*, 541 U.S., 149, 152-53 [2004], quoting *United States v. Ramsey*, 431 U.S., 606, 616 [1977]. Thus, the court held that the routine border search of Romm’s laptop was reasonable and a warrant was not necessary.

The decision of the 9<sup>th</sup> Circuit has sent shockwaves through the legal profession in the United States and Canada, and has raised serious concerns about the limits of border searches made without warrants. Interestingly enough, the 9<sup>th</sup> Circuit Court of Appeals, based in San Francisco, is generally known for its liberal views, so this decision comes as somewhat of a surprise to legal observers. While Mr. 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, and now, 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.