

The Federal Government (U.S. Customs) Will Seize Any Electronic Intellectual Property, Without Suspicion, From American Travelers Entering the U.S.

Fact Sheet – Updated January 2011

“A landmark case was filed on Sept. 7, 2010 by Pascal Abidor, a US citizen, and joined by the National Press Photographers Association to find unconstitutional the U.S. government’s policy of unrestricted searches of electronic devices at the border. The government continues to defend this controversial practice and has asked the Federal Court in New York to dismiss the case.”

– John Gurley, *Arent Fox*
Counsel for the Arab-American Anti-discrimination Committee,
who intends to file an amicus brief in this case.

Overview

Millions of travelers enter the United States on a yearly basis carrying electronic devices – cell phones, laptops, MP3 players, I-Pads, thumb-drives, and clones, tablets – for both personal and business use. The U.S. federal government's Customs Service maintains that the government has the right to seize, “detain,” download, and examine the content of ANY electronic device belong to ANY person – without ANY individualized suspicion – at the time of entry into the U.S.

Privacy Rights Watch (PRW) believes that the information contained on laptops or other electronic devices is an extension of a person's thoughts, personal expression, and may include proprietary business information and thus, should be regarded differently than a piece of luggage. While PRW does not encourage or condone travelers hiding misappropriated property or information from government officials, PRW does seek the requirement of reasonable grounds for search and seizure of electronic devices and the content they keep.

- In 2008, A federal appeals court in Pasadena, Calif., ruled that the federal government has a nearly absolute right to inspect the contents of the laptop computers and other electronic devices of international travelers entering the U.S., even without “reasonable suspicion.” More recently, the Obama Administration has at least established procedures for returning Customs-seized electronic devices to owners within seven days -- but maintains the federal government's complete intrusive ability to seize and download any persons electronic content.
- What is not yet clear: Can the government force a person to reveal a password?
- The Founding Fathers adopted the Bill of Rights “against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. *Marcus*, 367 U.S. at 729. Surveillance of private communications therefore poses a grave danger to free speech.
- Congress has noted that “the law must advance with the technology to ensure the continued vitality of the fourth amendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances.” S. Rep. No. 99-541, at 5 (1996). Thus, “[t]he question we confront today is what limits there are upon [the] power of technology to shrink the realm of guaranteed privacy.”

Read It And Weep:

The Absence of American's Electronic Privacy Rights at U.S. Customs

The sections below are excerpts of internal U.S. Customs and Border Protection guidance with respect to search and seizure of Electronic devices and information belonging to U.S. Citizens (who might have thought they were protected by the U.S. Constitution and Bill of Rights):

Customs and Border Protection

Directive No. 3340-049

Dated: August 20, 2009

Subject: Border Search of Electronic Devices Containing Information

Sections:

- 5.1.2 “In the course of a border search, with or without individualized suspicion, an Officer may examine electronic devices and may review and analyze the information encountered at the border, subject to the requirements and limitations provided herein...”
- 5.1.4 “Searches of electronic devices should be conducted in the presence of the individual whose information is being examined unless there are national security law enforcement or other operational considerations that make it inappropriate to permit the individual to remain present. Permitting an individual to be present in the room during a search does not necessarily mean that the individual will be permitted to witness the search itself...”
- 5.2.1 “Legal materials are not necessarily exempt from a border search...”
- 5.2.2 “[at the border] ...sensitive information, such as medical records and work-related information carried by journalists shall be handled in accordance with any applicable federal law...Questions regarding the review of these materials shall be directed to the CBP Associate/Assistant Chief Counsel...”
- 5.3.1 “ An Officer may detain electronic devices...for a brief, reasonable period of time to perform a thorough border search. The search may take place on-site or at an off-site location...the detention of devices ordinarily should not exceed five (5) days.”
- 5.3.1.1 “...extension of detentions exceeding fifteen (15) days must be approved...”
- 5.3.2.2 “...officers may sometimes have technical difficulties in conducting search of electronic devices...Officers may seek such assistance...from other federal agencies... with or without individualized suspicion.”
- 5.4.1.3 “Nothing in this directive limits the authority of CBP to share copies of Information...with federal, state, local, and foreign law enforcement agencies...”
- 8. “This Directive is an internal policy statement of U.S. Customs and Border Protection and does not create or confer any rights, privileges, or benefits to any person or party.”