FOURTH AMENDMENT APPLICABILITY: EXPECTATIONS OF PRIVACY/PRIVATE SEARCHES

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OBJECTIVES:

After this session you will be able to:

1. Summarize the current framework utilized by the Supreme Court to measure reasonable expectations of privacy; and
2. Apply that framework to various locations where digital evidence may be found.

REQUIRED READING: PAGE

Fourth Amendment Applicability
Considerations Involving Digital Evidence

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Published search and seizure appellate ct. decisions

<table>
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<th>STATE</th>
<th>FEDERAL</th>
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Applicability and Satisfaction

IN EVERY CASE, ....

1. **Does the 4th Apply?**
   A. Gov’t activity: “Search” or “Seizure”
   B. Protected interest: Liberty, possession, privacy

2. **Is it Satisfied?**
   “Reasonable”
   Warrant Clause requirements

[3. Remedies?]
Digital Evidence Searches and Seizures

1. Is the Fourth Amendment applicable?
   - Inside the box vs. outside the box

2. Is it satisfied?
   - Two approaches to digital evidence
   - Conceptual difficulties of applying traditional doctrines to digital evidence

“Inside the box, outside the box”

The Box

Outside the box: Network investigations

Typical Steps in Digital Investigation

Outside the box: Network investigations
   - Tracing electronic communications
   - Identifying suspect and account

Getting to and inside the Box:
   - Identifying who was at keyboard when crime occurred
   - Locating computers to be searched
   - Obtaining warrant or consent to search
   - Searching and seizing evidence
   - Forensic analysis
When does person have REP in data in computer?

Case law has examined variety of situations:
1. Person’s own computer
   - Info on screen
   - Data in computer
2. Work and gov’t computers
   - Monitoring and other policies that affect REP
   - Who has access to computer?

Non-consensual interception of communications, etc, over the Internet to another party
Example: email

Possible analogies:
   - It’s like a letter in the mail
   - It’s like numbers dialed on a telephone
   - It’s like any info possessed by third party

Congress / states have enacted some statutory regulation of computer network investigations:
   - Stored Communications Act
   - Wiretap Act
   - Pen Register / Trap and Trace
Traditional F/A Doctrine

No F/A protection from 3rd party disclosures to gov't

Rationale: Risk Analysis -- Voluntary Exposure

- Misplaced belief to whom voluntarily confides will not reveal secret (Miller)
- Such “risk” is “probably inherent in the conditions of human society” (Hoffa)
- Vol. exposure to public eliminates F/A protection (Katz)

Voluntary Disclosure

Assume risk that third party will disclose information, item to gov't

Peer-to-Peer (P2P) Networks

File-sharing technology - Creates virtual networks

Criminal activity:
- Copyright Infringement
- Computer Hacking
  - Worms -- Viruses -- Theft of information
- Child Exploitation and Pornography
How Gnutella Works

Considerations

- User on Internet voluntarily
- User decides, through settings in software, how much of computer open to others on Internet
- Every download exact duplicate of original
Law Enforcement Response

Search file sharing networks for known child porn images

Questions:

- "Search" w/ in meaning of 4th Amendment?
- Does user connected to Internet via P2P have reasonable expectation of privacy in files in shared folders?

Operation Fairplay

U.S. v. Ganoe, 538 F.3d 1117 (9th Cir. 2008)

"To argue that Ganoe lacked the technical savvy or good sense to configure Lime Wire to prevent access to his child pornography files is like saying that he did not know enough to close his drapes."

No REP in P2P
**Connecting Computer to Local Network**

**US v. King, 509 F.3d 1338 (11th Cir. 2007)**
- Connected own laptop in dorm room to military base network
- Knew activities on network subject to monitoring
- Airman looking for music found porn on King's computer
- After report, investigator located King's computer on network
  - Found porn file
  - Additional CP files

**[H]ard drive contents “akin to items stored in the unsecured areas of a multi-unit apartment building or put in dumpster accessible to the public”**

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**Same principles applied --**

**No F/A protection against**

1. Disclosure of subscriber info by ISPs
2. Email recovered from recipient  
3. Internet chat rooms
4. Posting Info on a Website

**Doctrines:**
- Voluntary exposure
- Assumption of risk

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**Application of Principles to --**

1. Virtual worlds
2. Cloud computing
3. Web based data storage

**What are the relevant considerations?**
Virtual Worlds


Create own virtual space
chat and interact with your friends in rooms you create

Express yourself
customize your avatar and stream personal videos and photos

Add your room to your site
Invite your friends to chat and decorate

Virtual Worlds

AVATAR = Graphical representation of you.
(note) = It’s probably not a realistic depiction.

Virtual Porn
Rooms in Virtual World

Getting More Cloudy!

Legacy Locker

This safe and easy way to back up your online accounts to protect them when disaster strikes.

Sign Up Now
Quon: Some Answers?

- Cop sent text messages to wife, mistress via gov’t issued pager
- Agency reviewed printouts obtained from provider to determine if needed more capacity for police business

Issues:
1. Quon have REP in messages?
2. Wife / mistress have REP in messages?

Police Pager Policies

- Formal Written Policy
  - Explicitly said user had no REP
  - Could audit, monitor, or log all activity
  - Not for personal use
  - Quon aware of and signed
- “Informal Policy”
  - Lt. Duke: You pay overages, will not audit

Should Quon be treated differently than wife / mistress?

Possible analogies as to the women:
- It’s like letter in mail
- It’s like numbers dialed on telephone
- It’s like any info possessed by third party
Extended discussion in --


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