FOURTH AMENDMENT APPLICABILITY: PRIVATE SEARCHES

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INTRODUCTION

Individuals have a right under the Fourth Amendment of the United States Constitution to be free from unreasonable searches and seizures by the government.[1] As such, before reaching the issue as to the lawfulness of a warrantless police intrusion, a determination must be made as to whether the intrusion was even a search as contemplated by the Fourth Amendment.[2] A search or seizure carried out by a private individual, even if it is unreasonable, does not implicate the Fourth Amendment.[3] Furthermore, to be a Fourth Amendment search, the governmental intrusion must infringe on a legitimate expectation of privacy.[4] The Supreme Court adopted the two-part test set forth by Justice Harlan in *Katz v. United States*[5] to determine whether the person's expectation of privacy is legitimate: (1) the person must hold an actual, subjective expectation of privacy, and (2) society must be prepared to recognize that expectation as objectively reasonable[6].

The outline will begin with an overview of the private search doctrine. The second section of this outline will discuss the status of the person conducting the search. Was he an agent of the government or a private party? How is this determination made? The third section will focus on replication of private searches; what constitutes a replication and under what circumstances might an official search that appears to have exceeded the scope of a private search be deemed permissible?

I. PRIVATE SEARCH DOCTRINE

A Government search that merely replicates a previous private search is not a "search" under the Fourth Amendment; instead, it will be judged according to the degree that it exceeded the scope of the private search.[7] A private search extinguishes an individual's reasonable expectation of privacy in the object

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[1] U.S. CONST. amend. IV.
[2] *See,* United States v. Miller, 152 F.3d 813, 815 (8th Cir. 1998).
[3] *See, e.g.,* United States v. Jacobsen, 466 U.S. 109, 113 (1984).
[4] *See, e.g., Id;* United States v. Miller, 152 F.3d at 815.
[5] Katz v. United States, 389 U.S. 347, 357 (1967) (Harlan, J., concurring).
[6] *Id.* at 360-62.
[7] United States v. Jacobsen, 466 U.S. 109, 115 (1984).

searched;[8] once this has occurred, the Fourth Amendment does not prohibit governmental use of this non-private information.[9]

II. Private Citizen or Government Agent?

Although a wrongful search or seizure conducted by a private party does not violate the fourth amendment, a private citizen's actions may in some instances be considered state action.[10] This question as to whether an individual was a private person or an agent of the state comes up time and again since evidence located on computers is often initially discovered by a computer technician, hacker, or other third party who inadvertently stumbles across the material.

A. General Principle:

Determining the existence of an agency relationship between the Government and the private party conducting the search turns on the degree of the Government's involvement in the private party's activities. This is done on a case-by-case basis, viewing the totality of circumstances.[11]

Courts routinely look to two critical factors in making a determination as to whether an individual was acting as a government agent: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor's purpose was to assist law enforcement rather than to further his own ends.[12]

While no agency relationship can be found if the Government did not know of or acquiesce to the search by the private party, it is generally held that something more than "mere knowledge and passive acquiescence by the Government" is required.[13]

For example, in *United States v. Leffall*,[14] the Tenth Circuit held that the government agent must be involved directly as a participant (not a mere

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[8] *Jacobsen*, 466 U.S. at 117.
[9] *Jacobsen*, 466 U.S. at 117.
[10] Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971).
[11] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-15 (1989).
[12] *See, e.g.,* United States v. Soderstrand, 412 F.3d 1146, 1153 (10th Cir. 2005); United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003); United States v. Grimes, 244 F.3d 375, 383 (5th Cir. 2001); United States v. Jarrett, 338 F.3d 339, 345 (4th Cir. 2003).
[13] United States v. Jarrett, 338 F.3d 339, 345 (4th Cir. 2003); United States v. Ellyson, 326 F.3d 522, 527-38 (4th Cir. 2003); United States v. Smythe, 84 F.3d 1240, 1242-43 (10th Cir. 1996); United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988); People v. Wilkinson, 78 Cal.Rptr.3d 501, 511 (2008).
[14] United States v. Leffall, 82 F.3d 343 (10th Cir. 1996).

witness), or indirectly as an encourager of the private person's search.[15] The Seventh Circuit in *United States v. Crowley*,[16] noted that one of the factors to be considered in determining whether the person was an agent of the state was whether the government requested the action or offered the individual a reward.[17]

B. **Applicability to the digital world**

1. Computer repairmen

   Courts have consistently held that the observation of files on a defendant's computer by a computer technician constitutes a private search, and as such, the Fourth Amendment is inapplicable.[18]

   - This conclusion is not difficult to reach in cases where there are no communications between the repairman and the government until after the evidence is discovered. A search initiated by a repairman or technician in the ordinary course of his business is not a search under the Fourth Amendment, and as a private individual he is free to turn any evidence he finds over to law enforcement.[19] Upon this basic framework the court in *State v. Horton*[20] found that the examination of defendant's computer by a computer technician was a private search; evidence that the discovery of child pornography was inadvertent added support to the conclusion that the acts by the technician were not connected with the authority of the state.[21]

     Having reached the conclusion that the examination was a private one, the court in *Horton* considered whether the evidence would nevertheless be subject to suppression as a matter of state constitutional law under Article 1, section 5 of the Louisiana Constitution,[22] which protects individuals from unreasonable invasions of privacy as well as unreasonable searches and seizures.

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[15] *Id.* At 347.
[16] United States v. Crowley, 285 F.3d 553 (7th Cir. 2002).
[17] *Id.,* at 558.
[18] *See, e.g.,* United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998); United States v. Barth, 26 F. Supp. 2d 929, 932-35 (W.D. Tex. 1998); Commonwealth v. Sodomsky, 2007 PA Super. 369, 939 A.2d 363, 368; People v. Phillips, 805 N.E.2d 667, 673-74 (Ill. App. 2004).
[19] United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998).
[20] State v. Horton, (La. App. 2 Cir. 6/20/07) 962 So.2d 459, 463.
[21] *Id.,* at 464.
[22] LA. CONST. art.1, § 5.

However, the court found it unnecessary to decide whether the state constitution extends to private searches,[23] since the evidence before them did not establish that the defendant had a legitimate expectation of privacy in the computer file containing child pornography.[24] The defendant took no steps to secure the images in the file before voluntarily relinquishing his computer to the technician.[25]

- The court in *State v. Lasaga*[26] held that a student employed by a university as a computer technician was not acting as an agent of the state when he monitored defendant's computer and discovered that the defendant was downloading child pornography. The court reasoned that the police did not ask the student to monitor the computer, there was no prior relationship between the student and the police, and the police did not reward or offer the student anything in return for the information.[27]

  After providing police with computer logs and a disk containing images obtained from the defendant's computer, the student continued to monitor defendant's computer and provide police with information. The court noted that while there was conflicting testimony as to whether the student did this of his own accord or was requested to do so by the police, the record supported the trial court's conclusion that the level of police involvement did not serve to create an agency relationship.[28]

2. Computer hackers
   It may become more difficult to determine if a computer hacker who furnishes information to authorities is a private individual or an agent of the state as the contacts between the hacker and government official increase, and it looks like an on-going relationship. However, the analysis is the same, and the answer turns on the degree of the Government's participation in the hacker's actions taking into consideration the totality of the circumstances.[29]

   - The case of "Unknownuser" -

[23] *Horton*, 962 So.2d at 465.
[24] *Id.*
[25] *Horton*, 962 So.2d at 464.
[26] State v. Lasaga, 848 A.2d 1149 (Conn. 2004).
[27] *Id.* at 1157.
[28] *Id.*
[29] United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003).

- In *United States v. Jarrett*,[30] the court was faced with the issue as to whether a computer hacker with the user name "Unknownuser" was acting as a private citizen or an agent of the state when he hacked into Jarrett's computer and provided information to law enforcement regarding child pornography. First, Unknownuser attached a Trojan Horse program to a photo that he posted to a news group frequented by pornography enthusiasts. When anyone downloaded the photo, they also downloaded the Trojan Horse program, which provided Unknownuser access to their computers.[31] Unknownuser had previously provided authorities with information that had resulted in child pornography indictments and ultimately, convictions. *See United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003).[32]

- The contact between Unknownuser and law enforcement did not end when he gave them the information. After Steiger's indictment, FBI agent Murphy contacted Unknownuser via email in hopes of persuading him to testify at trial, assuring him that he would not be prosecuted for hacking. When Unknownuser refused, the agent thanked him for his assistance and in closing his email told Unknownuser, "If you want to bring other information forward, I am available."[33] Several months later, the agent Murphy contacted Unknownuser to tell him that Steiger's trial had been postponed. The agent again thanked him for his assistance, and repeated the promise that he would not be prosecuted for hacking if he testified at Steiger's trial.[34]

- Meanwhile, Unknownuser continued hacking into computers and in the course of doing so, uncovered information that served as the basis for a search warrant against Jarrett.[35] In determining Unknownuser's status, the Fourth Circuit considered whether the Government knew of and acquiesced in his search, and whether the purpose of the search was to assist law enforcement or further his own needs. Since the Government conceded that Unknownuser's purpose was to aid law enforcement, the court focused on whether the acts by the

[30] United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003).
[31] United States v. Jarrett, 338 F.3d 339, 341 (4th Cir. 2003).
[32] United States v. Steiger, 318 F.3d 1039 (11th Cir. 2003).
[33] *Jarrett*, 338 F.3d at 341.
[34] *Id.*
[35] *Id.* at 342.

Government transformed Unknownuser into an agent.[36] The court found that there was not an agency relationship, asserting that mere acquiescence is insufficient, and there must be some evidence that the Government participated in or affirmatively encouraged the private search.[37] The court characterized the statements made by FBI agent Murphy as a mere expression of gratitude, which did not suffice to create an agency relationship.[38]

- Following Jarrett's arrest, another FBI agent began a correspondence with Unknownuser in which she said she could not ask him to provide the authorities with more information as that would make him an agent of the state and make the information unusable. But she encouraged him to send more information and said he would not be prosecuted for hacking. The Fourth Circuit saw this exchange as "probably" the sort of Government participation sufficient to create an agency relationship,[39] but since the agent's knowledge an acquiescence was post-search, it could not serve to transform the prior relationship between Unknownuser and the Government into an agency relationship.[40]

II. REPLICATION ISSUES

A. General Principle

Once a private search is conducted, the original expectation of privacy is frustrated, and as such, the Fourth Amendment does not prohibit Governmental use of the now non-private information. [41] Illustrative of this point is *United States v. Jacobsen*[42] in which the Supreme Court held that the government's replication of a prior private examination was not a "search" because the defendant no longer had an expectation of privacy in the package.[43] In *Jacobsen*, Federal Express employees examined a damaged package that contained a cardboard tube wrapped in crumpled newspaper. The employees removed from the tube several clear plastic bags containing a white powdery substance. The employees put the bags back in the tube, the tube and packing material in the box, and contacted federal agents. When the agent arrived he removed the tube from the box and the plastic bags from the

[36] *Id.* at 345.
[37] United States v. Jarrett, 338 F.3d at 345-46.
[38] *Id.* at 346.
[39] *Id.*
[40] *Id.*
[41] United States v. Jacobsen, 466 U.S. 109, 117 (1984).
[42] United States v. Jacobsen, 466 U.S. 109 (1984).
[43] *Id.* at 119.

tube. The Court found that the Fourth Amendment was not implicated by the agent's actions since his acts enabled him to learn nothing that had not already been learned by the private search.[44]

B. Expectation of Privacy: A Contextual Analysis?

1. Generally: It is well-settled that in order to be a "search" under the Fourth Amendment, there must be a legitimate expectation of privacy invaded by the government. Are there circumstances in which a private search can extinguish the expectation of privacy in objects not examined during the private search? If the answer is "yes," - a private examination of part of an object can destroy the expectation of privacy as to the whole, any subsequent search by the government, even if it exceeds the scope of the private search, is not a "search" under the Fourth Amendment.

- This issue was before the Court in *Walter v. United States*,[45] in which the government argued that the private examination of packages that revealed boxes of films destroyed any reasonable expectation of privacy in the content of the films. In *Walter*, 12 packages were delivered to the wrong company.[46] When employees opened the packages, they discovered 871 boxes of 8-millimeter film; each box was labeled with a suggestive drawing as well as an explicit description of the contents.[47] One employee tried unsuccessfully to view the contents of a sampling of the films by holding the film up to the light.[48] The employees then contacted federal agents who viewed the films with a projector.[49]

  - The Supreme Court did not produce a majority opinion, but the opinion authored by Justice Stevens, held that the government's search of the films (viewing by use of a projector) violated the Fourth Amendment, because it exceeded the scope of the prior private search.[50] Justice Stevens maintained that just as a lawful official search is limited by the particular terms of its authorization, there must be a strict limitation to any official use of information gained through a private party's invasion of another's privacy.[51]

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[44] *Jacobsen*, 466 U.S. at 120 (the Court likewise held the field test conducted by the agent that revealed the substance to be cocaine did not implicate the Fourth Amendment as there is no legitimate privacy interest in the possession of contraband).
[45] Walter v. United States, 447 U.S. 649 (1980).
[46] *Id.* at 651.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 659.
[51] *Walter*, 447 U.S. at 659.

- Justice Stevens' reasoned that when the private party unwrapped the containers and revealed the labels on the film canisters, the sender's expectation of privacy was frustrated in part, but not altogether extinguished.[52] The subsequent projection of the films breached the remaining, unfrustrated portion of the sender's expectation of privacy.[53]

- The analysis as to the expectation of privacy was somewhat obscured by a comment that Stevens made in a footnote in which he seemed to indicate that there might be no expectation of privacy in a container if the contents can be ascertained by information outside the container. He noted that one would not have a reasonable expectation of privacy in the contents of a gun case, whereas he would if the gun case was enclosed in the locked suitcase.[54]

- In his dissent, Justice Blackmun asserted that because the private search revealed the pictures and labels describing the nature of the films, there was no remaining expectation of privacy in the contents of the films.[55] Accordingly, the viewing of the films by the FBI was not an additional search.[56] Addressing Stevens' gun case hypothetical, Justice Blakmun wrote: "The films in question were in a state no different from Mr. Justice Stevens' hypothetical gun case when they reached the FBI. Their contents were obvious from the 'condition of the package,'…and those contents had been exposed as a result of a purely private search that did not implicate the Fourth Amendment."[57]

2. Expectation of Privacy in Computers

Whereas the analysis of a case in which the Government searches a shoe box following a private search of the same (one would have no problem classifying the Government's search as mere replication), it becomes less clear when the object searched is a computer. What is the proper analysis for determining whether police searching a computer exceeded the scope of a prior private search? To what does the expectation of privacy attach itself in regard to computers and other digital media: hard drives, folders, files, disks?

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[52] Walter v. United States, 447 U.S. 649, 659 (1980).
[53] *Id.*
[54] *Id.* at 658, n.12.
[55] *Id.* at 663.
[56] *Id.*
[57] *Id.* at 665.

- The court in *United States v. Runyan,*[58] faced the same type of inquiry as the *Walter* court; namely, did police exceed the scope of a private search when they examined more disks than were examined by the private searcher? Did they exceed the scope of the private search when, in examining the disk viewed by the private party, they viewed files not examined by the private party?

  Analogizing a computer disk to a closed container, the court held that police exceeded the scope of the private search when they opened more closed containers (disks) than the private party had opened, but not when they viewed more files on the disk than the private party had viewed. The court reasoned that the defendant lost his expectation of privacy in the entire disk when some of the files were viewed by the private party.[59]

  - In *Runyan,* the defendant's estranged wife and companions, while in the process of removing her belongings from the house she had once shared with the defendant, discovered what appeared to be child pornography. She took the images, a computer belonging to her, and a collection of 3.5 inch floppy disks, CDs, and ZIP disks. Although wife and friends did not examine the ZIP drives, they viewed approximately twenty of the CDs and floppy disks where they found more images of child pornography. They turned over all of the storage devices to the police, who examined all of the floppy disks, CDs, and ZIP drives.

  - The court recognized the tension among the circuits as to this issue. The Tenth and Fourth Circuits have held that if police open a new container they have, by definition exceeded the scope of the private search,[60] whereas the Eighth Circuit did not find such an act to be problematic under the Fourth Amendment. In *United States v Bowman*,[61] an airline employee opened an unclaimed suitcase and found five identical bundles. After unwrapping one bundle and finding a white powdery substance wrapped in plastic and duct tape, he contacted a federal narcotics agent. The agent identified the exposed bundle as a kilo brick of cocaine and proceeded to open the other four bundles. The court held that the agent's

[58] United States v. Runyan, 275 F.3d 449 (5th Cir. 2001).
[59] *Runyan*, 275 F.3d 449, 462 (5th Cir. 2001).
[60] *Id.* at 463.
[61] United States v. Bowman, 907 F.2d 63 (8th Cir. 1990).

opening of the four previously unopened bundles were not improper, in that "the presence of the cocaine in the exposed bundle 'spoke volumes as to [the] contents [of the remaining bundles] – particularly to the trained eye of the officer.' "[62]

- The court in *Runyan* found that the Supreme Court's decision in *United States v. Jacobsen*[63] which analyzed whether a search by police enabled them to learn more than had been learned during the private search served to reconcile the apparent split among circuits.[64] Relying on *Jacobsen*, the court stated that police exceed the scope of a prior private search if they examine a closed container that was not opened by the private searchers ***unless*** the police are already substantially certain of what is inside the container based on: (1) the statement of the private searcher, (2) their replication of the private search, and (3) their expertise.[65]

- By applying this guideline, the *Runyan* court held that the police clearly exceeded the scope of the private search when they opened disks that were not opened during the private search.[66] The police could not have concluded with reasonable certainty that all of the disks contained child pornography based on statements from the private searchers, information in plain view or their expertise.[67] The fact that the disks were found in the same location as the disks containing child pornography was not sufficient to establish with substantial certainty that all of the storage media contained child pornography.[68]

- The court then addressed whether the police exceeded the scope of the private search by examining more files on each of the disks than the private searchers, and held that they did not.[69] The *Runyan* court reasoned that police do not exceed the scope of a private search by performing a more thorough examination of the same materials previously examined by a

[62] United States v. Bowman, 907 F.2d 63, 65 (quoting United States v. Jacobsen, 466 U.S. 112, 121 (1984).
[63] United States v. Jacobsen, 466 U.S. 112 (1984).
[64] *Runyan*, 275 F.3d at 463.
[65] *Id.*
[66] *Id.* at 464.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 465.

private party.[70] Therefore, in the context of a closed container search, police do not exceed the scope of a private search by examining more items within the closed container than did the private searchers.[71]

- In *United States v. Emerson*,[72] the court asserted the fact that police viewed more images of child pornography than the private searcher was not alone determinative as to whether police exceeded the scope of the prior search.[73]

    - The *Emerson* court began its analysis with the assumption that computer file folders and perhaps even individual images are closed containers.[74] In *Emerson,* a computer repairman discovered two file folders (closed containers) on defendant's computer, both of which contained files with names describing children performing pornographic acts. The repairman opened some of the files within the folders, determined the images to be child pornography, and contacted police.

    - As to the images viewed by repairman and re-examined by police, the court found no invasion of defendant's privacy; since the search did enabled agents to learn nothing that had not already been learned during the private search.[75]

    - The court likewise found no problem with the portion of the search in which police opened additional files within the two file folders, reasoning: "The police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials *more thoroughly* than did the private parties. In the context of a closed container search … police do not exceed the private search when they examine *more items* within the closed container than did the private searchers."[76]

    - How does the holding in *Emerson* fit in with the holdings in *Walter*, *Runyan*, and *Bowman*, which also contemplate

[70] *Runyan*, 275 F.3d at 465 (citing United States v. Simpson, 904 F.2d 607, 610 (11th Cir. 1990)).
[71] *Runyan*, 275 F.3d at 464.
[72] United States v. Emerson, 766 N.Y.S.2d 482 (N.Y. Sup. Ct. 2003).
[73] *Emerson*, 766 N.Y.S.2d at 489.
[74] *Id.* at 488.
[75] *Id.* at 487.
[76] *Id.* at 490.

searches in which the government does not merely replicate a prior private search?

- The court in *Emerson* found it to be of critical significance that the private searcher actually viewed images of child pornography in the course of examining two file folders, whereas the private searcher in *Walter* did not view the contents of the films.[77] Emerson's expectation of privacy as to the contents of the two computer files was frustrated once the repairman gave this information to the authorities.[78]

- The portion of the search in *Runyan* that was found to exceed the scope of the prior private search occurred when police opened more of the defendant's CDs than the private searcher had. The *Emerson* court distinguished the case before them from *Runyan* on the facts; namely, that the defendant in *Runyan* had an expectation of privacy in the contents of the unopened CDs due to the very nature of CDs as storage devices that are "free standing" – not a part of the computer's hard drive,[79] unlike the images in *Emerson* located on the same hard drive in the same file folders that contained image files with titles clearly indicating the presence of contraband. The court asserted that the titles of the additional images spoke volumes as to their contents.

- The court in *Emerson* analogized the case before them to *Bowman*; the presence of cocaine in the privately opened bundle "spoke volumes" as to the contents in the remaining bundles, as did the titles of the additional files opened by the police.[80]

[77] *Emerson*, 766 N.Y.S.2d at 489.
[78] *Id.*
[79] *Id*. at 490.
[80] *Id.* (citing United States v. Bowman, 907 F.2d 63, 65 (8th Cir. 1990).