Do Officers Need More than a Warrant to Search a Computer?

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The Ninth Circuit recently decided *United States v. Payton*, a computer search case that quietly adopts some pretty radical ideas. Based on the lack of comments on my previous computer search posts -- here and here --most of you aren't keenly interested in the application of the Fourth Amendment to emerging technologies, but *Payton* strikes me as important enough that a mere lack of interest isn't going to stop me from writing about it!

Payton began as a drug case. Officers received a complaint about possible drug activity at a residence, and they applied for a search warrant. Although the application requested authorization to search any computers at the residence, the warrant as issued did not specifically mention computers. It did, however, authorize the officers to search for and seize, among other things, "[s]ales ledgers showing narcotics transactions" and "[f]inancial records of the person(s) in control of the residence."

The officers didn't find any evidence of drug activity during the search, but they did find a computer. They opened some of the files on the computer and found child pornography, which resulted in federal criminal charges against the defendant. The defendant moved to suppress, arguing that the search exceeded the scope of the warrant. The government argued that sales ledgers and financial records could have been stored on the computer, and that the computer was therefore subject to search, like any other container capable of holding the object of a search warrant.

The district court denied the motion to suppress and the defendant entered a conditional guilty plea, reserving the right to appeal the denial. The Ninth Circuit unanimously reversed, finding that the search of the computer exceeded the scope of the warrant and violated the Fourth Amendment. (For those interested in the apparent politics of the panel, it consisted of a senior-status Carter appointee [Canby, the author of the opinion], a Clinton appointee [Wardlaw], and a senior-status Reagan appointee, a district judge from Illinois sitting by designation [Mills].)

The court started by observing that "computers are capable of storing immense amounts of data," much of which is private. It argued that searches of computers are therefore more intrusive than searches of most other containers, and stated that "[s]uch considerations commonly support the need specifically to authorize the search of computers in a search warrant." It cited no authority for the latter statement, which a number of courts have rejected (as discussed in this manuscript I recently prepared for the superior court judges' annual conference).

The court implicitly acknowledged that sales ledgers and financial records *could be* kept on a computer, but it held that absent "legitimating facts" suggesting that evidence was *likely to be* found on the computer, searching the computer was unreasonable under the Fourth Amendment. It contrasted the case to *United States v. Giberson*, where officers properly searched a computer after finding a sheet of bogus ID cards laying on an attached printer.

Payton may be an example of the maxim that hard cases make bad law. The court seems to have been reacting to the officers' decision to search the computer despite having found no evidence of drug activity in the house -- a decision that it seems to have viewed, understandably, as a fishing expedition. But to the extent that the court's holding requires more than a warrant -- a warrant plus "legitimating facts" -- to search a computer that may contain items listed in a search warrant, it is difficult to reconcile with settled Fourth Amendment precedent regarding closed containers. I'm not aware of any other courts that have created different rules for computers. Perhaps an alternative justification for the

court's disposition of the case would have been to conclude that probable cause had disappeared by the time the search of the computer took place, based on the lack of other evidence of drug activity at the home. *Cf. United States v. Grubbs*, 547 U.S. 90, 95 n. 2 (2006) (recognizing that "probable cause may cease to exist after a warrant is issued").