

# **CBLDF Advisory:**

## **Legal Hazards of Crossing International Borders With Comic Book Art**

The Comic Book Legal Defense Fund has received an increasing number of reports from travelers who have been stopped, searched, and/or detained by customs agents because of comic book art. In one recent incident, an individual was detained at the U.S.-Canada border while en route to an anime/manga convention. He was handcuffed and held briefly on charges of child pornography, and his materials seized. Such tactics, focusing on expressive materials that are presumptively protected by the United States Constitution, are even more troubling to the extent border searches are not limited to hard copies of materials in a traveler's possession. Customs agents also may search for information stored on electronic devices, including cameras, laptop computers, cell phones or other storage devices, or on electronic media, such as flash drives or DVDs. Such searches may be conducted at random, with or without reasonable suspicion, and are becoming increasingly common. According to information revealed pursuant to a Freedom of Information Act request filed by the ACLU, over 6,500 people traveling to and from the United States between October 2008 and June 2010 had their electronic devices searched at the border. Nearly half of those searched were U.S. citizens. These developments also cause special concern because few legal protections exist with respect to such searches. This Advisory generally discusses the phenomenon of border searches of expressive materials, describes the

basic legal framework governing such searches, and offers some general suggestions for international travelers planning to transport expressive materials.<sup>1</sup>

## **I. IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES**

In its published policy regarding search of information, U.S. Customs policy states that “in the course of every border search, CBP [U.S. Customs and Border Protection] will protect the rights of individuals against unreasonable search and seizure.” However, the published policy of Immigration and Customs Enforcement (“ICE”) also explains that customs agents have broad authority to conduct searches without cause:

- “In the course of a border search, and absent individualized suspicion, officers can review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States.”
- “[O]fficers may examine documents, books, pamphlets, and other printed material, as well as computers, disks, hard drives, and other electronic or digital storage devices.”
- U.S. Customs describes such border searches as “a crucial tool for detecting information concerning terrorism, narcotics smuggling, and other national security matters; alien admissibility; contraband including child pornography, monetary instruments, and information in violation of copyright or trademark laws; and evidence of embargo violations or other import or export control laws.”

ICE may choose to conduct a search of an international traveler’s property or electronic media for one of several reasons. Although the specific criteria that may trigger a search have not been fully disclosed, some information is publicly available on ICE procedures:

- Random examinations. All persons, baggage, and merchandise arriving in, or departing from, the United States are subject to inspection, search, and detention. ICE agents randomly select some air passengers or vehicles crossing the U.S. border for closer scrutiny as a routine matter.

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<sup>1</sup> This Advisory provides general information on the practice of international border searches, and is not intended as legal advice. Persons planning international travel who have concerns about their legal risks in this regard, or anyone who has been subject to a border search, should consult competent legal counsel for specific advice.

- General risk factors. A number of circumstances may result in greater scrutiny of international travelers. These include incomplete travel documents, failure to have a visa, previous law violations, or having a name that matches that of a person of interest in one of the government's enforcement databases.
- Suspicious behavior or activity. Certain activities or behavior may also trigger a border search. For example, individuals who fit the description of certain "profiles," such as a drug courier profile, may be subject to search. Other circumstances or behavior, such as nervousness when responding to questions, evasive answers, the extent or nature of the traveler's belongings being transported, or even some types of written or visual material in the traveler's possession, may form the basis for the agent's suspicion. Such suspicion may result in a more intensive search.

ICE considers the search of expressive materials and electronic devices or media to be a routine examination. Routine examinations at the border may include limited searches such as a pat-down, the removal of outer garments, such as jackets, hats, or shoes, the emptying of pockets, wallets, or purses, the use of drug-sniffing dogs, the examination of both outbound and incoming materials, and the inspection of luggage. Non-routine examinations require a showing of reasonable suspicion, which is a particularized and objective basis for suspecting the traveler of wrongdoing. Such a heightened showing is required only in the case of more intrusive examinations, such as prolonged detentions, strip searches, body cavity searches, some X-ray examinations, or particularly destructive or offensive searches.

Review of information or of storage devices is conducted pursuant to the following policies:

- "Officers may detain documents and electronic devices, or copies thereof, for a reasonable period of time to perform a thorough border search. The search may take place on-site or at an off-site location."
- "Officers may encounter information in documents or electronic devices that is in a foreign language and/or encrypted." Customs agents "may seek translation and/or decryption assistance from other Federal agencies or entities" without any individualized suspicion.
- Officers may encounter information "that requires referral to subject matter experts to determine whether the information is relevant to the laws enforced and administered by CBP." Officers may make a copy of the material and seek subject matter

assistance when they have reasonable suspicion of activities that would violate laws enforced by U.S. Customs.

- Copies of information must be destroyed if, after review, no probable cause is found. Any electronic devices must also be returned. If, however, officers determine there is probable cause of unlawful activity, they may seize and retain the originals and/or copies of relevant documents or devices.
- When an electronic device is detained pursuant to a border search, the detention should not exceed five days unless extenuating circumstances exist. Detentions for longer periods are subject to approval by supervisory personnel. ICE's policy says that searches of devices and copies of data typically will be completed within 30 days, although anecdotal reports suggest that devices sometimes are retained for significantly longer periods.
- Under applicable regulations, "[o]fficers may not read or permit others to read correspondence contained in sealed letter class mail (the international equivalent of First Class) without an appropriate search warrant or consent. Only articles in the postal system are deemed 'mail.' Letters carried by individuals or private carriers such as DHL, UPS, or Federal Express, for example, are not considered to be mail, even if they are stamped, and thus are subject to a border search."

## **II. BORDER SEARCHES LACK TRADITIONAL LEGAL PROTECTIONS**

American citizens are accustomed to standing on their constitutional rights. In this context, the most relevant protections of the Bill of Rights include the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," and the Fourth Amendment, which guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In normal circumstances, no search could be conducted without a warrant based on probable cause to believe a crime is being committed, and expressive materials could not be seized. However, crossing an international border is not a normal circumstance.

Courts have held that the United States has inherent sovereign authority to protect its territorial integrity. This means that searches conducted at the border are reasonable "simply by virtue of the fact that they occur at the border." Under this "border search doctrine" the luggage and possessions of a traveler entering or leaving the country may be searched at random without

a warrant or reasonable suspicion of criminal activity. Under this doctrine, the Customs Service can require those seeking entry to the country to establish both the right to enter and to bring into the country any possessions. A routine border search may be conducted at any port of entry to the U.S., such as any airport that receives international flights. Such entry points are considered to be the functional equivalent of the border. Thus, for example, a border search could be conducted at the St. Louis airport of passengers arriving on a nonstop flight from Mexico City.

The border search doctrine permits the customs service to search closed containers and their contents without any particularized suspicion. Courts have approved the search of such items as a traveler's brief case and luggage, purses or wallets, papers found in a traveler's pockets, or pictures, films, or other graphic materials. More recently, courts have been asked to decide whether reasonable suspicion is required for customs officials to search laptop computers or other electronic storage devices at the border. In a number of cases, courts have found that such searches were lawful because customs agents had reasonable suspicion under the circumstances. In another recent case, however, the U.S. Court of Appeals for the Ninth Circuit held that such electronic devices may be searched under the border search doctrine without a warrant or reasonable suspicion that a crime is being committed.

In addition, courts thus far have declined to create a First Amendment exception to the border search doctrine for expressive materials. While a search warrant for speech-related materials must be specific as to what may be examined, no such requirement applies to searches at the border or its equivalent. Customs agents may search at random and without suspicion any papers, writings, drawings, photographs, or electronic media the same as they can go through a suitcase or any other object the traveler is carrying.

Because such examinations are not subject to traditional legal constraints, the types of inquiries and searches that result often create significant tensions with traditional constitutional values. For example, the Asian Law Caucus (“ALC”), which filed a Freedom of Information Act suit against the Department of Homeland Security for denying public access to records regarding these policies, complained that free speech and association are sacrificed at the nation’s border. ALC cited complaints from Northern California residents who said that customs agents grilled them about their families, religious practices, volunteer activities, political beliefs, or associations when returning to the United States. Customs agents reportedly examined travelers’ books, business cards collected from colleagues, handwritten notes, personal photos, laptop computer files, and cell phone directories, and sometimes made copies of that information.

Reports of this type are consistent with information CBLDF has received about examinations of comic book art in connection with border searches. Customs agents frequently use an overly broad and inaccurate definition of “child pornography” in order to justify intrusive searches of materials that are fully protected by the United States Constitution. Under U.S. law “child pornography” is the record and product of child sexual abuse, and as the Supreme Court stated in a 2002 case, “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.” However, the depiction of such child abuse in the form of “child pornography” can only involve *real* children – cartoons of fictionalized characters cannot be subjected to “child abuse.” In such cases, the Court noted, “there is no underlying crime at all.” Nevertheless, CBLDF has gotten reports that travelers have been detained and their computers and expressive materials seized after customs agents found comic art that contained no depictions of actual children and no representations of sexual activity. Any

photographic or artistic rendering that depicts nudity may heighten the risk of a search, even if the depiction has nothing to do with child pornography.

The Supreme Court has not yet addressed this issue directly, and it is possible that the law in this area could evolve. In another case in which the Ninth Circuit approved the suspicionless search of a sealed envelope during a border search, the Chief Judge of that court wrote a powerful dissent arguing that the Fourth Amendment provides special protection for personal “papers.” This was based, he wrote, on “the Founders’ deep concern with safeguarding the privacy of thoughts and ideas – what we might call freedom of conscience – from invasion by the government.” At present, this view remains a minority position.

The question of whether the First Amendment provides some protection from border searches of expressive materials may once again be addressed in a case filed last year by the ACLU against the Department of Homeland Security on behalf of Pascal Abidor, a dual U.S.-French citizen who had his laptop computer searched at the U.S.-Canadian border. Abidor, a PhD student in Islamic studies, was questioned, handcuffed, and detained in a holding cell for several hours before being released without charge. His laptop was returned eleven days later, and evidence indicated that many of his personal files had been searched, including academic research, photos, and chats with his girlfriend. The case was also filed on behalf of the National Press Photographers Association and the National Association of Criminal Defense Lawyers.

It will require time – years, most likely – before these issues reach other appellate courts, including the Supreme Court. Even when that happens, the courts may decide to affirm current lower court decisions. Accordingly, it is imperative for CBLDF members to understand the current state of the law, the current practices of U.S. customs officials, and what steps they can take to help avoid complications when crossing the U.S. border. In light of the broad authority

for the government to conduct border searches and the lack of traditional legal protections, travelers should take practical steps to minimize or avoid the risk of intrusive border searches.

### **III. SUGGESTIONS FOR AVOIDING INTRUSIVE BORDER SEARCHES**

Most people are unaware that their papers, computers, and other electronic devices are subject to search and seizure when they are crossing the U.S. border, and that traditional constitutional protections do not apply. Those who are aware of these facts may take some solace in the mindset of the gazelle on the African plain – the lion is likely to pounce only on one when the herd is large. The Department of Homeland Security has fostered this view by announcing that between October 2008 and August 2009, U.S. Customs encountered more than 221 million travelers at U.S. ports of entry, and only about 1,000 laptop searches were performed, with 46 of those searches characterized as “in depth.” However, while the chances of being subject to such “in depth” scrutiny might be about the same as buying a winning lottery ticket, such odds are cold comfort for those “lucky winners” selected for special screening. In addition, the chance of receiving such screening at the border may be higher than DHS suggests. A 2008 survey of the Association of Corporate Travel Executives found that seven percent of those surveyed reported that they had been subject to a seizure of a laptop or other electronic device while reentering the country.

Given these facts, here are some suggestions for avoiding or minimizing the risk of an intrusive search of expressive materials by U.S. Customs:

- Carry as little data as possible when crossing international borders. Many people routinely travel internationally with laptop computers or other electronic devices containing massive amounts of personal information. This should be avoided.
- If traveling internationally to a known destination such as a convention, send “hard copy” materials or artwork to your destination in advance via U.S. mail or its equivalent. U.S. Customs rules prohibit opening such mail without reasonable suspicion and a warrant. Be aware, however, that these rules do not protect materials



sent using private carriers such as DHL, UPS, or Federal Express. Follow the same procedure for your return trip.

- If you travel internationally with a laptop or other electronic storage device, backup your data before the trip. Because such devices are subject to search and seizure at the border and may be kept for an extended time, having a backup is essential for avoiding further disruption.
- Store the information you need for your trip online and download it at your destination. This would permit you to cross the border with a computer that contains little personal information while confidential information is stored on a workplace or third-party server. Such information may be subject to government review subject to other laws governing electronic surveillance, but it would not be vulnerable to a search at the border. The information should be uploaded to the servers and securely deleted from the computer for your return trip.
- Protect data on your laptop computer using encryption or passwords. These are imperfect solutions, but can help protect confidential information from prying eyes. Data on your computer that is protected by strong encryption would not be viewable by a customs agent, although the computer could be seized and subjected to decryption attempts. Border agents are not empowered to force you to decrypt data, divulge passwords, or answer questions. Only a judge could order such a thing, and even then only if the Fifth Amendment privilege against self-incrimination does not apply. In that regard, lower court decisions suggest it is difficult to overcome Fifth Amendment protections. From a practical standpoint, however, declining to answer questions may lead customs agents simply to seize your computer for further technical analysis. Of course, if you do answer questions during such screening, you must answer truthfully.
- Data protected by passwords alone (and not encryption) is protected to a certain extent, but not as much. As with decryption keys, border agents cannot force you to reveal passwords. But if your computer or electronic storage device is subjected to technical analysis, a password alone is unlikely to prevent review or downloading of your data.

If you are subjected to a search at the U.S. border and your computer and/or expressive materials are seized, it is important that you seek out qualified legal counsel. But the most effective way to avoid that situation is by planning ahead and implementing practical measures in advance of international travel.