

Digitizing the Private Search Doctrine: Is a Computer a Container?

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Introduction

The digital era has ushered in a new age, where the technology of today is almost instantaneously surpassed by the ideas of tomorrow. As America embraces this digital evolution, the law becomes paralyzed and unable or unprepared to adapt to the new demands of digital devices. New Fourth Amendment search and seizure issues—not previously contemplated—continue to develop. This Note addresses the issue of the circuit split among the U.S. Courts of Appeals over the scope of the Private Search Doctrine as it applies to information stored or viewed in digital media devices (e.g., cell phones, computers, hard drives, etc.). The Private Search Doctrine allows the government to conduct a warrantless follow-up search, on the heels of a private search, without violating the Fourth Amendment. However, the circuits are split as to the constitutional limits on government conduct for a follow-up search of digitally stored material subsequent to an initial private search.

Here is a hypothetical to illuminate this issue: Private Citizen A discovers a couple of documents on her Friend, B's, unlocked computer that appear to be detailed plans for a future terrorist attack that include a map of a federal court house and bomb instructions. Friend B did not give permission to Private Citizen A to use her computer. Friend B's computer has a storage capacity of two terabytes of data and contains an immense amount of personal information including photographs, medical records, tax forms, and journal entries. After discovering the documents, Private Citizen A notifies the authorities and provides the government agents who respond to the call with Friend B's computer. At this point, the circuits diverge as to what the government agents may now search without a

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warrant. The circuits, however, are in agreement that, if the government agents limit their examination to *only* the documents originally seen by the private searcher, then there is no Fourth Amendment search or violation. If, instead, the agents see things Private Citizen A had not viewed previously—or they conduct a full search of the computer without obtaining a warrant—the courts disagree as to whether a broader search beyond what was seen by Private Citizen A violates the Fourth Amendment prohibition against unreasonable searches and seizures.¹

The federal circuit courts' holdings run contrary to one another in how they resolve these issues and disagree as to what constitutes a permissible search under the Private Search Doctrine. For instance, the Fifth and Seventh Circuits adopted the “closed container” approach where the government may examine all of the contents of a “container,” such as a computer or other digital media device—subsequent to a private search—including items that the private citizen did not see.² The Sixth and Eleventh Circuits, in contrast, hold that the government is limited by and may only view things seen by the private citizen. Essentially, the Sixth and Eleventh Circuits restrict the authorities to conducting a duplicate search—an examination identical to what the private searcher originally viewed.³ The issue is a question of degree: to what extent may government agents look beyond the original documents or images seen by the private party on an electronic device, and how should the courts define the permissible scope of the Private Search Doctrine?

While some may argue that allowing the government to search through one's computer without a warrant is justified in order to learn more about a potential terrorist attack, the resulting standard creates a significant expansion of the government's search and seizure abilities. This Note argues that the Private Search Doctrine—as applied to electronic devices and digital files—should be narrowly construed so that the government may only conduct a duplicate search without a warrant, consistent with the Sixth and Eleventh Circuits' holdings, and examine only those items already seen by a private searcher. Absent some other exception, the government should be required to obtain a warrant to go beyond the scope of the initial search to protect individuals' Fourth Amendment privacy rights.

1. U.S. CONST. amend. IV.

2. *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832, 835 (7th Cir. 2012).

3. *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015); *United States v. Sparks*, 806 F.3d 1323, 1335 (11th Cir. 2015).

In light of the Supreme Court's recent holding in *Riley v. California* and the development of modern technology, this Note seeks to answer the question of the correct interpretation and scope of the Private Search Doctrine, as applied to electronic devices.⁴ Part I of this Note provides the background of the Private Search Doctrine and explains the origins, purpose, and applications of the doctrine. It discusses the expectation of privacy in digital devices, the government agency test, and the rights of private searchers. Part II describes the conflicting approaches—"closed container" versus "duplicate search"—taken by the circuit courts that have addressed the scope of a follow-up search under the Private Search Doctrine and explains the subsequent doctrinal confusion. Part III argues that the conflicting opinions should be resolved by narrowly limiting the scope of a warrantless follow-up investigation, so that the government may only conduct a duplicate search. Ultimately, the duplicate search approach should be adopted, requiring the government to obtain a warrant to search beyond the scope of the private search, because a narrower reading of the Private Search Doctrine as it applies to electronic devices is consistent with the sentiments expressed in *Riley* regarding the "privacies of life" that cell phones and other electronic devices possess.

I. The Private Search Doctrine Defined in the Digital Age

This Part discusses the background, substance, and purpose of the Private Search Doctrine as it relates to the Fourth Amendment search and seizure requirements. It examines the origin of the Private Search Doctrine in the Supreme Court cases *Walter v. United States* and *United States v. Jacobson*, and inspects an individual's right to privacy in digital devices.⁵ Lastly, it clarifies who is classified as a private searcher, rather than a government agent, and explains when the doctrine is applicable.

A. Individuals Have an Expectation of Privacy in Their Electronic Devices

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"⁶ Accordingly, a Fourth Amendment search exists where the government obtains evidence resulting from "physical intruding on the persons, houses, papers, or effects."⁷ In *Katz v. United*

4. *Riley v. California*, 134 S. Ct. 2473 (2014).

5. *Walter v. United States*, 447 U.S. 649 (1980); *United States v. Jacobson*, 466 U.S. 109 (1984).

6. U.S. CONST. amend. IV.

7. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (internal quotations omitted).

States, Justice Harlan—in his concurrence—provided a two-prong test to determine whether an individual has a Fourth Amendment right in items searched.⁸ The test required that: (1) “a person have exhibited an actual (subjective) expectation of privacy,” and (2) “the expectation be one that society is prepared to recognize as ‘reasonable.’” Based on the *Katz* test, when the government violates a subjective expectation of privacy that society recognizes as reasonable, a Fourth Amendment violation exists.⁹

In 2013, the Court recognized that citizens “expect” that the contents of their electronic devices are private and that this expectation is objectively reasonable.¹⁰ Therefore, police examinations of electronic devices are unreasonable, absent a warrant, and should be regulated to ensure privacy rights remain intact in such effects.¹¹ Although the law is still adapting to address the new issues modern technology poses, electronic devices are worthy of the same Fourth Amendment protections afforded to one’s home or other personal effects.¹² A computer hard drive is essentially “the digital equivalent of its owner’s home, capable of holding a universe of information.”¹³ Accordingly, courts have held that the owner of a computer has an expectation of privacy in its contents and that this expectation is one that society deems objectively reasonable.¹⁴ Consistent with the privacy rights afforded to cell phones in *Riley v. California*, guidelines must be set addressing the scope of the Private Search Doctrine to prevent the government from utilizing it as a Fourth Amendment loophole.

B. Origins of the Private Search Doctrine: *Walter v. United States* and *United States v. Jacobsen*

Private intrusions or searches conducted by citizens not acting under governmental authority are exempt from Fourth Amendment requirements.¹⁵ When a private searcher discovers evidence of a crime and alerts government agents, they need not “stop [the private searcher] or avert their eyes.”¹⁶ The Private Search Doctrine says that when an individual

8. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

9. *See Katz*, 389 U.S. at 361; *Kyllo*, 533 U.S. at 33.

10. *Riley v. California*, 134 S. Ct. 2473, 2483 (2014).

11. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009).

12. *See Riley*, 134 S. Ct. at 2483.

13. *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) (quoting *Kansas v. Rupnick*, 125 P.3d 541, 552 (Kan. 2005)).

14. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (holding that the defendant had a “objectively reasonable expectation of privacy in his personal computer”).

15. *See United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

16. *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971).

shows contraband to another, or a private searcher gains access to such information, and then shares it with the authorities, the government is not precluded from examining such information.¹⁷ But, the agents must limit their investigation to those items previously seen by the private searcher to protect constitutional privacy rights.¹⁸

Under the Private Search Doctrine, private intrusions or searches conducted by citizens not acting under governmental authority do not implicate the Fourth Amendment.¹⁹ The Private Search Doctrine applies when a private individual searches an item, finds potential contraband, and notifies law enforcement.²⁰ Following a private search, a government agent may conduct a warrantless follow-up search that does not exceed the scope of the initial search.²¹ Precedent indicates that the government may replicate the private searcher's examination without it qualifying as a search because the defendant no longer has an expectation of privacy in those objects.²²

I. Walter v. United States (1980): Creation of the Private Search Doctrine

The Private Search Doctrine originated in Supreme Court precedent indicating that Fourth Amendment search and seizure restrictions only apply to searches conducted by government agents, not private citizens.²³ In 1980, the Court in *Walter* recognized the government's duty to investigate potentially illegal evidence found during a private search and set the stage for its ruling in *United States v. Jacobsen*.²⁴ The *Walter* Court held that strict limitations must be placed on an official search conducted on the heels of a private one to comply with Fourth Amendment protections.²⁵ Any items not viewed by the private searcher should not be open to a warrantless investigation by the government because the owner still has an expectation of privacy in the remaining contents.²⁶

17. *Id.* at 489.

18. *Id.*

19. *See Jacobsen*, 466 U.S. at 117.

20. *Id.* at 115.

21. *United States v. Jacobsen*, 466 U.S. 109, 115 (1984); *see Walter v. United States*, 447 U.S. 649, 662 (1980).

22. *Jacobsen*, 466 U.S. at 117.

23. *See Burdeau v. McDowell*, 256 U.S. 465 (1921); *Walter*, 447 U.S. at 662.

24. *Walter*, 447 U.S. at 662.

25. *Id.*

26. *Id.* at 659.

In *Walter*, packages containing obscene material (on film) were shipped to the wrong address.²⁷ The recipients opened the packages and notified the Federal Bureau of Investigation (“FBI”).²⁸ Although the private searchers were unable to view the contents of the films, the boxes that they arrived in had “suggestive drawings” and “explicit descriptions of the contents.”²⁹ The FBI picked up the packages “without making any effort to obtain a warrant” before viewing several reels of the film on a projector, *none* of which had been seen by the private searchers.³⁰ At issue before the Court was whether the FBI agents were required to obtain a warrant under the Fourth Amendment, or if they were permitted to view the films without one.³¹ The Court decided that “[i]t was a search, there was no warrant; the owner had not consented; and there were no exigent circumstances.”³² Therefore, the unauthorized viewing of the films was an unconstitutional invasion of the owner’s right to privacy.³³

The scope of authorized searches must be clearly established and the “government may not exceed the scope of the private search unless it has the right to make an independent search.”³⁴ In *Walter*, the viewing of the films was akin to a separate search altogether because it went beyond what the private searchers had seen.³⁵ The Court clarified that even though the FBI agents legally obtained the boxes, they were not authorized to search their contents.³⁶ In *Walter*, the Court analogized the situation to a scenario in which officials obtain a warrant to search a garage—they may not search the entire house.³⁷ Similarly, if the government is searching for a stolen refrigerator, the agents may not look through desk drawers.³⁸ The Court stressed that the agents conducted a new search when they projected and viewed images not previously seen by the private searchers because the owner of the package still had a legitimate expectation of privacy in their contents.³⁹ The *Walter* Court’s narrow allowance of the follow-up search is

27. *Walter v. United States*, 447 U.S. 649, 651 (1980).

28. *Id.* at 652.

29. *Id.*

30. *Id.*

31. *Id.* at 651.

32. *Id.*

33. *Walter v. United States*, 447 U.S. 649, 654 (1980).

34. *Id.* at 657.

35. *Id.*

36. *Id.* at 654.

37. *Id.* at 657.

38. *Id.*

39. *Walter v. United States*, 447 U.S. 649, 659 (1980).

the approach that should be adopted in order to protect Fourth Amendment privacy rights.

2. *United States v. Jacobsen (1983) The Court Places Parameters on the Scope of the Doctrine, the “Virtual Certainty” Test*

The Court next addressed the scope of the private search doctrine in *United States v. Jacobsen*—three years after *Walter v. United States*—and provided a two-factor analysis to evaluate the scope of the doctrine.⁴⁰ The Court concluded that the degree of how much the government “stands to gain when it re-examines the evidence and . . . how certain it is regarding what it will find” determines whether the government impermissibly exceeds the scope of the initial search.⁴¹ Under this test, the government remains within the scope of a prior private search when: (1) an individual’s expectation of privacy in information uncovered was already frustrated, and (2) the government was “virtually certain” that it would not discover anything else of significance.⁴² Information found during a private search may be classified as nonprivate once the private party finds or opens it, thereby eliminating any expectation of privacy that may have existed.⁴³ A warrantless investigation, on the heels of a private search, must meet this virtual certainty threshold to comply with the Private Search Doctrine.⁴⁴

The Court distinguished between searches involving physical “containers” and electronic devices. In the modern technological world, what constitutes a “closed container” is unclear and difficult, if not impossible, to define. In *Jacobsen*, after a package was damaged in transit, Federal Express employees examined the contents pursuant to company policy.⁴⁵ They observed bags of a white powdery substance within the package and notified the Drug Enforcement Agency (“DEA”), suspecting that the substance was contraband.⁴⁶ When a DEA agent arrived at the scene he reopened the package, opened the bags of white powder, and tested a small amount in each to confirm that the substance was cocaine.⁴⁷ The Court held that the agents did not infringe on any constitutional privacy interests that had not already been frustrated by the private search

40. *Id.* at 119.

41. *United States v. Lichtenberger*, 786 F.3d 478, 485–86 (6th Cir. 2015).

42. *United States v. Jacobsen*, 466 U.S. 109, 125 (1984).

43. *Id.*

44. *Id.* at 117.

45. *Id.* at 111.

46. *Id.*

47. *United States v. Jacobsen*, 466 U.S. 109, 111 (1984).

so their actions were permissible without a warrant.⁴⁸ The government agent acted within his purview in conducting an examination of the contents of the package because the agents were “virtually certain” as to what they would find and any expectation of privacy no longer existed after the private search.⁴⁹

The Court arrived at this decision by weighing the additional invasion of privacy from inspecting the remaining contents of the package against the degree to which the agent exceeded the scope of the private search.⁵⁰ Because the agent was “virtually certain” that there was “nothing else of significance” in the package beyond the identical bundles of white powder, the Court held it was not a new search and the agent’s manual inspection of the contents could not “tell him anything more than he already had been told” by the private searchers.⁵¹ Any privacy interests the owner of the package previously had disappeared once it was unsealed and examined by the private searchers.⁵² In addition, even the agent’s on-site test of the powdery substance was deemed reasonable because the government’s interest to confirm that the substance was cocaine outweighed the intrusion of using a small amount of powder to test it.⁵³ The Court held that a government agent’s confirmation of prior knowledge—namely the contents of the container, according to the private searcher—did not exceed the scope or require them to first obtain a warrant.⁵⁴

The Court’s analysis of physical storage containers with physical contents, such as the bags of powder in *Jacobsen*, cannot be properly applied to protect privacy rights in the digital realm. In the case of *Jacobsen*, the officers could simply glance at the package to understand its storage potential.⁵⁵ While government agents may be virtually certain that a few bags of white powder all contain cocaine, this logic is unworkable when applied to a computer or cell phone—full of images, files, and documents where one click could lead to infinite possibilities of locating and viewing vast amounts of personal information. Once the package in *Jacobsen* was opened and its contents revealed, the expectation of privacy

48. *Id.* at 126.

49. *Id.* at 119.

50. *Id.* at 115.

51. *Id.* at 119.

52. *Id.*

53. *United States v. Jacobsen*, 466 U.S. 109, 125 (1984).

54. *Id.* at 120.

55. *Id.*

ceased to exist.⁵⁶ The same cannot be said after a digital image or file is viewed on an electronic device.

C. Government Agency Test: Was the Private Searcher Acting as a Government Agent?

The Private Search Doctrine is based on the notion that the Fourth Amendment restricts unreasonable searches and seizures by the government against private citizens.⁵⁷ The Fourth Amendment is only intended to limit governmental action, so a search by a private individual for private reasons does not implicate it.⁵⁸ Even where the initial search by the private party is an unreasonable invasion, it does not trigger Fourth Amendment protections.⁵⁹ However, the fact that the private party searched something “that might have been impermissible for a government agent” to view without a warrant does not preclude the government from conducting a follow up examination.⁶⁰ The government may inspect potential contraband discovered by a private party.

The majority of circuit courts use some variation of the Sixth Circuit’s two-prong test to define when a private searcher qualifies as a government agent which requires that: (1) the police must have instigated, encouraged, or participated in the search; and (2) the private searcher must have conducted the search with the intent of assisting the police in their investigative efforts.⁶¹ The First, Ninth, and Tenth Circuits echo the Sixth Circuit’s emphasis on government involvement in the search and the searcher’s personal intent.⁶² For the search to be considered government action, the individual must have acted as an “‘instrument’ or agent of the state.”⁶³ A person does not qualify as a government agent simply because

56. *Id.*

57. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

58. *Id.* at 476; *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

59. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 115 (1984); *Walter v. United States*, 447 U.S. 649, 662 (1980); *United States v. Lichtenberger*, 786 F.3d 478, 482 (6th Cir. 2015).

60. *Jacobsen*, 466 U.S. at 114–15.

61. *See, e.g., United States v. Lambert*, 771 F.2d 83 (6th Cir. 1985).

62. *See, e.g., United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997) (explaining that “the extent of the government’s role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government” are all relevant factors); *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981) (holding that the two relevant factors of analysis are: “(1) the government’s knowledge and acquiescence, and (2) the intent of the party performing the search” to make a determination); *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996) (finding that the government must have purposefully encouraged the private action under a totality of the circumstances analysis).

63. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

there was some “antecedent contact” between the private searcher and the police.⁶⁴ Returning to the hypothetical at the beginning of this Note, we assume that Private Citizen A was not acting as a government agent or on behalf of the government when she used Friend B’s computer and stumbled upon the questionable documents.

II. The Circuits are Split When Applying the Private Search Doctrine

Part II will discuss the pre-*Riley* application of the Private Search Doctrine as applied to searches of physical spaces and objects; and it will examine the circuit decisions and split in chronological order to demonstrate the shift in how federal circuit courts apply the doctrine before and after *Riley*, as technology and precedent have developed. It will examine how the Fifth and Seventh Circuits expanded the Court’s reasoning in *Walter* and *Jacobsen* in an attempt to classify various electronic devices as closed containers.⁶⁵ Next, it will discuss the significance of the *Riley* decision and explain its relevance in the shift towards a narrower interpretation of the doctrine. Finally, it will examine how the Sixth and Eleventh Circuits addressed the issue post-*Riley*, determined that the container approach is unworkable, and that the government may only duplicate a private search without a warrant.⁶⁶

A. Closed Container Versus Duplicate Search Approach

There is disagreement among the circuit courts that have addressed the issue of whether a private search totally eliminates the expectation of privacy in digital items not examined by the private searcher, thus, enabling the police to search without a warrant. This question becomes more complicated when dealing with the search of an electronic device containing vast amounts of data and personal information. The federal circuit courts are split over whether electronic devices should be considered traditional “containers” to define the scope of a follow-up search under the Private Search Doctrine.⁶⁷ There is currently an equal two-two circuit split

64. *United States v. Coleman*, 628 F.2d 961, 965 (6th Cir. 1980).

65. *See generally* *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832, (7th Cir. 2012).

66. *See generally* *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015); *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015).

67. *See Runyan*, 275 F.3d at 449 (holding that a CD is a “closed container,” and the government may search the remaining contents of the container once it is opened); *see also Rann*, 689 F.3d at 833 (following the Fifth Circuit’s approach in *Runyan* that electronic devices should be treated as containers); *but see Lichtenberger*, 786 F.3d at 480 (holding that due to the significant privacy interests at stake in computers, the government may only view images seen by

regarding how to apply the Private Search Doctrine to modern electronic devices. The Eleventh Circuit recently handed down a ruling in *United States v. Sparks*, which was consistent with the Sixth Circuit's holding in *United States v. Lichtenberger* that a laptop cannot be treated as a closed container and that only a duplicate search is permissible under the Private Search Doctrine.⁶⁸ Notably, the Sixth and Eleventh Circuits' rulings came after the Court's *Riley v. California* decision and are consistent with the holding that electronic devices—such as cell phones—contain “privacies of life” that must be protected.⁶⁹ The Fifth and Seventh Circuit decisions, in contrast, were pre-*Riley*. The Court has yet to clearly define the scope of the Private Search Doctrine and denied the petition for certiorari of the Eleventh Circuit case to address the split over the correct interpretation of the doctrine.⁷⁰ The narrower scope purported by the Sixth and, now Eleventh Circuit, is the correct interpretation and should be adopted by the Court to provide clear guidelines for government searches and proper instructions for the circuit courts to address this kind of issue.

B. The Fifth Circuit and Seventh Circuit Follow the Closed Container Approach

I. United States v. Runyan (5th Cir. 2001)

The Fifth Circuit held that no new “search” exists if an officer views any item in the container previously opened by the private individual.⁷¹ Under this standard, police may examine the remaining contents of a container, subsequent to a private search, including items that the original searcher had not seen.⁷² In *United States v. Runyan*, the Fifth Circuit held that computer disks (“CDs”) containing child pornography were to be considered closed containers.⁷³ Each CD was treated as a separate closed container to determine whether the police exceeded the scope of their investigation by viewing their contents.⁷⁴ The government officials were

the private searcher); *Sparks*, 806 F.3d at 1335 (affirming the Sixth Circuit's standard that the government may only conduct a duplicate examination and cannot view objects not seen by the private searcher).

68. *Sparks*, 806 F.3d at 1335; *Lichtenberger*, 786 F.3d at 483.

69. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014).

70. Orin Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/?tid=a_inl.

71. *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001).

72. *Id.*

73. *Id.* at 458.

74. *Id.*

only permitted to view the contents of each CD where the private searcher viewed at least one of the images on it.⁷⁵ The remaining unopened ones were not subject to government intrusion.⁷⁶

Defendant Runyan's soon-to-be-ex-wife conducted a private search and discovered CDs, computer files, photographs, film, zip drives, and boxes containing child pornography.⁷⁷ She reported her findings to the police after viewing some images on the CDs, although she was unable to view the zip drives.⁷⁸ The defendant argued that police violated the Fourth Amendment when they viewed the contents of each item—including those that the private searchers had not personally seen.⁷⁹ The Fifth Circuit held that the officers did not exceed the scope permitted by the Private Search Doctrine when they observed additional images on the unopened CDs or other closed containers.⁸⁰

2. *Rann v. Atchison* (7th Cir. 2012)

The Seventh Circuit utilized the Fifth Circuit's analysis of the scope of the Private Search Doctrine and applied its reasoning in *Rann v. Atchison*, holding that a government agent may conduct a more detailed search of an already opened container.⁸¹ In *Rann*, the defendant argued that images and evidence of child pornography used at his trial should have been suppressed because the police exceeded the scope of the private search.⁸² He alleged that the police should have had a warrant to open and view the contents on his digital media devices (CDs and zip drives) because there was no evidence that the private searchers saw any of the images.⁸³ Consistent with *Runyan*, the Seventh Circuit held that the police officers could view the images following the private search.⁸⁴ The government agent was free to search any materials on the CD if the private searcher viewed at least one file on it in his initial search.⁸⁵ Even if the police conducted a more thorough search of the devices, it was a legal expansion

75. *Id.*

76. *Id.*

77. *United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001).

78. *Id.*

79. *Id.* at 460.

80. *Id.* at 465.

81. *Rann v. Atchison*, 689 F.3d 832, 838 (7th Cir. 2012).

82. *Id.* at 836.

83. *Id.* at 837.

84. *Id.*

85. *Id.* at 836 (citing *United States v. Runyan*, 275 F.3d 449, 456 (5th Cir. 2001)).

of the initial search.⁸⁶ Although the Fifth Circuit analogized a CD in 2005 to a container—with the Seventh Circuit following suit in 2012—these decisions were made prior to *Riley*.⁸⁷ Even if a CD could be classified under this analysis, the same cannot be said for modern electronic devices that have the capacity to store significantly larger amounts of data than that in a CD.

C. The Court Implies that Electronic Devices Should Not Be Treated as Closed Containers in *Riley v. California* (2014)

The scope of the Private Search Doctrine must be narrowly construed so as to only allow a duplicate search, which is consistent with the Court's treatment of electronic devices in *Riley v. California*. In *Riley*, the Court rejected the government's argument that data on a cell phone was indistinguishable from searches of physical items.⁸⁸ The Court analogized the comparison of the two and stated "that is like saying a ride on horseback is materially indistinguishable from a flight to the moon."⁸⁹ Computers and other digital devices should be afforded the same protections the *Riley* Court recognized for the contents of cell phones in the realm of the Private Search Doctrine. Modern electronic devices are analogous to—and include—cell phones because they, too, have an immense storage capacity and can also be classified as the equivalent of many devices rolled into one, such as a camera, video player, library, and photo album.⁹⁰ The difference between the two scenarios—searching a cell phone incident to arrest versus conducting a warrantless investigation of a computer, or the like, subsequent to a private search—is that the police can examine contents of an electronic device following a private search, so long as they do not go beyond the scope of the initial search.⁹¹ Although the Court has not explicitly defined how to apply the Private Search Doctrine to electronic devices, *Riley* indicates that a more restrictive approach to searches in electronic devices is preferred because of their immense storage capacities.⁹²

86. *Id.* at 838.

87. *Rann v. Atchison*, 689 F.3d 832, 838 (7th Cir. 2012).; *Runyan*, 275 F.3d at 460; *see Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (addressing the significant privacy interests at stake in modern electronic devices in 2014).

88. *Riley*, 134 S. Ct. at 2488.

89. *Id.*

90. *Id.* at 2489.

91. *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

92. *Riley*, 134 S. Ct. at 2489.

In addition to the privacy rights afforded to data stored on computers, the Court recently emphasized that the “fact that technology now allows an individual to carry such [private] information in his hand does not make the information any less worthy of the protection for which the Founders fought.”⁹³ The Court cautioned that the legality of a search of cell phones is based on “the degree to which it intrudes upon an individual’s privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”⁹⁴ Where modern electronic devices contain the “privacies of life,” the risk of intrusion into the contents is colossal.⁹⁵ Privacy rights in electronic devices must be fiercely protected with strict guidelines for the government in searching these items without first obtaining a warrant.⁹⁶

In *Riley*, the Court unanimously held that the police could not, without a warrant, search through the contents on a cell phone seized from a defendant incident to arrest.⁹⁷ The Court reasoned that any search of a cell phone—beyond ensuring that it was not a weapon—required a warrant because no harm could be done to the arresting officer otherwise.⁹⁸ The nature of cell phones is distinct from other physical objects or containers because of the large amount of personal information they can contain.⁹⁹ Therefore, the privacy interests at risk versus the “negligible threat” posed to law enforcement supports protecting this type of data from warrantless intrusion.¹⁰⁰

D. The Sixth Circuit and the Eleventh Circuit Hold that the Duplicate Search Approach Is Correct Post-*Riley*

I. United States v. Lichtenberger (6th Cir. 2015)

In contrast to the Fifth and Seventh Circuit rulings on the scope of the Private Search Doctrine, the Sixth Circuit adopted a more workable standard, requiring that evidence be suppressed when police search beyond the scope of the private search.¹⁰¹ In *Lichtenberger*, the defendant’s

93. *Riley v. California*, 134 S. Ct. 2473, 2473 (2014).

94. *Id.* at 2484 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

95. *Id.* at 2495.

96. *Id.* at 2489.

97. *Id.* at 2480.

98. *Id.*; *Chimel v. California*, 395 U.S. 752, 763 (1969) (establishing the rule that “it is reasonable for the arresting officer to search the person arrested in order to remove any weapons” which may later threaten the safety of the officer or be used to escape).

99. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

100. *Id.* at 2482.

101. *United States v. Lichtenberger*, 786 F.3d 478, 479 (6th Cir. 2015).

girlfriend found images of child pornography and called the police.¹⁰² When an officer arrived, he asked her to show him the images she had found.¹⁰³ The defendant's girlfriend began clicking on random thumbnails of images depicting child pornography, but was unsure if they were the same ones she had viewed previously.¹⁰⁴

The Sixth Circuit suppressed the evidence and concluded that "there are significant privacy interests at stake in searches of a laptop" and the officer was too uncertain as to what he would find when the defendant's girlfriend showed him the images.¹⁰⁵ Therefore, the court reasoned that the privacy interests of the laptop were too extensive.¹⁰⁶ However, the court stated that government searches are permissible "in instances involving physical containers and spaces," where the officers are virtually certain of the contents and are unlikely to find additional contraband.¹⁰⁷ Under the *Walter* standard, the intrusion of the individual's privacy in *Lichtenberger* outweighed the governmental interests when the officer seized the defendant's computer that contained a wealth of unknown information on it.¹⁰⁸

2. *United States v. Sparks* (11th Cir. 2015)

The Eleventh Circuit recently addressed the scope of the Private Search Doctrine, as it pertains to viewing images and videos on a cell phone in *United States v. Sparks*. Ultimately, a video not previously viewed by the private searcher was not subject to a warrantless search by law enforcement under the Private Search Doctrine.¹⁰⁹ In that case, after a store employee discovered a lost cell phone and viewed some of its contents, she found images that appeared to be child pornography.¹¹⁰ She later showed her fiancé who turned the phone in to the police.¹¹¹ When the fiancé arrived at the police station, he showed an officer some of the images and scrolled through the entire album.¹¹²

102. *Id.* at 479–80.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 485.

107. *United States v. Lichtenberger*, 786 F.3d 478, 486 (6th Cir. 2015).

108. *Id.* at 479.

109. *United States v. Sparks*, 806 F.3d 1323, 1335 (11th Cir. 2015).

110. *Id.*

111. *Id.*

112. *Id.*

The Eleventh Circuit found that there was no clear error with the district court's conclusion that the private searcher previously observed all of the images within the photo album.¹¹³ Because the private searcher had already viewed the photo album in its entirety it "insulated law enforcement's later, more thorough review of [the images] from transgressing the Fourth Amendment."¹¹⁴ The court held that although the officer was free to view all of the images within the specified photo album, he was not permitted to view one of the videos, which was not previously seen by the private searcher, without first obtaining a warrant.¹¹⁵ Since the officer's viewing of the second video on the cell phone exceeded, instead of duplicated, the private searcher's initial examination, it was outside the boundaries permitted under the Private Search Doctrine.¹¹⁶

The Eleventh Circuit emphasized that disallowing law enforcement to view the second video was consistent with the Court's reasoning in *Riley*.¹¹⁷ The private searcher's examination of the cell phone may have eliminated an expectation of privacy in the contents he viewed, but "it did not expose every part of the information contained in the cell phone."¹¹⁸ So the warrantless examination of the second video constituted a search under the Fourth Amendment because no search warrant was obtained.¹¹⁹ Although the court specified that the officer should not have viewed the second video, it ultimately had no effect on the state court's valid issuance of two warrants to search the cell phone and the defendant's house.¹²⁰

III. How to Resolve the Doctrinal Confusion

After examining the conflicting approaches adopted by the circuit courts, Part III discusses the proper interpretation of the doctrine with reference to the hypothetical posed at the beginning, and the impact it may have on Fourth Amendment jurisprudence and privacy rights. It then argues that the approach taken by the Sixth and Eleventh Circuits, post-*Riley*, is correct so that the government is restricted to only conducting a duplicate search. It explains why the container approach adopted by the Fifth and Seventh Circuits leads to an unworkable standard in the realm of modern technology. Lastly, it addresses the counter arguments against

113. *Id.*

114. *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015).

115. *Id.* at 1335.

116. *Id.* at 1336.

117. *Id.* at 1335.

118. *Id.*

119. *Id.*

120. *United States v. Sparks*, 806 F.3d 1323, 1335 (11th Cir. 2015).

adopting a narrow interpretation of the Private Search Doctrine and ultimately rebuts them by explaining how Fourth Amendment privacy rights outweigh any purported benefits to the container approach.

A. Private Search Doctrine Today: Returning to the Hypothetical

The scope of the Private Search Doctrine is inevitably intertwined with the role the Fourth Amendment plays in the modern technological world. Determining whether electronic devices—with their immense storage capacities—can be accurately classified as physical containers is relevant in developing modern Fourth Amendment jurisprudence. Courts must set guidelines regarding the scope for how far the government may search in the realm of modern day technology. These limits would prevent the government from traipsing through private information unrelated to an initial search, which could potentially uncover criminal activity.

Current events and case law suggest that strict guidelines must be established to preserve Fourth Amendment privacy rights in the digital age. Returning to the hypothetical proposed in this Note's Introduction, one key question to consider is whether the only suspicious items on the individual's computer were those two documents. Assume that the documents that Private Citizen A mistook for a new terrorist attack plan were research conducted by Friend B for a presentation in an international law class. Assume, too, that the next documents that would have popped up in the file were Friend B's medical history and birth certificate. If the Private Search Doctrine allows the government to search items the private searcher did not view, all of this intimately private information would be subject to a warrantless investigation by the government. Requiring the government to obtain a warrant to investigate beyond conducting a duplicate search creates a bright line rule for which officers need to adhere. The narrower reading of the Private Search Doctrine—effectuated by the Sixth and Eleventh Circuits—requires agents to engage in common police practices they already follow and would not impose an undue burden. Even if the documents appeared to be a real terrorist plan, rather than class research, the agents would surely have had probable cause after viewing the documents to obtain a warrant and search the remaining contents of the computer to confirm or deny their suspicions. At that point, the agents could have also confiscated the computer to ensure its safety and to prevent the destruction of evidence before obtaining a warrant to search it.

The right to privacy from unreasonable governmental intrusion is the keystone of the Fourth Amendment. The reasonableness of a search turns on whether the police seeking evidence of criminal wrongdoing first

obtained a judicial warrant.¹²¹ If not, some exception to the warrant requirement must be present to determine an—otherwise unreasonable—search reasonable.¹²² Limiting the scope of the Private Search Doctrine to allowing only a duplicate search, without a warrant, is the best course of action. The closed container logic cannot, and should not, be transferred to electronic devices or their contents. Where one image is seen on a screen at a time or even where additional thumbnails or documents may be visible at once, they hardly indicate the remainder of the contents of the device so that an agent would be virtually certain as to what he could uncover.

B. The Duplicate Search Approach Should Be Adopted

The government should be required to limit its follow-up investigations without a warrant—consistent with Fourth Amendment jurisprudence and warrant exceptions. The *Riley* Court acknowledged that even in scenarios where an individual has diminished privacy rights, such as when he or she is lawfully arrested, it does not dispense with his or her Fourth Amendment rights altogether.¹²³ The Fourth Amendment applies when the government searches items or uses information where an individual still has an expectation of privacy.¹²⁴ Certainly then, Friend B in the hypothetical, whose documents and/or computer may be subject to investigation, should retain her privacy rights in the remainder of the items stored within the device. The *Riley* Court established that beyond disabling a device, an officer should not look through the digital contents of the device—even after an arrest.¹²⁵ Therefore, when a private party notifies the government about something suspicious, the Fourth Amendment protects the individual's private information until a warrant is issued. Such information should remain classified and maintain an expectation of privacy, unless the private searcher's viewing or examination of the digital file was consistent with the Court's analysis in *Walter*.¹²⁶ The mere fact that a private searcher saw one item should not eliminate an individual's privacy rights in the other items that exist on a computer or other electronic device.

121. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

122. *Kentucky v. King*, 563 U.S. 452, 460 (2011).

123. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014).

124. *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

125. *Riley*, 134 S. Ct. at 2480.

126. *Walter v. United States*, 447 U.S. 649, 649 (1980) (holding that the defendant maintained an expectation of privacy in the contents of film strips because the private searchers were unable to view them).

C. Electronic Devices Should Not Be Treated as Containers

The possible intrusion on privacy is not physically limited when it comes to cell phones or electronic devices, because they can store up to “millions of pages of text, thousands of pictures, or hundreds of videos.”¹²⁷ Electronic data is both qualitatively and quantitatively distinguishable from physical items and “treating a cell phone as a container whose contents may be searched incident to arrest is a bit strained as an initial matter.”¹²⁸ The closed container approach cannot be logically applied to electronic devices, such as a computer, because of the inherent differences between those devices and objects like a suitcase in *Jacobsen* or even a CD in *Runyan*.

As an initial matter, the analogy does not work with electronic devices because electronic devices, such as cell phones and computers, can be used to access data elsewhere and are not confined to the contents within their physical device.¹²⁹ The majority of computers and cell phones today have “cloud” computing and access to data stored within various external databases or servers.¹³⁰ Additionally, the potential for discovering private information or data unrelated to any search or investigation is incredibly high, given the sheer number of items on electronic devices. The Court has held that “the sum of an individual’s life can be reconstructed” through contents on electronic devices.¹³¹ It is true that, today, a search of a cell phone would likely expose more information than a full search of a house.¹³²

Proponents of the container approach may argue that there is no dispute that Friend B in the hypothetical had an initial expectation of privacy in the contents of her computer. Further, proponents may believe that Private Citizen A frustrated Friend B’s expectation of privacy when she discovered the documents. Therefore, the government would be “properly limited in scope” if they only looked at the contents of one container: the computer.¹³³ The container approach is based on the argument that the legality of a search depends on “the degree to which it intrudes upon an individual’s privacy, and on the degree to which it is

127. *Riley*, 134 S. Ct. at 2489.

128. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (citing *New York v. Belton*, 453 U.S. 454, 460 (1981) (describing a “container” as “any object capable of holding another object”)).

129. *Id.* at 2491.

130. *Id.* (defining “cloud computing” as “the capacity of internet-connected devices to display data stored on remote servers rather than on the device itself”).

131. *Id.* at 2489.

132. *Id.* at 2491.

133. *Id.* at 2491.

needed for the promotion of legitimate governmental interests” to ensure there is a legal balance between these interests.¹³⁴ However, the balance between these interests vanishes under the container approach when the government is permitted to comb through limitless information—no matter what cost.¹³⁵

D. Physical Computer vs. Digital File Folder: Neither Is a Container

Under the container approach, it could be argued that even if the idea is dismissed in the context of the physical device (the computer), perhaps it could be applied to the digital container, such as a digital folder. Although no case law currently supports this standard, its presumption is that it would create a balance between the physical world versus the digital world arguments and allow for the containers, referred to in earlier case law, to be applied in the modern day. However, this theory would fall short as well because of the unworkability of such a standard given the nature of modern technology. Nowadays, it is common for digital folders to be linked and accessible from various locations. For instance, if a suspicious document was found within a folder on an employee’s computer while using a virtual private network (“VPN”) or remote work access, a broad interpretation of the Private Search Doctrine could open up the entire company server to a government investigation. Or suppose the document was in a sub-folder of a larger folder—which one would be classified as the container: the file, the sub-folder, or the entire desktop? The endless potential for the government to search under the container approach with the Private Search Doctrine fails to create any boundaries for government agents or rule for the courts to apply. Therefore, treating electronic devices as “containers” is an unworkable standard, regardless of whether it is applied to the physical or digital aspect of a device.

Conclusion

The question presented by this Note is: What happens when a private searcher finds potential contraband on an electronic device and reports it to the authorities? The answer is: a government agent conducting a follow-up investigation who responds to this type of call should only conduct a duplicate search in order to examine what the private searcher saw, and determine if any contraband or indication of illegal activity is present. The agent should not be allowed to search the entire device because the owner maintains an expectation of privacy in the remaining contents. Society

134. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

135. *See United States v. Lichtenberger*, 786 F.3d 478, 479 (6th Cir. 2015).

must not accept the notion that the discovery of one *potentially* incriminating image, document, or file is enough to allow the government to conduct a warrantless search of that *entire* device and any other devices to which it may be connected. It is illogical to create a standard in the wake of *Riley* that one illegal document could potentially open up an entire company's server to the government's prying eyes without a warrant. If the seemingly boundless digital world is unfastened in this manner, the heart of the Fourth Amendment will cease to exist in the realm of electronic devices under the Private Search Doctrine.

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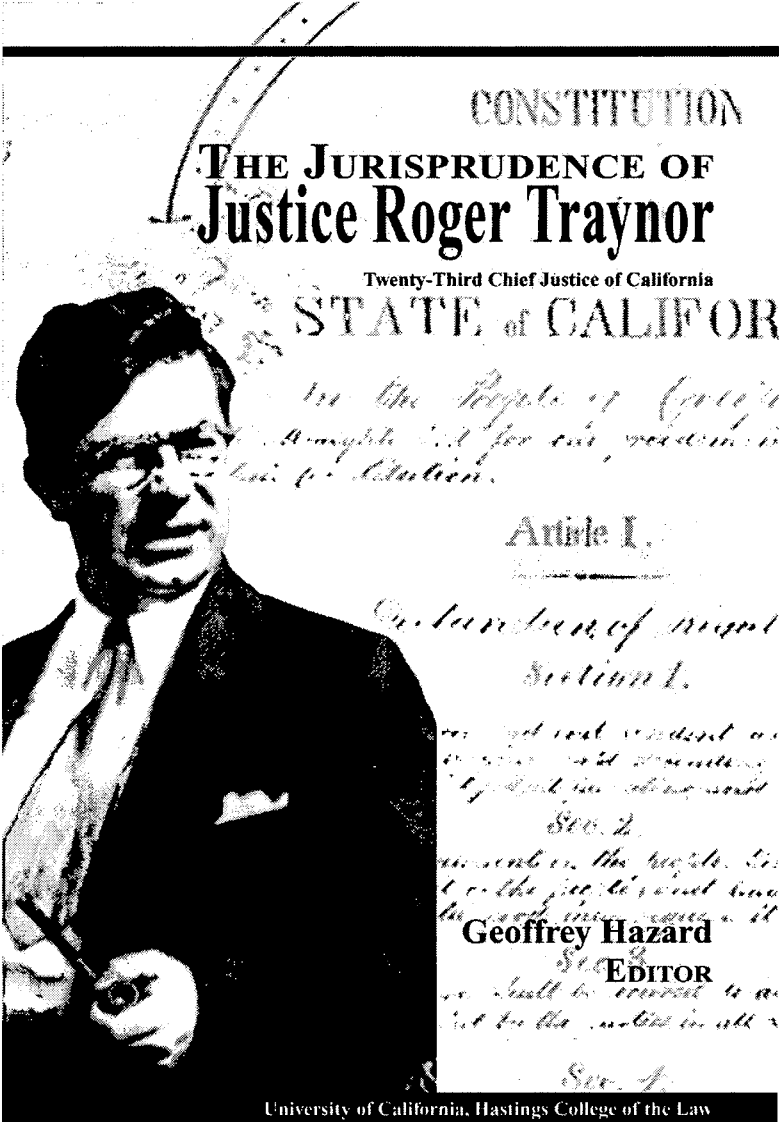
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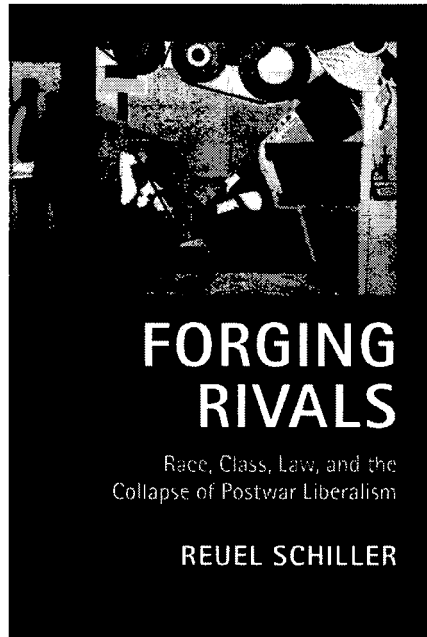
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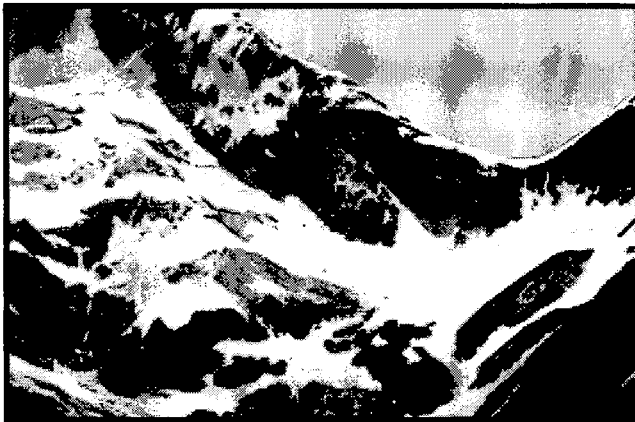
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