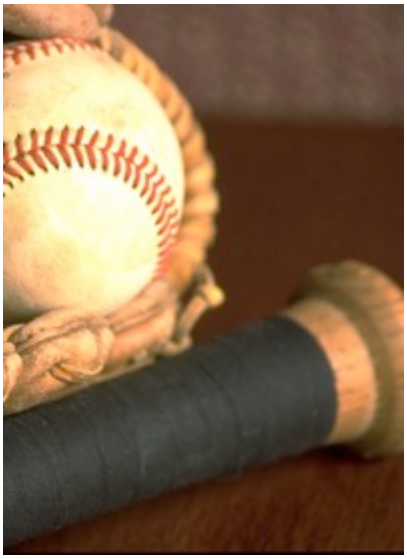
Written by **Jack Kenny** on August 28, 2009

# Court Sets New Rules for Computer Searches



In a ruling with broad implications for computer privacy, the Ninth U.S. Circuit Court of Appeals in San Francisco ruled that federal investigators went too far when they seized the digital records of a drug testing company and kept the results of confidential drug tests performed on all Major League baseball players during the 2002 season.

According to published reports, 104 players tested positive for performance enhancing drugs. The names of four of them — Alex Rodriguez, Manny Ramirez, David Ortiz, and (now retired) Sammy Sosa — were leaked to the press by an anonymous source or sources.

The court upheld a ruling by Judge Florence-Marie Cooper of the Central District Court of California that required the government to yield records taken in the investigation. The judges ruled that law-enforcement agents went far beyond the scope of the warrant authorizing a search of the records of 10 ballplayers for whom the government had established probable cause. Government officials said they are considering an appeal to the U.S. Supreme Court.

The court's 9-2 ruling could have a significant impact on future database searches. It sets forth a five-part standard for warrants, reminiscent of the "Miranda warning" established by the U.S. Supreme Court in a 1966 ruling requiring that criminal suspects be fully notified of their rights when placed under arrest. In computer searches, the circuit court ruled, warrants should not be issued unless the government waives reliance upon the plain view exception to the exclusionary rule, which bars evidence seized without authority of a warrant. Under the long-established plain view exception, evidence

that is in plain sight during an authorized search may be taken and used in court even when the object or objects seized are not among the things described in the warrant. Officers with a warrant to search a home for stolen merchandise, for example, may also recognize and seize as evidence marijuana in a transparent bag, left in plain sight on a coffee table.

The Ninth Circuit ruling is the latest in a long and winding trail of litigation stemming from a federal investigation of the Bay Area Laboratories Company (BALCO), suspected of providing steroids to professional baseball players. Prosecutors obtained a subpoena from a grand jury in the Northern District Court of California, calling on Comprehensive Drug Testing Inc. of Santa Ana to turn over all drug testing records and specimens of all the players who had participated in the 2002 testing. The tests were conducted on all Major League players at the time, with the guarantee that the results would be confidential and there would be no penalties for testing positive. The purpose was to determine if five percent or more of the players would test positive, the threshold agreed to by the Major League Baseball and the Major League Baseball Players Association as grounds for future testing.

The players association and the testing company appealed the subpoena and succeeded in having it quashed. But the government also obtained a warrant from the Central District Court of California to seize and search the records of the 10 players for whom it had probable cause. Both the district and circuit courts ruled, however, that officials exceeded the terms of the warrant they executed against Comprehensive Drug Testing. The warrant instructed the investigators to determine how much of the information about the ten players could be segregated on-site from the rest of the company's records. It also required procedures for segregating the data in any investigation of the files and records that might be conducted in a law-enforcement laboratory.

"Brushing aside an offer by on-site by CDT personnel to provide all information pertaining to the ten identified baseball players," wrote Chief Judge Alex Kozinski, "the government copied from CDT's computer what the parties have called the 'Tracey Directory,' which contained, in Judge Cooper's words 'information and test results involving hundreds of other baseball players and athletes engaged in other professional sports.'"

Kozinksi dismissed as "too clever by half" the contention that once the agents opened the directory, the disputed records were in plain view. Under that line of reasoning, the judge argued, everything the government wishes to seize would come under the plain view exception.

"Why stop at the list of all baseball players when you can seize the entire Tracey Directory?" Kozinski wrote. "Why just that directory and not the entire hard drive? Why just this computer and not the one in the next room and the next room after that?"

The court noted the difficulties inherent in computer searches, since records can be quickly and easily be destroyed, mislabeled or even "booby trapped" to thwart an investigation. Nonetheless it set forth the following rules for judges to follow in issuing warrants:

1. Magistrates should insist that the government waive reliance on the plain view doctrine in digital evidence cases.
2. Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.
3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.
4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.
5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what ithas kept.

The court's majority opinion acknowledged the difficulty of limiting searches to prescribed bounds when dealing with computer data:

> We accept the reality that such over-seizing is an inherent part of the electronic search process and proceed on the assumption that, when it comes to the seizure of electronic records, this will be far more common than in the days of paper records. This calls for greater vigilance on the part of judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures.

The two dissenting judges argued that it was the court's majority that was overreaching in this case and ignoring it's own precedent, established in a ruling in which the court had denied an appeal to suppress evidence of child pornography found during a computer search for false identity cards. "There is no rule," wrote Judges Consuelo Callahan and Sandra Ikuta, "that evidence turned up while officers are rightfully searching a location under properly issued warrant must be excluded simply because the evidence may support charges for a related crime."