

**IN THE MATTER OF DEVELOPMENT OF THE JOINT STRATEGIC PLAN  
ON INTELLECTUAL PROPERTY ENFORCEMENT: REQUEST OF THE  
INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR FOR  
PUBLIC COMMENTS**

**COMMENTS OF PUBLIC KNOWLEDGE**

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## Introduction

Public Knowledge (PK) thanks the Intellectual Property Enforcement Coordinator for inviting public comments on the U.S. government's intellectual property enforcement efforts. PK believes that in order to make the most efficient use of scarce government resources, the US government's enforcement strategy should be directed at large scale commercial infringers of copyright and not small scale operations. To be successful, that enforcement strategy has to be targeted and avoid collateral damage to innocent actors. Certain practices the government has adopted, in particular the seizures of domain names and servers, have not followed this targeted approach. As a result, the government's actions have adversely impacted the due process and free speech rights of innocent third parties. In order to remedy these harms, PK suggests that:

1. The US government ensure that its seizure strategy is targeted and applies only to allegedly infringing content;
  - a. Domain name seizures generally do not represent such a targeted approach.
  - b. The government must independently evaluate the likelihood that the targeted content is infringing and focus only on clear cases.
2. If the US government chooses to continue to employ seizures of domain names or servers as a strategy to combat commercial scale infringement, it should provide prior notice and opportunity to be heard to owners of domain names and servers.
3. If the government chooses to seize servers hosting allegedly infringing content, it must have a clear plan for protecting non-infringing content prior to seizing domains.

### **The seizure of domain names by US Immigration and Customs Enforcement agency adversely impacts the due process and free speech interests of innocent third parties as well as alleged infringers.**

In 2010, the Immigration and Customs Enforcement (ICE) division of the Department of Homeland Security initiated "Operation In Our Sites", an Intellectual Property (IP) enforcement effort that targeted the domain names of websites that link to allegedly infringing content.<sup>1</sup> The operation cast a wide net by focusing on entire websites rather than particular infringing content. The resulting seizures took down sites where the allegedly infringing content was only a small part of the content on the website. For example, in November 2010, the government seized Dajaz 1, a popular hip

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<sup>1</sup> See U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2010 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT 21 (Feb. 2011), 2, available at [http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipiec\\_annual\\_report\\_feb2011.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipiec_annual_report_feb2011.pdf) ("IPEC 2010 Report").

hop blog, for providing links to four allegedly infringing songs.<sup>2</sup> The seizure of the site prevented access not only to links to the allegedly infringing content, but also the many legitimate blogs hosted on the site. Such actions harm the free speech and due process interests of both innocent third parties as well as the owner of the domain name.

a. *The seizure of domain names as a copyright enforcement tactic unjustifiably deprives domain name owners of due process*

The opportunity to defend one's self against allegations of wrongdoing *prior* to the imposition of remedial measures is a value of the highest order in this country.<sup>3</sup> Only in “extraordinary circumstances” may the government deprive a person of property without advance notice and hearing – the basic requirements of due process.<sup>4</sup> For instance, property may be seized and notice and hearing postponed in order to shield the public from contaminated produce<sup>5</sup> or defective medicine.<sup>6</sup> Intuitively, the case for grouping domain names allegedly linking to copyright-infringing works alongside food capable of poisoning the public in a list of property that warrants seizure without notice and hearing strains credibility. Legally, the “extraordinary circumstances” test confirms this intuition.<sup>7</sup>

Three elements must be satisfied for a circumstance to qualify as “extraordinary” such that a lack of pre-seizure notice and hearing is justified.<sup>8</sup> First, the seizure must be directly related to an important governmental or public interest.<sup>9</sup> Second, there must be a “special need for very prompt action” such that pre-seizure notice may undermine the intent of the statute authorizing forfeiture in the first place (i.e. by providing an opportunity for the destruction, concealment, or other removal of the property).<sup>10</sup> Third, the seizure must be initiated by an impartial government official, not self-interested private parties.<sup>11</sup>

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<sup>2</sup> Timothy Lee, *Waiting on the RIAA, Feds Held Seized Dajal Domain for Months*, Ars Technica, (May 4, 2012), available at <http://arstechnica.com/tech-policy/2012/05/waiting-on-the-riaa-feds-held-seized-dajaz1-domain-for-months/>

<sup>3</sup> See generally *Coffin v. United States*, 156 U.S. 432 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”); FED R. CIV. P. 65 advisory committee’s note (1966) (“In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, *before* the order is granted.”).

<sup>4</sup> *Fuentes v. Shevin*, 407 U.S. 67, 90, 92, *reh’g denied*, 409 U.S. 902 (1972).

<sup>5</sup> See *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

<sup>6</sup> See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

<sup>7</sup> See *Fuentes v. Shevin*, 407 U.S. 67, 90, 92 (1972); see also *United States v. Puello*, 814 F. Supp. 1155 (E.D.N.Y. 1993) (pointing to two instances in which the prompt seizure of property prior to hearing is justified; first, where defendant can remove the valuable asset at issue, and second, where there is a reasonable fear that the property would be “freely used as instrumentality of crime”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974).

<sup>11</sup> See *id.*

The seizure of domain names fail to satisfy at least the second and third prongs of this test, and thus do *not* constitute an extraordinary circumstance that warrants the denial of due process. In the case of defective drugs, there clearly exists a “special need for very prompt action” – anything less potentially jeopardizes the health of the public.<sup>12</sup> The same cannot be said of domain names of websites that allegedly link to or host infringing content.

First, with respect to the domain names of linking websites, these links are not the actual property at issue; rather, linking websites merely point visitors to allegedly infringing content hosted elsewhere.<sup>13</sup> In a sense, seizing the domain name of a website for linking to allegedly infringing content (in addition to non-infringing content) is not unlike seizing a doctor’s office because the doctor prescribes the allegedly defective drug. Neither seizure directly addresses the property actually at issue. In both situations, providing the domain name owner or the doctor notice of the issue would enable them to independently remedy the problem without frustrating due process. Similarly, providing a notice to domain name owners that host content would enable that owner to remove access to infringing content. In fact, in the copyright context, the notice and take-down procedures codified in 17 U.S.C. section 512 accomplish this very goal.<sup>14</sup>

Further, providing domain name owners with pre-seizure notice would not undermine the intent of the forfeiture statute. If the purpose of expanding civil forfeiture law to reach property used to facilitate copyright infringement was to effect the removal of infringing content from the Internet, then providing notice of infringement to domain name owners could only advance this goal. In other words, pre-seizure notice cannot be said to create an unjustifiable risk that the property at issue will be removed if the ultimate objective of the statute is the removal of the property. Unlike with physical items, there is no threat that prior notice will give targets an opportunity to destroy evidence or move to unknown location. Enforcement agencies are quite capable of making copies of web pages for evidentiary purposes prior to notice. Similarly, any attempt to relocate the site will require giving visitors notice as to the new location – information that enforcement agencies will also be able to use.

Finally, while Operation in Our Sites was an ICE initiative, its credibility and impartiality have been undermined by instances where self-interested private parties have exercised undue influence in the identification and investigation of targeted domain names. Indeed, unsealed court records in the Dajaz1.com case revealed that the “Recording Industry Association of America (RIAA) ... had pointed the authorities to the

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<sup>12</sup> See *Ewing v. Mytinger & Casselberry, Inc.* 339 U.S. 594. (1959).

<sup>13</sup> See, e.g., Application and Affidavit for Seizure Warrant, In re 5 Domain Names, No. 10-2822M (C.D. Cal. filed Nov. 17, 2010) (“*Rapgodfathers Affidavit*”).<sup>55</sup> (linking websites like Dajaz1.com do not host infringing content, but “link to cyberlockers” where the content resides).

<sup>14</sup> See generally 17 U.S.C. § 512 (establishing a notice-and-takedown regime whereby copyright owners can submit notice of infringement to website owners and request that the infringing content be removed).

sites in the first place” and that “prosecutors in the case made three secret requests [to extend the seizure of Dajaz1.com while] ... awaiting information” from the RIAA.<sup>15</sup>

Thus, the seizure of domain names does not constitute an extraordinary circumstance warranting a lack of pre-seizure notice and hearing. Further, even if seizure of domain names without prior notice results in increased efficiency of enforcement, efficiency must not be the measure of its ultimate value to society. As the Supreme Court has articulated, “[a] prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: *it is intended to protect the particular interests of the person whose possessions are about to be taken.*”<sup>16</sup>

*b. Seizing domain names unnecessarily burdens free speech on the Internet.*

The Internet has been called the 21<sup>st</sup> century equivalent of the printing press.<sup>17</sup> People use the Internet not only to receive information but also to participate in political and social debates. Government actions intended to target unlawful activity on the Internet must be sensitive to the importance of the Internet as a medium of expression and must be narrowly targeted to ensure that it does not encumber free expression interests.

The ICE seizures do not represent such sensitivity. They have indiscriminately targeted much more than allegedly infringing, speech. Seizure of entire domain names not only disrupts access to allegedly infringing content, but also to “lawful [...] content, including non-Web content like email or instant messaging connections.”<sup>18</sup> For instance, in the Dajaz1 seizure the allegedly infringing content consisted of links to four songs. The site also contained other commentary on hip hop music and access to this commentary was disabled as a result of the seizure. Thus, the Dajaz1 seizure impinged upon the free speech interests of many who posted blogs on the site and those who read these blogs.

The Dajaz1 situation may not be unique. The ICE seizures have not targeted particular infringing content, but entire websites. Thus the seizure policy, by design, fails to focus on infringing content only. Scholars have pointed out<sup>19</sup> that, in many instances,

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<sup>15</sup> Ben Sisario, *Hip-Hop Copyright Case Had Little Explanation*, N.Y. TIMES (May 6, 2012), <http://www.nytimes.com/2012/05/07/business/media/hip-hop-site-dajaz1s-copyright-case-ends-in-confusion.html> (detailing the unsettling circumstances of the Dajaz1.com dispute).

<sup>16</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972)

<sup>17</sup> *See, Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

<sup>18</sup> *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites. Part I: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Intellectual Property, Competition, and the Internet*, 112th Cong. 6-9 at 6 (2011) (“*Online Commerce Hearing*”) (statement of David Sohn, Senior Policy Counsel, Center for Democracy & Technology).

<sup>19</sup> *Puerto 80 Projects, S.L.U. v. Dept. of Homeland Security, Immigration and Customs Enforcement*, Opening Brief and Special Appendix for Petitioner Appellant Puerto 80 Projects, S.L.U., Second Circuit

the ICE seizures amount to unconstitutional prior restraint of speech. These seizures result in preventing access to forums of debate and discussion – the websites have been taken down, while hosting some infringing allegedly content, also provided a forum for posting blogs, comment etc. These restrictions may not be imposed without sufficient procedural safeguards including notice and an opportunity to be heard.<sup>20</sup>

**The government’s seizure of cloud storage servers hosting allegedly infringing content can adversely impact due process and free speech rights.**

In addition to domain name seizures, the government’s strategy to fight infringement has recently expanded to servers that host infringing content. U.S. authorities seized about 1000 servers leased by the company MegaUpload as part of a larger operation against Megaupload for allegedly facilitating copyright infringement. These servers also hosted a significant amount of non-infringing content that is unrelated to the government’s case against the owners of MegaUpload.<sup>21</sup> The seizure is preventing the owners of this content from accessing it. To make matters worse, the government has reportedly indicated to the server hosting company that they are free to discard content on the servers, once it completed examining content on the servers in order to establish its case

This incident indicates a disturbing disregard for the free speech and property rights of innocent third parties caught in the web of copyright enforcement. The arguments about the importance of preserving the free speech and due process interests made above apply equally to the third party content stored on the MegaUpload servers.

**The US government must reexamine if its seizure strategy is an appropriate mechanism to fight copyright infringement.**

The adverse impacts of the government’s seizures of domain names and servers described above is, in part, a result of the view that seizure and forfeiture provisions can apply in the same manner to physical objects and intangible objects. Seizure provisions were originally created to empower the government to seize ships in admiralty cases.<sup>22</sup> As Congresswoman Zoe Lofgren has observed, domain name seizures without due process may pose fewer concerns where objects such as stolen cars or knock off

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Court of Appeals, *available at*:  
[https://www.eff.org/files/filenode/puerto80\\_v\\_US/038%20Rojadirecta%20Puerto%2080%20Opening%20Appellate%20Brief.pdf](https://www.eff.org/files/filenode/puerto80_v_US/038%20Rojadirecta%20Puerto%2080%20Opening%20Appellate%20Brief.pdf)

<sup>20</sup> *Caroll v. President & Comm’rs of Princess Anne*, 992 F.2d 445 (1968); *U.S. v. Quattrone*, 402 F.3d 304, 312 (2d. Cir. 2005); *Astro Cinema corp. Inc. v. Mackell*, 422 F.2d 293, 296 (2d. Cir. 1970)

<sup>21</sup> In fact, Public Knowledge’s own legitimate content was hosted by MegaUpload. *See also* Julie Samuels, *Megaupload User Asks Court for Files Back. Again.*, EFF Deeplinks Blog, (May 24, 2012), available at: <https://www.eff.org/deeplinks/2012/05/megaupload-user-asks-court-files-back-again>.

<sup>22</sup> See, e.g., *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 508-11 (1921); Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 Wm. Mitchell L. Rev. 265, 271-281 (1995) (noting that over time, forfeiture law has expanded to encompass funds garnered through tax evasion, bootleg alcohol, and illegal drugs).

handbags are being seized, but when applied to websites and speech online “domain seizures without due process are a form of censorship”.<sup>23</sup>

To overcome some of these adverse impacts, the government must tailor its enforcement efforts to target infringing content. This approach would involve pursuing bad actors that distribute infringing content. In the online context, these actors could be those who upload large quantities of infringing content. A focus on an entire website poses the danger of targeting far more content than is necessary to fight infringement.

If the government continues to use seizure of websites and servers as a part of its enforcement strategy, it must ensure that the process incorporates greater due process safeguards. Thus, owners of websites or servers that would be targeted for seizure must first be given notice and provided an opportunity to present their case.

In addition, where seizure involves third party content, the government must ensure that a plan to protect and preserve this content has been put in place before seizing servers.

Respectfully submitted,

/s/ \_\_\_\_\_

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<sup>23</sup> Rep. Zoe Lofgren, *Lofgren, Wyden Question Response to Seizure Inquiries*, [http://lofgren.house.gov/index.php?option=com\\_content&view=article&id=637&Itemid=130](http://lofgren.house.gov/index.php?option=com_content&view=article&id=637&Itemid=130) (last visited Dec. 15, 2011).