

MAY 09 2011



**U.S. Immigration
and Customs
Enforcement**

The Honorable Zoe Lofgren
Member, U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Lofgren:

Thank you for your April 7, 2011 letter. You wrote regarding Operation In Our Sites, a law enforcement operation that combats federal criminal copyright and trademark violations on the Internet.

ICE cannot answer questions relating to ongoing criminal investigations or matters in litigation. However, we can answer general questions concerning the enforcement actions undertaken during Operation In Our Sites. All of ICE's answers below are meant to represent only the views of ICE and not the Administration as a whole or any other agency.

- 1. In determining whether to seize the domain names of particular websites for copyright infringement related to online media (either downloads or streaming), what additional investigation did ICE conduct after receiving complaints of infringement from copyright owners?**

Although ICE cannot discuss the ongoing investigations of any seized domain name or a matter in litigation, ICE conducted thorough independent investigations of each seized domain name prior to obtaining court-ordered seizure warrants. I would refer you to the voluminous affidavits filed with courts in these matters that detail the specific actions within each investigation conducted under Operation In Our Sites.

- a. Did ICE conduct an independent investigation of the allegations of infringement by copyright owners to determine their validity? If so, please describe the specific actions involved.**

Please see the answer directly above.

- b. Did ICE conduct any investigation related to possible defenses against the allegations of copyright infringement, such as fair use or evidence of authorization by the copyright owner?**

Yes, ICE investigated possible affirmative defenses.

- c. Did ICE investigate whether the owners of the seized domains complied with the DMCA—specifically, whether they received any takedown notices from copyright owners for the allegedly-infringing content, whether they responded to those notices, and whether they qualified for any of the safe harbors from infringement liability established by 17 U.S.C. § 512?**

In certain circumstances, the issuance and compliance of the Digital Millennium Copyright Act (DMCA) takedown notices was part of investigations. However, criminal violations under 18 U.S.C. §§ 2319 and 2320, as well as the forfeiture section contained in 18 U.S.C. § 2323, are provisions Congress enacted separate from the takedown process provided for under the DMCA.

- d. Did ICE investigate whether the owners of the seized domains were located in the United States and whether the allegedly infringing content was hosted on servers located within the United States?**

Yes, ICE did investigate whether the owners of the seized domains were located in the United States. If an arrest can be made of an individual in the United States violating criminal trademark or copyright law, ICE will work with the Department of Justice (DOJ) to make such an arrest. ICE also investigates whether the infringing content is hosted on servers within the United States. During Operation In Our Sites, ICE agents obtained several court orders to seize servers in the United States that contained infringing content.

- 2. If an infringing website is hosted in the United States, meaning that its servers and/or data are within the physical reach of U.S. law enforcement, is a seizure of that website's domain name still necessary? If so, why?**

ICE's investigation of online piracy shows that a domain name has value to the criminal operator of a website illegally offering copyrighted content. Sites illegally offering copyrighted content often earn tremendous profit from advertising revenue. For instance, ICE recently worked with DOJ to forfeit a U.S. bank account holding \$500,000, alleged to be proceeds from advertising revenue from just one infringing site.

As you may be aware, advertising revenue is based upon the number of visits to the site. Often, the number of visits to a pirate site builds over time as its reputation increases. Industry sources advise it can take 9 to 15 months for a website illegally distributing copyrighted material to build up enough traffic to profit from the criminal activity. The greatest profit is earned by well known and popular "pirate sites." Indeed, the domain name sometimes becomes synonymous with criminal copyright infringement.

Therefore, in addition to seizing a server and any available assets, seizing the domain names, under 18 U.S.C. § 2323, is another tool law enforcement can use to disrupt criminal activity. The criminals cannot simply reuse the same domain name and start with the same level of profitability. If the criminal chooses to reengage in such illegal conduct, he or she must begin to socialize a new domain name.

- 3. The seizures in Operation In Our Sites were executed without any prior notice to or contact with the domain owners. Why was this necessary? For seizures related to online media, why did ICE not attempt to contact the website operators and give them a short amount of time to respond to the allegations of infringement?**

The seizures of domain names conducted in Operation In Our Sites were conducted as part of criminal investigations for violations of 18 U.S.C. §§ 2319 and 2320, after judicially authorized seizure warrants were obtained. Law enforcement agencies do not notify suspects of impending criminal enforcement actions prior to their execution.

- 4. Do you believe that a website that hosts no content of its own but instead merely links to other websites can be guilty of criminal copyright offenses under existing U.S. law and subject to a seizure of its domain name? If so, what legal authority can you provide for this view?**

ICE cannot provide an advisory opinion about the lawfulness or unlawfulness of particular websites. ICE can answer certain questions related to a domain name seizure under Operation In Our Sites, if there is no longer an ongoing investigation or the issue is not in litigation.

- 5. Would ICE refrain from seizing the domain name of a website for copyright infringement related to online media if the website's operators fully comply with the DMCA?**

ICE cannot render an advisory opinion on the investigation of websites for possible court-ordered seizure.

- a. Would ICE refrain from seizing the domain name of a website for infringing online content posted or uploaded by that website's users if the website qualifies for the safe harbor from liability provided by 17 U.S.C. §512(c)?**

ICE cannot render an advisory opinion on the investigation of websites for possible court-ordered seizure.

- b. Would ICE refrain from seizing the domain name of a website for links or other information location tools pointing to infringing online content if the website qualifies for the safe harbor from liability provided by 17 U.S.C. §512(d)?**

ICE cannot render an advisory opinion on the investigation of websites for possible court-ordered seizure.

- 6. One of the domain names seized in Operation In Our Sites was torrent-finder.com. This website reportedly hosted no infringing content of its own, but instead provided a search engine for links to other websites. How does ICE distinguish between this website and more popular search engines like Google and Bing, where links to a substantial amount of infringing content can also be found?**

The forfeiture of www.torrent-finder.com is a matter under litigation at this time and we cannot comment. We can refer you to the affidavit publicly filed in the U.S. District Court for the Central District of California.

- 7. In deciding whether to seize the domain names of particular websites for infringement related to online media, did ICE consider the existence of constitutionally-protected speech on each website, or weigh the amount of legitimate speech versus the extent of alleged infringement on each site?**

Yes, ICE, working with DOJ, does consider the existence, or lack thereof, of constitutionally protected speech on each website.

- 8. In general, do you agree that domain name seizures in copyright enforcement actions should be reserved for the “worst of the worst”—those websites that are conducting large-scale commercial infringement and whose violations of criminal copyright statutes are beyond doubt?**

Again, as a law enforcement agency, ICE cannot offer advisory opinions on domain name seizures. However, enforcement actions under Operation In Our Sites have resulted in court-ordered seizure of 120 domain names from among millions of active domain names. Approximately 100 of the seized domain names were for sites engaged in criminal trademark violations by selling counterfeit hard goods.

- 9. What criteria does ICE use to prioritize possible targets for investigations of online copyright infringement?**

All of the domain names seized through court orders obtained during Operation In Our Sites were commercial sites, profiting from criminal trademark violations and criminal copyright infringement through a combination of sales, advertising revenue, and subscription fees. As a law enforcement agency, ICE has no interest in disrupting lawful commerce or protected speech. The targeted sites were designed with the specific intent to derive profits from protected trademarked goods and copyrighted materials of American businesses.

- a. Operation In Our sites resulted in the seizure of several domain names for blogs dedicated to hip hop music—rapgodfathers.com, onsmash.com and dajaz1.com. How are these seizures consistent with ICE’s priorities in such investigations, which guide the use of scarce law enforcement resources?**

Forfeiture of www.onsmash.com and www.dajaz1.com are in litigation and ICE cannot comment on the seizure of these sites. However, ICE investigates intellectual property theft across all industries. American businesses continue to suffer tremendously from theft of intellectual property. The impact goes throughout sections of America’s workforce, including software, pharmaceuticals, electronics, health and safety items, and automobile and aircraft parts. This includes counterfeiting of luxury goods like handbags, clothing, and watches. While law enforcement must make determinations about resource allocation, approximately one

tenth of one percent of ICE's special agents have been engaged in Operation In Our Sites. ICE believes this represents a very good use of limited resources to combat a massive and costly problem for American businesses.

- 10. In the course of a separate action against online child pornography, ICE seized the domain name mooo.com, including 84,000 of its sub-domains, many of which hosted innocent websites. What steps is ICE taking to ensure that this mistake is not repeated in future domain seizures, including those related to copyright infringement?**

As you note, this action was conducted against online child pornography. ICE and DOJ have issued guidance to the field on the investigations of sub-domains.

- a. For enforcement actions against websites hosted on sub-domains, can ICE selectively seize a single sub-domain through the registry operator (such as Verisign for .com domains), or must it work with the domain owner (such as the owner of mooo.com) in order to avoid disabling all other sub-domains in addition to the target?**

ICE will continue to work with registry operators and domain owners to selectively seize a sub-domain if such seizure is ordered by a federal court.

- 11. In February of this year, the domain names of six different websites were reportedly seized in Operation In Our Sites, for alleged infringement related to streams of sports broadcasts. A recent news report indicated that five of those six websites continue to be accessible through other domain names. The only exception is the website located at channelsurfing.net, which also migrated to other domain names immediately after the seizure and was shut down only after its owner was arrested. In light of this record, do you continue to believe that domain seizures are effective in significantly disrupting online infringement? How does ICE measure the continued effectiveness of its domain seizures in cutting off access to the targeted websites?**

Success in law enforcement is often measured by a combination of specific criminal enforcement as well as deterrence caused by such enforcement. In intellectual property enforcement, public awareness of the criminal activity is also critical, both from a consumer protection standpoint as well as reducing demand for counterfeit goods or pirated content.

In addition to arrests, asset seizures, and incapacitation of websites engaged in piracy or hard goods counterfeiting, Operation In Our Sites has already demonstrated success in deterrence and raising awareness. Following Operation In Our Sites v. 1.0, conducted on June 30, 2010, ICE was notified that 81 other sites offering pirated material voluntarily stopped offering illegally copyrighted material. This is a general deterrence not often seen in criminal enforcement.

Indeed, of the first 9 domain names seized in Operation In Our Sites in June 2010, only two of the sites returned to offer illegally-copyrighted content. This level of specific deterrence, and lack of recidivism, is rare in law enforcement.

The domain names seized now display an electronic seizure banner that notifies both the site owner and viewers that a federal court order has been issued for the domain name and educates them that willful copyright infringement is a federal crime. As of April 11, 2011, there have been over 45 million hits to the seizure banners on 120 seized sites. ICE does not record the Internet Protocol addresses of those individuals that hit the banner, but the collective number of "hits" indicates public awareness about the criminal laws against copyright violation and trademark infringement has increased.

As you note, the mission of law enforcement in combating online infringement of copyright can be difficult. As with many criminal activities, individuals will often continue to engage in the conduct. Copyright infringement for commercial purposes is often seen by criminals as a low-risk, high-profit enterprise.

12. Of the domains that have been seized in Operation in Our Sites, how many of their owners have been arrested for the underlying offense? For the seizures that have not been followed by an arrest, has ICE attempted to make arrests? If not, why?

So far, criminal charges have been filed against two individuals associated with two of the domain names seized during Operation In Our Sites. In addition, ICE has obtained court orders to freeze assets in 16 bank, PayPal, investment, and advertising accounts. Multiple seizures of servers, both domestically and overseas, were conducted and five residential search warrants were executed. For many of the sites, the criminal investigations remain ongoing and more criminal charges are anticipated.

However, approximately 100 of the 120 domain names seized during Operation In Our Sites had website operators based in China. Many of the other sites were also operated by individuals outside the jurisdiction of the United States.

13. Is it appropriate for ICE to use an allegation of criminal copyright infringement to seize a domain name without also pursuing the arrest of those who are responsible for the infringement?

As a law enforcement agency, ICE will use the various tools provided by congress to enforce criminal laws. In most cases, that will include criminal arrest, asset forfeiture, and the imposition of a fine and/or imprisonment. In some instances the tools available to law enforcement are more limited.

As noted above, many of the websites engaged in criminal copyright infringement or trademark violation are operated and hosted in foreign countries with which the United States does not have positive law enforcement working relationships. There may be no known physical assets in the United States associated with these sites. In these instances, seizure of a domain name that is registered in the United States is the sole law enforcement action available.

14. The traditional authority of ICE's predecessor—the United States Customs Service—was over goods that crossed international borders. Are there any similar limits to ICE's authority over the Internet? Is it your position that ICE has investigative and enforcement authority over any Internet transaction, even one between a website based in the United States and a user in the United States?

ICE does not take the position that it has enforcement authority over "any Internet transaction." Rather, ICE's investigation of online criminal copyright infringement or trademark violations is based on whether the website is actively used to violate U.S. laws. ICE investigates copyright and trademark violations only when there is a U.S. nexus, such as a U.S. copyright or trademark being violated or an obvious intent to sell counterfeit goods to American consumers.

Thank you for your interest in Operation In Our Sites. Please do not hesitate to contact my office if you have additional concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "John Morton", with a long horizontal flourish extending to the right.

John Morton
Assistant Secretary