

February 2, 2011

The Honorable John Morton  
Director  
U.S. Immigration and Customs Enforcement  
500 12<sup>th</sup> Street SW  
Washington, DC 20536

The Honorable Eric Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave  
Washington, DC 20530

Dear Attorney General Holder and Director Morton:

I write to learn more about the seizures of Internet domain names that your offices executed over the last year. These seizures represent a major shift in the way the U.S. government combats copyright infringement in the digital environment. This shift is best exemplified by comparing the actions that Congress authorized under the Digital Millennium Copyright Act (DMCA) and the recent actions by the Obama Administration that seized domain names under its interpreted authority of the Pro-IP Act (P.L. 110-403). Under the DMCA, when specific content is found to be infringing, the host of that content is contacted and requested to remove it. This process enables infringing content to be targeted for removal from a website without impinging on legitimate speech that the website may also facilitate. The "Operation in our Sites" campaign executed by the Obama Administration targets entire domain names. Moreover, in contrast to ordinary copyright litigation, the domain name seizure process does not appear to give targeted websites an opportunity to defend themselves before sanctions are imposed. As you know, there is an active and contentious legal debate about when a website may be held liable for infringing activities by its users. I worry that domain name seizures could function as a means for end-running the normal legal process in order to target websites that may prevail in full court. The new enforcement approach used by Operation in Our Sites is alarmingly unprecedented in the breadth of its potential reach.

While I believe it important to combat copyright piracy, I grow concerned when the methods used may not be effective and could stifle constitutionally protected speech, job-creating innovation, and give license to foreign regimes to censor the Internet. If Operation in our Sites is to continue, the Obama Administration must, at a minimum, provide some clarity about which types of websites the Administration intends to target, and which ones it will not. Furthermore, for the Administration's efforts to be seen as legitimate, it should be able to defend its use of the forfeiture laws by prosecuting operators of domain names and provide a means to ensure due process. If the federal government is going to take property and risk stifling speech, it must be able to defend those actions not only behind closed doors but also in a court of law. I ask that ICE and DoJ answer the questions that follow.

1. How does ICE and DoJ measure the effectiveness of Operation In our Sites and domain seizures more broadly -- how does the government measure the benefits and costs of seizing domain names?
2. Of the nearly 100 domain names seized by the Obama Administration over the last 9 months, how many prosecutions were initiated, how many indictments obtained, and how were the operators of these domain names provided due process?
3. What is the process for selecting a domain name for seizure and, specifically, what criteria are used?
  - a. Does the Administration make any distinction between domain names that are operated overseas and those that are operated in the U.S.?
  - b. Does the Administration consider whether a domain name operated overseas is in compliance with the domestic law from which the domain name is operated?
  - c. What standard does the Administration use to ensure that domains are not seized that also facilitate legitimate speech?
  - d. What standards does ICE use to ensure that it does not seize the domain names of websites the legal status of which could be subject to legitimate debate in a U.S. court of law; how does ICE ensure that seizures target on the true "bad actors"?
4. Does the Administration believe that hyperlinks to domain names that offer downloadable infringing content represent a distribution of infringing content, or do they represent speech?
5. Does the Administration believe that websites that facilitate discussion about where to find infringing content on the Internet represents speech or the distribution of infringed content? What if the discussion on these websites includes hyperlinks to websites that offer downloadable, infringing content?
6. What standard does DoJ expect foreign countries to use when determining whether to seize a domain name controlled in the U.S. for copyright infringement?
7. Did DoJ and ICE take into account the legality of Rojadirecta.org before it seized its domain name? If so, did DoJ and ICE consult with the Department of State or the United States Trade Representative before seizing this site in order to consider how doing so is consistent with U.S. foreign policy and commercial objectives?
8. In an affidavit written by Special Agent Andrew Reynolds, he uses his ability to download four specific songs on the domain name dajaz1.com as justification for seizure of this domain name. According to press accounts, the songs in question were legally provided to the operator of the domain name for the purpose of distribution. Please explain the Administration's justification for continued seizure of this domain name and its rationale for not providing this domain name operator, and others, due process.
9. Can you please provide to me a list of all the domain names seized by the Obama Administration since January of 2009 and provide the basis for their seizure?

10. Do ICE and DoJ keep a record of who meets with federal law enforcement about particular domain names? If not, would you consider keeping such a record and making it publicly available, to ensure transparency in government and that Operation in Our Sites is not used to create competitive advantages in the marketplace?

I thank you in advance for expeditiously answering these questions. If you have questions or need clarification about any of these questions, please contact Jayme White of my staff.

Sincerely,



Ron Wyden  
United States Senator