

Info/Law

• Information, Law, and the Law of Information

Featuring Tim Armstrong, Derek Bambauer, and William McGeeveran

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U.S. Gets In on Censorship Action

Posted on December 2nd, 2010 by Derek Bambauer

The [United States Immigration and Customs Enforcement](#), part of the Department of Homeland Security, has seized [82 domain names](#) that it contends are [responsible for facilitating IP infringement](#) (and perhaps infringing themselves). The seizures have prompted some outrage, and some head-scratching. The head-scratching has been by lawyers (and normal people) trying to figure out the legal basis for the seizure. If I'm reading the U.S. Code right, seizures are authorized under [18 U.S.C. 2323\(a\)](#), and [18 U.S.C. 981\(a\)\(1\)\(A\) and \(C\)](#), which authorizes civil seizures of property that is used in a violation, or attempted violation, of [18 U.S.C. 1956\(c\)\(7\)](#). If you're bored enough to trace to 1956(c)(7)(D), you'll see that it does in fact mention criminal copyright infringement: [18 U.S.C. 2319](#). Now, we've got civil seizure of items used in crime, so that's weird enough. What is even more strange is that the government doesn't have to provide notice to the domain name owners if it files a civil complaint against the property – that is, against the domain names (an *in rem* proceeding for you Civ Pro nerds). (This assumes I'm reading [18 U.S.C. 983\(a\)\(1\)\(A\)\(ii\)](#) properly – no sure thing.) While the government still bears the burden of showing that the seizure is proper – [983\(c\)\(1\)](#) – it also gets to lock up the domain name until the matter is resolved.

OK. That was some painful statutory lifting. The larger – and to me more interesting – question is about censorship. The U.S. government is grabbing domain names to prevent users from reaching content it views as illegal. Not content that has been adjudicated illegal, as far as we know – content that is alleged to be illegal. To content owners, and probably to ICE, it looks only natural that we'd prevent people from reaching information they view as stolen, or counterfeit. But it's natural to China to censor human rights sites. Or Wikileaks, for that matter. Legitimacy in information control on-line rests, I've argued, on being open, transparent, narrow, and accountable. The problem here is twofold: narrowness, and accountability. First, the accountability analysis looks to the procedures by which censorship is carried out. Given that the government can seize sites without notice, and with a showing only in an ex parte hearing (to obtain a warrant), this is problematic in this case. Moreover, the government gets the benefit of the doubt: if they make a mistake, well, too bad for the domain name owner, whose URL is out of commission until there's a hearing. Second, these seizures aren't narrow. They're both overbroad and underbroad. The domain name seizures are underbroad because, surprise surprise, there are more than 82 sites out there offering copyrighted content. They're overbroad because seizing a domain name blocks licit along with illicit content. It fails to distinguish between content used in an infringing way, and content in a lawful way (such as fair use). It's true that many of these Torrent sites traffic primarily in infringing materials, but the Supreme Court let the VCR off the hook for secondary copyright liability when less than 10% of taping was lawful. Domain name seizures are a blunderbuss for a problem that needs a scalpel.

Every country in the world believes that some material on the Net qualifies inherently for censorship. It's obvious! In this respect, we're no different from China. So, we should give up pretensions of American exceptionalism for information controls – for us, it's IP; for Saudi Arabia, it's porn; for France, it's hate speech. Only the quality of the legal process differentiates censors. And with these seizures, I think there's much to worry us in the (lack of) process...

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