

“Unfriending” the Internet: U.S. Government Domain Seizures and a Democratic Web

Guy W.C. Huber*

I.	INTRODUCTION	243
II.	BACKGROUND	246
III.	OPERATION IN OUR SITES IS A PRIOR RESTRAINT	248
	A. <i>Speech Interests in Seized Web Sites</i>	248
	B. <i>The Dajaz1 Seizure and Due Process</i>	251
	C. <i>Rojadirecta Challenges the Government Seizures</i>	253
IV.	THE STOP ONLINE PIRACY ACT	256
	A. <i>Censorship and the Internet Blacklist</i>	256
	B. <i>The Costs of Regulation</i>	258
V.	CONCLUSION	259

I. INTRODUCTION

In 2005, the international market for counterfeit and pirated goods was estimated at \$200 billion.¹ In the United States alone, illegal copying of films, television, music, video games, and computer software is estimated to cost the national economy over 373,000 jobs and \$16.3 billion in earnings annually.² As Internet access becomes more widespread, governments around the world are scrambling to implement legislation that will enable them to protect their intellectual property domestically and overseas from activities like peer-to-peer file sharing and Web sites like Megaupload. This Comment looks at two recent, distinct U.S. government efforts to regulate the Internet: the United States Department of Homeland Security’s “Operation In Our Sites” and the Stop Online Piracy Act (SOPA).

* © 2012 Guy W.C. Huber. J.D. candidate 2013, Tulane University Law School; B.A. 2007, University of Michigan, Ann Arbor. The author would like to thank Professor Elizabeth Townsend Gard, Lynn Becnel, and the members of the *Tulane Journal of Technology and Intellectual Property* for their dedicated and tireless work on this volume.

1. *Fact Sheet 2012: Intellectual Property: A Threat to U.S. Workers, Industries, and Our Economies*, DEP’T FOR PROF’L EMPLOYEES, AFL-CIO, at 4 (Jan. 2012), <http://dpeaflcio.org/wp-content/uploads/IP-Theft-Fact-Sheet-2012.pdf>.

2. *Id.*

Operation In Our Sites falls under the purview of the Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE).³ The targets are supposed to be Web sites dedicated to stealing copyrighted material, thereby harming the U.S. economy and, in the government's view, justifying their seizure.⁴ The government has limited itself to domains registered in the United States, though foreign corporations own some of the seized domains, and has sought ex parte injunctive orders in waves where upwards of a hundred sites are seized simultaneously.⁵ Critics of the Operation point out that the government's actions amount to censorship and unconstitutional restraint of free speech rights.⁶ Furthermore, the secretive nature of the seizures and the seeming lack of due process reflect an approach that seems at odds with the democratic principles that have been a large part of the Internet's success in the United States. The government seems set on waging war against intellectual property theft, but the lack of safeguards to prevent baseless seizures leaves many wondering how pervasively the government can regulate Web sites.⁷

The Stop Online Piracy Act and the groundswell of public opposition that derailed its passage demonstrate the considerable task Congress has in drafting legislation to regulate online speech.⁸ Web sites like Google, Facebook, and AOL demonstrated their embrace of pro-sharing attitudes that have proliferated with the recent growth of the Internet, riding public opinion backlash against what was seen as an

3. See *Homeland Security Investigations Brings Counterfeit Designers to Heel*, ICE (July 28, 2011), <http://www.ice.gov/news/releases/1107/110728washingtondc.htm>.

4. See Nat'l Intellectual Prop. Rights Coordination Ctr., *Operation In Our Sites*, ICE, <http://www.ice.gov/doclib/news/library/factsheets/pdf/operation-in-our-sites.pdf> (last visited Nov. 3, 2012).

5. See Tom Cheredar, *Super Bowl Sting—Feds Seize 307 Domains in “Operation Fake Sweep”*, VENTURE BEAT (Feb. 2, 2012, 02:18 AM), <http://venturebeat.com/2012/02/02/sports-streaming-domain-seizure/>; Mike Masnick, *Here We Go Again: Operation In Our Sites Round 4 Kicks Off with More Domains Illegally Seized*, TECHDIRT (May 23, 2011, 2:46 AM), <http://www.techdirt.com/articles/20110521/13414114371/here-we-go-again-operation-our-sites-round-4-kicks-off-with-more-domains-illegally-seized.shtml>.

6. See, e.g., *Here We Go Again: Operation In Our Sites Round 4 Kicks Off with More Domains Illegally Seized*, *supra* note 5.

7. See, e.g., Nate Anderson, *Senator: Domain Name Seizures “Alarmingly Unprecedented”*, ARS TECHNICA (Feb. 2, 2011, 9:04 PM CST), <http://arstechnica.com/tech-policy/news/2011/02/senator-us-domain-name-seizures-alarmingly-unprecedented/>.

8. See, e.g., *Growing Chorus of Opposition To “Stop Online Piracy Act”*, CENTER FOR DEMOCRACY & TECH. (Jan. 9, 2012), <https://www.cdt.org/report/growing-chorus-opposition-stop-online-piracy-act>.

opportunistic grab by Congress to enhance regulation in a manner that threatened popular conceptions of First Amendment rights.⁹

The ongoing deliberations in Europe over the passage of the Anti-Counterfeiting Trade Agreement (ACTA), a U.S.-backed multinational treaty that would establish heightened international intellectual property enforcement, has thrust the issue of Internet regulation onto the world stage.¹⁰ Amidst all this, the United States has shown it is capable of pursuing criminal copyright charges overseas—two examples being the high-profile arrest of Megaupload founder Kim Dotcom and the recent extradition of a British student to the United States to face piracy charges.¹¹ The United States has an inherent role in guiding international consensus on the Internet at least in part because the vast majority of Web sites are registered with U.S. domain registrars.¹² Jurisdictional reasons notwithstanding, U.S. companies amongst the vanguard of Internet innovators should be expected to lobby fiercely on any proposed changes to Internet regulatory practice. The primacy of these economic sectors could be enough for legislators to retreat, even if only temporarily, from the stricter liability and enforcement regimes contemplated in SOPA and ACTA.

This Comment takes the position that the U.S. government’s pattern of domain seizures as part of Operation In Our Sites, and embodied in SOPA, while not unconstitutional on its face, does not incorporate adequate procedural requirements. The background Part will give a brief overview of Domain Name Systems (DNS), the Digital Millennium Copyright Act (DMCA), and the emergence of in rem actions against Web domains as property. Part I.A.1 will examine the First Amendment implications of using prior restraints to enjoin online activity, focusing on the types of speech that are enjoined as part of the Operation-In-Our-Sites seizures. Part II.A.2 will discuss the constitutionality of the

9. See *id.* (follow link to “Nine Major Internet Companies: Letter Regarding SOPA and Protect IP”).

10. See Carolina Rossini et al., *Anti-Counterfeiting Trade Agreement*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/acta> (last visited Nov. 3, 2012); *Europeans Protest Controversial Internet Pact*, AL JAZEERA (last modified Feb. 12, 2012, 04:28 GMT), <http://www.aljazeera.com/news/europe/2012/02/20122121520280831.html>.

11. See Sam Laird, *Fifth Megaupload Arrest; No Bail for Kim Dotcom*, MASHABLE (Jan. 25, 2012), <http://mashable.com/2012/01/25/fifth-megaupload-arrest-no-bail-for-kim-dotcom/>; Christopher Williams, *Home Secretary Approves Extradition of Student Richard O’Dwyer over Pirate TV Website*, TELEGRAPH (Mar. 13, 2012, 5:05 PM GMT), <http://www.telegraph.co.uk/technology/news/9141514/Home-Secretary-approves-extradition-of-student-Richard-ODwyer-over-pirate-TV-website.html>.

12. See *Largest ICANN Registrars*, WEBHOSTING.INFO (2012), <http://www.webhosting.info/registrars/top-registrars/global/>.

procedure that the seizures incorporate in light of the recent Dajaz1.com (Dajaz1) case. Part II.A.3 will examine the seizure of Rojadirecta domains for criminal copyright infringement, and the government's surprise decision ultimately to dismiss its action against the domains' owner, Puerto 80. Part II.B will focus on the genesis, purpose, and shortcomings of SOPA. Part II.B.1 will discuss the proposed Internet "blacklist," and Part II.B.2 will look at the impact of the proposed legislation on markets with foundational ties to the Internet.

II. BACKGROUND

DNS allows identification of Web sites on the basis of easy-to-remember "addresses": for example, youtube.com or wikipedia.org.¹³ The other benefit is that it allows the separation of the Internet property from the physical network location.¹⁴ DNS enables this through a hierarchical translation of the address into a query in the appropriate Internet protocol.¹⁵ In order to block access to particular infringing Web sites, a government seizure requires some type of DNS interference.¹⁶ Some proponents of the seizures have construed them in a way that suggests it is only the DNS address that is being seized and not the Web site content once that address is queried in the DNS.¹⁷ Because Web sites are typically also accessible on domains registered outside U.S. jurisdiction, the burdens on DNS are alleviated under this type of seizure methodology.¹⁸

Passed as part of the DMCA in 1998, the Online Copyright Infringement Liability Limitation Act (OCILLA) codified what has come to be known as the "safe harbor provision."¹⁹ Under OCILLA, service providers are protected from liability for claims of copyright infringement if they follow the notice and takedown procedure that is described in the statute.²⁰ A "service provider" is defined as an "entity

13. See Daniel Karrenberg, *The Internet Domain Name System Explained for Non-Experts*, INTERNET SOC'Y (Feb. 2004), <http://www.isoc.org/briefings/016/>; see also Affidavit in Support of Application for Seizure Warrant at 4-6, *United States v. Hq-streams.com*, No. 11 MAG 262 (S.D.N.Y. Jan. 31, 2011).

14. See Karrenberg, *supra* note 13.

15. See *id.*

16. See *Internet Society Perspectives on Domain Name System (DNS) Filtering*, INTERNET SOC'Y (Sept. 15, 2011), <http://www.isoc.org/internet/issues/dns-filtering.shtml>.

17. See Terry Hart, *Feds Seize Domain Names*, COPYHYPE (Dec. 6, 2010), <http://www.copyhype.com/2010/12/feds-seize-domain-names/>.

18. See *id.*

19. The Digital Millennium Copyright Act, Pub. L. No. 105-304, § 201-03, 112 Stat. 2860, 2877-86 (1998) (codified as amended at 17 U.S.C. § 512 (2006)).

20. See *id.*

offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.”²¹ Congress explicitly designed these provisions to protect Web sites from the infringing activities of their users.²² Through a “notice and takedown procedure,” a copyright owner (or an entity claiming to own a copyright) provides the service provider with notice of the alleged infringing content, and the service provider is then required to “expeditiously . . . remove, or disable access to, the material.”²³ But a party may petition to have the alleged infringing material reinstated.²⁴

In *Viacom International v. YouTube*, the United States District Court for the Southern District of New York held that 17 U.S.C. § 512 requires actual or constructive knowledge of specific acts of infringement, as opposed to a general knowledge that potentially infringing activity has occurred.²⁵ One important effect of this rule is that service providers are discouraged from seeking out material that might infringe copyright on their sites: if a service provider only has a general knowledge of activity that infringes a copyright, they can qualify for the DMCA safe harbor provisions.²⁶

It is well established that domain names are property.²⁷ Writing for the majority in *Kremen v. Cohen*, Judge Kozinski compared domain names to “a share of corporate stock or a plot of land,” explaining that all three satisfied the traditional three-part test to determine whether a property right exists: “First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.”²⁸ The 1999 passage of the Anticybersquatting Consumer Protection Act (ACPA) sent a clear signal that Congress intended domain names to be treated as property, providing an in rem cause of action

21. 17 U.S.C. § 512(k)(1)(A).

22. S. REP. NO. 105-190, at 8 (1998).

23. 17 U.S.C. § 512(c)(1)(C).

24. *Id.* § 512(g).

25. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010), *aff'd in part, vacated in part*, 676 F.3d 19 (2012).

26. Ashley Pawlisz, *The Bill of Unintended Consequences: The Combating Online Infringement and Piracy Act*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 283, 295 (2011).

27. See Thomas R. Lee, In Rem *Jurisdiction in Cyberspace*, 75 WASH. L. REV. 97 (2000).

28. 337 F.3d 1024, 1030 (9th Cir. 2003) (quoting *G.S. Rasmussen & Assocs. Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992)).

against a party's Web domain when personal jurisdiction cannot be obtained.²⁹

III. OPERATION IN OUR SITES IS A PRIOR RESTRAINT

A. *Speech Interests in Seized Web Sites*

The prior restraint doctrine is supposed to protect expression that could nevertheless be subject to valid legal action once it is disseminated.³⁰ Prior restraints, while not per se unconstitutional, must overcome what the United States Supreme Court has called a "heavy presumption against . . . constitutional validity."³¹ The Court has described such restraints on speech as "the most serious and the least tolerable infringement on First Amendment rights."³² Accordingly, not only must the government overcome a heavy burden to demonstrate a justification for imposing any restraints, but the Court has traditionally been willing to permit it only in a limited range of scenarios.³³ For example, the Court has upheld prior restraints on obscene material when it has been deemed necessary to protect national security.³⁴ Although the doctrine is well established in U.S. jurisprudence, courts have been inconsistent in its framing and application.³⁵

Web domains are multifaceted in the types of speech they contain and express. While commercial speech predominates on most of the domains seized as part of Operation In Our Sites, some also have a sizable component of speech more akin to the types of speech given strong protection under the "market place of ideas" formulation of First Amendment protection.³⁶ How speech on these seized domains is classified is fundamental to resolving the balance of interests at stake

29. See Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, div. B, § 1000(a)(9), 113 Stat. 1536, 1501A-545 (1999) (codified as amended at 15 U.S.C. § 1125(d) (2006)). See generally 2 RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 5:11 (4th ed. 2012).

30. See Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984).

31. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 & n.10 (1963).

32. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

33. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 15:7 (Release #25, 2012 ed.).

34. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Near v. Minnesota*, 283 U.S. 697, 707-08 (1931).

35. Redish, *supra* note 30, at 53.

36. See, e.g., FORUM, ROJADIRECTA, <http://forum.rojadirecta.es/forum.php> (last visited Nov. 8, 2012). The ".com" and ".org" domains for Rojadirecta were both seized during Operation In Our Sites, but the Spanish-registered ".es" version remains available. See Karrenberg, *supra* note 13. See generally SMOLLA, *supra* note 33, § 2:4 (explaining "marketplace of ideas" theory).

when the government seizes a domain and also in determining the standard of scrutiny for a reviewing court.³⁷ Complicating matters is the fact that the Internet, by its very nature, conflates speech in new ways.

Domains seized as part of Operation In Our Sites bear the hallmarks of for-profit business, and it follows that some of the speech could be classified as commercial. The Supreme Court has held that commercial speech is generally entitled to standard First Amendment protection, stating, “The existence of ‘commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.’”³⁸ But the Court has refrained from establishing a bright-line rule that commercial speech is always entitled to the strongest First Amendment protection, emphasizing that the protection that should be afforded to commercial speech must be in balance with legitimate government interests in regulating such speech.³⁹

Social-media-oriented speech on Web sites connected to the seized domains functions as a “marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect.”⁴⁰ This is borne out in criticism of the restraints focusing on the “collateral” suppression of forums and similar user-interactive features.⁴¹ A court reviewing the domain seizures will have to evaluate the degree of protection Web site speech should receive and how much restraint of protected expression can be tolerated under the First Amendment. Inevitably, it must be decided how much protected speech on these domains can be restrained in the interest of stopping a Web site’s alleged infringing activity. The simple fact that the Internet is still in its relative infancy should be enough for courts to recognize the need for caution in how they classify swathes of speech on Web sites.

Instances where a court has upheld prior restraint reflect a limited scope of subject matter that such censorship should protect.⁴² Critics of

37. See generally SMOLLA, *supra* note 33, § 4:3 (discussing “[s]trict scrutiny as the default standard for content-based regulation of speech”).

38. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (quoting *Ginzburg v. United States*, 383 U.S. 463, 474 (1966)).

39. See *id.* at 818-23.

40. *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005).

41. See *e.g.*, Amici Curiae Brief of Electronic Frontier Foundation et al. in Support of Petitioner-Appellant at *17, *Puerto 80 Projects, S.L.U. v. United States*, No. 11-3390-cv, 2011 WL 5909020, at *17 (2d Cir. Sept. 23, 2011).

42. See, *e.g.*, *Balboa Island Vill. Inn, Inc. v. Lemen*, 57 Cal. Rptr. 3d 320 (2007) (holding that plaintiff was entitled to an injunction prohibiting defendant from making defamatory statements); *United States v. Richey*, 924 F.2d 857 (9th Cir. 1991) (allowing prior restraint barring disclosure of personal tax information); *Am. Motors Corp. v. Huffstutler*, 575 N.E.2d 116 (Ohio 1991) (allowing prior restraint to protect trade secrets and other confidential information). See generally SMOLLA, *supra* note 33, § 15:7.

the domain seizures unsurprisingly emphasize the limited number of situations where restraints have been upheld as evidence of jurisprudential hostility to this type of government action, but this argument heavily discounts courts' disposition to restraints for the purpose of protecting commercial interests and unprotected speech.⁴³

Commercially misleading speech does not get any protection from prior restraints under the First Amendment.⁴⁴ Similarly, speech that is "related to unlawful activity" is subject to broad government regulation.⁴⁵ If the government's characterization of the Web sites seized during Operation In Our Sites is correct, much of the restrained speech is of precisely the unlawful commercial nature exempted from First Amendment prior restraint protection.⁴⁶ What is more, an unsympathetic view of user-to-user speech on the forums of the seized domains could result in much of it being deemed speech that "incite[s] or produc[es] imminent lawless action" and thus a valid target of a prior restraint.⁴⁷

While it is true that many of the domains seized are largely dedicated to trafficking in counterfeit goods—so, largely not protected speech—two domains in particular have been held out as examples of Web sites with substantial expression that should be fiercely guarded from prior restraints.⁴⁸ *Rojadirecta*, a linking Web site for television sport streams that also featured a forum, and *Dajaz1*, a music blog, had their U.S. domains seized as part of Operation In Our Sites and have been elevated to case studies in the ongoing debate over the Operation's constitutional justifications.⁴⁹ In the case of *Rojadirecta*, the government ultimately returned the domains, but not before the owners had spent months, even years, litigating the constitutionality of the seizures.⁵⁰ In

43. See, e.g., SMOLLA, *supra* note 33, § 15:59.

44. See *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) (allowing prior restraint for false commercial speech).

45. See *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

46. See *Operation In Our Sites Protects American Online Shoppers*, ICE.GOV (Nov. 28, 2011), <http://www.ice.gov/news/releases/1111/111128washingtondc.htm>.

47. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

48. See *Fact Sheet: Websites Seized During the Eighth Phase of Operation In Our Sites*, ICE (Nov. 28, 2011), <http://www.ice.gov/doclib/news/releases/2011/111128washingtondc.pdf>.

49. See Mike Masnick, *Senator Wyden Demands Answers About Feds' Seizure of Dajaz1*, TECHDIRT (Dec. 22, 2011), <http://www.techdirt.com/articles/20111222/14270517174/senator-wyden-demands-answers-about-feds-seizure-dajaz1.shtml>; Ernesto, *U.S. Resume Controversial File-Sharing Domain Seizures (Updated)*, TORRENTFREAK (Feb. 1, 2011), <http://torrentfreak.com/us-resume-file-sharing-domain-seizures-110201/>.

50. See Timothy B. Lee, *ICE Admits Year-Long Seizure of Music Blog Was a Mistake*, ARS TECHNICA (Dec. 8, 2011, 5:14 PM), <http://arstechnica.com/tech-policy/2011/12/ice-admits-months-long-seizure-of-music-blog-was-a-mistake/>; Julie Samuels, *Rojadirecta: The Government Reverses Course and Returns Domains Without Explanation*. *Again*, EFF.COM

the Dajaz1 case, the government “tacitly” conceded that the “appropriate and just result was to decline to pursue judicial forfeiture.”⁵¹ Most recently, the government, citing unnamed “judicial authority,”⁵² entered a voluntary dismissal of the copyright infringement charges levied against Puerto 80, Rojadirecta’s owner.⁵³ The government’s flip-flop is attributed to recent decisions that give linking Web sites favorable parameters of noninfringing conduct.⁵⁴ Nevertheless, the First Amendment concerns that dominated briefs in the Rojadirecta action remain unresolved, and the risk of continued arbitrary seizures persists.⁵⁵

B. *The Dajaz1 Seizure and Due Process*

The Dajaz1 domain seizure was widely criticized on grounds that it violated procedural due process.⁵⁶ When the government ultimately returned the domain, its refusal to explain why the seizure had persisted so long fueled outcry that the government was censoring free speech with no due process.⁵⁷ The domain’s owner had evidence showing that some of the allegedly infringing material on the Web site was provided to him lawfully to disseminate on Dajaz1.⁵⁸ Furthermore, Dajaz1’s attorney made public statements that the government was granted multiple ex parte extensions of the deadline to file civil forfeiture proceedings, giving

(Aug. 29, 2012), <https://www.eff.org/deeplinks/2012/08/rojadirecta-government-reverses-course-and-returns-domains-without-explanation>.

51. Lee, *supra* note 50.

52. Letter from Preet Bharara, U.S. Attorney, to the Honorable Paul A. Crotty, District Judge, S.D.N.Y. (Aug. 29, 2012), http://www.wired.com/images_blogs/threat_level/2012/08/8.29.12-cover-letter-to-Judge-Crotty.pdf.

53. Notice of Voluntary Dismissal, United States v. Rojadirecta.org, No. 11 Civ. 4139 (PAC) (S.D.N.Y. Aug. 29, 2012).

54. See *Puerto 80 Gets Their Seized Domains Back*, KELLY/WARNER (Sept. 15, 2012), <http://www.aaronkellylaw.com/internet-law/Puerto-80-gets-their-seized-domains-back/> (citing *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 759 (7th Cir. 2012) (holding that although defendant “knows that some of the videos bookmarked on its site infringe copyright . . . that doesn’t make it a facilitator of copying”)).

55. See Opening Brief and Special Appendix for Petitioner-Appellant, Puerto 80 Projects, S.L.U. v. United States, No. 11-3390k, 2011 WL 4440567 (2d Cir. Sept. 16, 2011); see Mike Masnick, *Oops: After Seizing & Censoring Rojadirecta for 18 Months, Feds Give Up & Drop Case*, TECHDIRT (Aug. 29, 2012, 12:45 PM), <http://www.techdirt.com/articles/20120829/12370820209/oops-after-seizing-censoring-rojadirecta-18-months-feds-give-up-drop-case.shtml>.

56. See, e.g., Mike Masnick, *Breaking News: Feds Falsely Censor Popular Blog for over a Year, Deny All Due Process, Hide All Details . . .*, TECHDIRT (Dec. 8, 2011, 8:29 AM), <http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml>.

57. See Lee, *supra* note 50.

58. See Ben Sisario, *Music Web Sites Dispute Legality of Their Closing*, N.Y. TIMES, Dec. 19, 2010, at B6, available at http://www.nytimes.com/2010/12/20/business/media/20music.html?_r=1.

voice to public speculation that the government was using secretive procedural devices to circumvent constitutional requirements.⁵⁹

There were two distinct procedural challenges to the DaJaz1 seizure: first, that the seizure was a prior restraint and thus should be accompanied by the procedural requirements established by the Court; and second, that the government's delay in instituting the forfeiture proceeding violated procedural due process under the Fifth Amendment.⁶⁰ The first argument has significant implications for whole classes of domains that have already been seized or could be in the future. The current methodology is to seize the domains on a judge's finding that there is probable cause to believe the Web site is used to commit criminal copyright infringement.⁶¹ But in its current iteration, there is no provision of Operation In Our Sites for domain owners to have a hearing on the merits of a particular seizure. Exactly what procedural requirements are necessitated with prior restraints is somewhat ambiguous, but there is strong support for the premise that prior restraints absent adequate procedural safeguards are unconstitutional.⁶²

The Court has expressed a willingness to recognize *ex parte* prior restraints under certain circumstances, but where protected speech is implicated, *ex parte* orders to seize that speech "without a prior adversary hearing" violates the First Amendment.⁶³ If the Dajaz1 domain owner had access to a hearing prior to the seizure and been able to present evidence of the lawfulness of the Web site's content, the government would not have been able to seize the Web site in the first place, sparing the government the public relations blow of having to ultimately give the domain back. Furthermore, where restraint of speech is involved, the government's goal should be to quickly resolve whether a restraint is justified.⁶⁴

59. See Declan McCullagh, *DHS Abruptly Abandons Copyright Seizure of Hip-Hop Blog*, CNET NEWS (Dec. 8, 2011, 11:14 AM PST), http://news.cnet.com/8301-31921_3-57339569-281/dhs-abruptly-abandons-copyright-seizure-of-hip-hop-blog.

60. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 549, 560 (1975) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)).

61. See, e.g., *Order, Puerto 80 Projects, S.L.U. v. United States*, No. 11 Civ. 3983 (PAC) (S.D.N.Y. Aug. 4, 2011), <http://www.scribd.com/fullscreen/61674939> (stating that Magistrate Judge Frank Maas authorized the seizure on a finding of "probable cause to believe that the domain names were subject to forfeiture because they had been used to commit criminal violations of copyright law").

62. See, e.g., *Se. Promotions*, 420 U.S. at 560.

63. See *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968).

64. See *Bronco's Entm't, Ltd. v. Charter Twp. of Van Buren*, 421 F.3d 440, 444 (6th Cir. 2005) (stating that procedural safeguards must protect expeditious decision making, the "status quo," and the right of a party to seek a seasonable judicial decision).

C. *Rojadirecta Challenges the Government Seizures*

As of February 3, 2011, visitors to rojadirecta.org found that the U.S. Department of Justice and the U.S. Department of Homeland Security’s ICE division had seized the service provider’s domain name.⁶⁵ Trying to access the site simply brought up a notice informing the visitor that the site had been seized “in accordance with a seizure warrant obtained by the United States Attorney’s Office for the Southern District of New York and issued pursuant to 18 U.S.C. §§ 981 and 2323 by the United States District Court for the Southern District of New York.”⁶⁶

Prior to its seizure, the site was one of the most popular on the Internet, boasting over one million visitors a day.⁶⁷ The site operated as a “sports broadcast index,” linking visitors to live streaming sporting events.⁶⁸ The site did not host any copyrighted broadcasts itself, but redirected visitors to streams and .torrent files hosted by third parties.⁶⁹ A Spanish company, Puerto 80, owns the Web site, and two Spanish courts had previously determined that the Web site operated legally.⁷⁰

On June 13, 2011, Puerto 80 filed a petition pursuant to 18 U.S.C. § 983(f) in the Southern District of New York seeking the release of its seized domain name.⁷¹ Puerto 80’s petition requested the return of its seized domain on the basis that the seizure had caused substantial hardship under § 983(f)(1)(C).⁷² Puerto 80 argued that the government’s continued possession of the domain names would “substantially and irreparably harm the goodwill of the Rojadirecta website and drive its customers away” and that “[t]he seizure constitute[d] an unlawful prior restraint of speech in violation of [its] First Amendment rights.”⁷³ In response, the government argued that Puerto 80 had not demonstrated a level of hardship that justified release of the domain and, furthermore,

65. See ROJADIRECTA (Feb. 3, 2011, 9:56 AM), <http://web.archive.org/web/20110203095659/http://www.rojadirecta.es/> (accessed by searching for Rojadirecta on February 3, 2011, in the “Wayback Machine”).

66. Bianca Bosker, *Rojadirecta.org One of Several Sites SEIZED by U.S. Authorities*, HUFFINGTON POST (Feb. 2, 2011, 11:13 AM), http://www.huffingtonpost.com/2011/02/02/rojadirecta-org-seized_n_817458.html (displaying notice from Rojadirecta.org).

67. See *U.S. Resume Controversial File-Sharing Domain Seizures*, TORRENTFREAK (Feb. 1, 2011), <http://torrentfreak.com/us-resume-file-sharing-domain-seizures-110201>.

68. *Id.*

69. *Id.*

70. *Id.*

71. Puerto 80 Project’s Petition for Release of Seized Prop., Puerto 80 Projects, S.L.U. v. United States, No. 11 Civ. 3983 (S.D.N.Y. 2011).

72. *Id.* at 3.

73. *Id.* at 3-4.

that release of the domain would enable Puerto 80 to resume criminal copyright infringement.⁷⁴

Puerto 80 argued two justifications to the district court in support of its petition. First, Puerto 80 presented evidence that following the government's seizure, visitor traffic to the Web sites Puerto 80 established beyond the reach of U.S. jurisdiction decreased by thirty-two percent.⁷⁵ Second, the seizure constituted a violation of the Web site users' First Amendment rights because it was an invalid prior restraint on speech.⁷⁶ On the claim of substantial hardship because of the decrease in visitor traffic, the district court stated that because Puerto 80 had not explained how it generates profit or explained how the seizure resulted in a loss of profit, there was no basis to conclude that such a reduction in visitor traffic was a substantial hardship.⁷⁷

For its First Amendment claim, Puerto 80 alleged that the seizure amounted to an unconstitutional suppression of speech located on Rojadirecta's forums.⁷⁸ In dismissing this claim, the court reasoned, "The main purpose of the Rojadirecta websites . . . is to catalog links to the copyrighted athletic events—any argument to the contrary is clearly disingenuous."⁷⁹ The district court acknowledged that users of Rojadirecta's forums would now have to visit other Web sites to engage in the type of discussions they had previously enjoyed at rojadirecta.com, but that this was "clearly not the kind of substantial hardship that Congress intended to ameliorate in enacting § 983."⁸⁰

On December 6, 2011, Puerto 80 and the U.S. Department of Homeland Security filed briefs with the Second Circuit.⁸¹ In its brief, Puerto 80 focused on what it calls the government's "flawed assertion that the seizure [of the Rojadirecta domains] was not a prior restraint," alleging two errors in the government's reasoning that led it to its faulty conclusion.⁸² The first error Puerto 80 alleged was that the government

74. Government's Memorandum of Law in Opposition to Petition at 11-26, *Puerto 80 Projects, S.L.U.*, No. 11 Civ. 3983.

75. Memorandum in Support of Points and Authorities in Support of Puerto 80's Petition for Release of Seized Property at 9, *Puerto 80 Projects, S.L.U.*, No. 11 Civ. 3983 [hereinafter Memorandum].

76. *Id.* at 10-12.

77. Order, *supra* note 61, at 3-5.

78. Memorandum, *supra* note 75, at 10-13.

79. Order, *supra* note 61, at 4.

80. *Id.*

81. Brief for the United States at *7, *Puerto 80 Projects, S.L.U. v. United States*, No. 11 Civ. 3390, 2011 WL 5833572 (2d Cir. Nov. 15, 2011); Brief for Petitioner-Appellant, *Puerto 80 Projects, S.L.U.*, No. 11 Civ. 3390.

82. Brief for Petitioner-Appellant, *supra* note 81, at 1.

relied on case law where the party whose property was seized was granted a hearing, and that because Puerto 80 was not granted a hearing, the government conflated ex parte seizure with seizures that follow a hearing.⁸³ The second error Puerto 80 alleged was that the government adopted the position in its brief that the First Amendment does not protect any content that links to content that infringes copyright.⁸⁴ The problem with this presumption, Puerto 80 claimed, is that it sidesteps the purpose of the prior restraint doctrine: “[T]he government does not get to assume that speech is unprotected without first affording the speaker notice and an adversarial hearing on that issue.”⁸⁵ Puerto 80 warned that such an interpretation of the First Amendment would allow Web sites to be seized without ever having to prove that the owner actually violated the law.⁸⁶

Rather than challenge the district court’s ruling that they had not suffered a substantial hardship as required by 18 U.S.C. § 983(f)(1)(C), Puerto 80 instead took the position that if the seizure was a violation of the First Amendment, the question of whether there was a substantial hardship is rendered irrelevant.⁸⁷ This strategy had the added benefit of allowing Puerto 80 to call for the Second Circuit to ignore the standard of review that is otherwise required for challenges to a lower court’s ruling on substantial hardship under 18 U.S.C. § 983(f)(1)(C).⁸⁸

Citing *Fort Wayne Books, Inc. v. Indiana* and *Southeastern Promotions, Ltd. v. Conrad*, Puerto 80 claimed that the government’s seizure of the Rojadirecta domain was a “classic prior restraint on speech” because it arose from the “anticipation that some of the content linked to on the site may violate the law.”⁸⁹ This type of seizure that occurs before the speech at issue has been determined to be unprotected by the First Amendment is positioned as being almost per se unconstitutional in Puerto 80’s brief.⁹⁰ To support its position, Puerto 80 pointed out that the case law that the government cited in support of its seizure concerns posthearing restraints on free speech and that because Puerto 80 was afforded no hearing at all, this precedent should be

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 2.

87. *Id.* at 2-3.

88. *Id.*

89. *Id.* at 6.

90. *See id.* at 3-6.

inapplicable to determining the constitutionality of the Rojadirecta seizure.⁹¹

On August 29, 2012, the government filed a voluntary dismissal in its action against Puerto 80.⁹² In spite of the focus given First Amendment and Due Process claims in both parties' briefs, the impetus for the government's decision is largely credited to the United States Court of Appeals for the Seventh Circuit's recent decision in *Flava Works, Inc. v. Gunter*.⁹³ Judge Posner's opinion vacated a preliminary injunction against a Web site similar to Rojadirecta and in doing so, held that linking to copyrighted material is not infringement.⁹⁴ A letter from the United States Attorney to the court explaining the decision to withdraw charges against Puerto 80 mentions "judicial authority," and while the letter does not give specifics, the Seventh Circuit's decision is strong support for the proposition that no actionable activity occurs at the Rojadirecta domains.⁹⁵ But the merits of Puerto 80's First Amendment and Due Process claims remain unresolved. Nothing about the government's disposition towards the seizures indicates that it is prepared to reconsider policy and methods of Web site seizure, and the risk that domains will be seized without a hearing remains.

IV. THE STOP ONLINE PIRACY ACT

A. *Censorship and the Internet Blacklist*

The protests against SOPA and the PROTECT IP Act (PIPA) that are credited with convincing many legislators to abandon their support for the bills were driven by the public's fear of an Internet blacklist.⁹⁶ Legislators were lampooned as technologically naive, regulating a

91. *Id.* at 6-10.

92. See Letter from Preet Bharara to the Honorable Paul A. Crotty, *supra* note 52.

93. See Joyce E. Cutler, *Government Drops Domain Seizure Case Against Rojadirecta Streaming Websites*, BLOOMBERG BNA (Aug. 31, 2012), <http://www.bna.com/government-drops-domain-n17179869436/>.

94. See *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757-60 (7th Cir. 2012).

95. See Letter from Preet Bharara to the Honorable Paul A. Crotty, *supra* note 52.

96. See Josh Constine, *SOPA Protests Sway Congress: 31 Opponents Yesterday, 122 Now*, TECHCRUNCH (Jan. 19, 2012), <http://techcrunch.com/2012/01/19/sopa-opponents-supporters/>; Lizzy Davies, *Wikipedia Begins Blackout in Protest Against US Anti-Piracy Laws*, GUARDIAN (Jan. 18, 2012, 04:32 EST), <http://www.guardian.co.uk/technology/2012/jan/18/wikipedia-blackout-protest>. See generally Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011); Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011).

flourishing sector of the economy with broad strokes that seemingly imperiled powerhouses like Google and Wikipedia.⁹⁷

An open letter to Congress signed by over 100 law professors lays out foundational criticisms of SOPA and PIPA: first, the legislation would redefine inducement in a way that has consequences for a broad class of Web sites; second, Web sites will now be held liable where they facilitate infringement—a standard that is very easy to satisfy under current interpretations; third, it would grant a private right of action that could have an outside impact on commerce; and fourth, Web sites would be under strong incentives to self-regulate and preemptively censor speech.⁹⁸

The language in SOPA that generated the most concern was the new standard for Web site liability that appeared to drastically narrow the protections under the DMCA: any site that “engages in, enables, or facilitates” violations or infringement could be blocked under the bill.⁹⁹ All of a sudden Congress appeared to have turned its sights on some of the Internet’s most popular sites.¹⁰⁰ Web sites like YouTube.com that expend considerable resources complying with safe harbor requirements under the DMCA might nevertheless be at risk under the SOPA standard.¹⁰¹ Proponents of the bill are eager to point out that while Internet giants like Google advocate freedom of speech principles as the basis for their opposition to SOPA, they have significant commercial interests vulnerable to broad new laws over Web sites.¹⁰²

The SOPA private right of action is portrayed as vulnerable to abuse: frivolous suits and injunctions against Web sites on meritless

97. See, e.g., *Key Issues: SOPA & PIPA*, PUB. KNOWLEDGE, <http://publicknowledge.org/issues/rogue-websites-legislation> (last visited Nov. 7, 2012); Declan McCullagh & Greg Sandoval, *Google Will Protest SOPA Using Popular Home Page*, CNET NEWS (Jan. 17, 2012, 08:57 AM PST), http://news.cnet.com/8301-31001_3-57360223-261/google-will-protest-sopa-using-popular-home-page/.

98. See Mark A. Lemley et al., *An Open Letter to the House of Representatives*, ELEC. FRONTIER FOUND. (Nov. 15, 2011), <https://www.eff.org/document/law-professors-letter-sopa>.

99. See Stop Online Piracy Act (SOPA), H.R. 3261, § 103(a)(1)(B)(i).

100. See, e.g., Adam Dachis, *All About PIPA and SOPA, the Bills That Want To Censor Your Internet*, LIFEHACKER (Jan. 18, 2012, 5:00 AM), <http://lifehacker.com/5860205/all-about-sopa-the-bill-thats-going-to-cripple-your-internet>.

101. See *Frequently Asked Questions (and Answers) About DMCA Safe Harbor*, CHILLING EFFECTS, <http://www.chillingeffects.org/dmca512/faq.cgi#QID125> (last visited Nov. 15, 2012).

102. See, e.g., Ben Sheffner, *How Google Profits from Illegal Advertising—And Keeps the Money Even After Getting Caught*, MPAA BLOG (Jan. 10, 2012, 10:32 PST), <http://blog.mpa.org/BlogOS/post/2012/01/10/How-Google-profits-from-illegal-advertising-and-keeps-the-money-even-after-getting-caugh.aspx>.

claims.¹⁰³ The SOPA private right of action is especially notable because it does not require notice before a party can block a Web site's access to payment and advertising services.¹⁰⁴

B. *The Costs of Regulation*

A recent study showed that the passage of SOPA would have seriously impeded investor enthusiasm in U.S.-based startups.¹⁰⁵ The cost of complying with the new approach to Internet regulation embodied in SOPA would hinder a diverse range of U.S. businesses at a time when the world economy is still fragile from the 2008 financial crisis.¹⁰⁶ For example, the Booz & Company study presented evidence suggesting “digital content intermediaries” (DCIs), e.g., YouTube and Netflix, rely heavily on “angel investors” and venture capital funds, but that measures proposed under SOPA would deter as much as seventy percent of investors from investing in DCIs.¹⁰⁷

Nothing captures the spirit of the debate over Internet regulation like the change in attitude towards the DMCA and the safe harbor requirements.¹⁰⁸ The DMCA is often portrayed as a blow to free speech, fair use, and online innovation and competition.¹⁰⁹ The notice and takedown procedures to qualify for safe harbor protections under the DMCA saw material removed from Web sites on allegations that they infringed copyright, foreshadowing Congress's interest in strengthening general mechanisms for copyright and trademark holders to enforce their rights.¹¹⁰ But opponents of sweeping Internet regulation, having seen

103. See, e.g., Christina D. Frangiosa, *Stop Online Piracy Act Introduced To Combat Online Piracy and Counterfeiting*, PRIVACY & IP L. BLOG (Nov. 27, 2011), <http://privacyandip.blogspot.com/2011/11/stop-online-piracy-act-introduced-to.html>.

104. See *Summary of SOPA and PIPA*, MASUR LAW (Jan. 20, 2012), <http://www.masurlaw.com/resources/summary-of-sopa-and-pipa/>.

105. See Matthew Le Merle et al., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment*, BOOZ & CO. (2011), <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

106. See Eric Savitz, *How SOPA And PIPA Would Unfairly Burden Businesses*, FORBES (Jan. 19, 2012, 12:18 PM), <http://www.forbes.com/sites/ciocentral/2012/01/19/how-sopa-and-pipa-would-unfairly-burden-businesses/>.

107. See Le Merle et al., *supra* note 105, at 22.

108. See, e.g., Brief of Amicus Curiae Google Inc. at 2-5, *Disney Enter., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303 (S.D. Fla. 2011) (No. 11-202437-CIV); cf. Fred Von Lohmann, *Unintended Consequences: Twelve Years Under the DMCA*, ELEC. FRONTIER FOUND. (Feb. 2010), https://www.eff.org/sites/default/files/eff-unintended-consequences-12-years_0.pdf.

109. See Von Lohmann, *supra* note 108, at 2, 9, 12.

110. See *What Are the DMCA Harbor Provisions?*, *supra* note 22; see also 17 U.S.C. § 512(c) (2006).

how far Congress would like to go, are now more willing to embrace the significantly laxer requirements of the DMCA.¹¹¹

In addition to the concerns over censorship of the Internet, there is worry that DNS filtering requirements to effect Web site blocks could damage the underlying Internet architecture.¹¹² The most compelling of which, from Congress’s perspective, appear to be the risks to national security that could be raised through widespread DNS filtering.¹¹³ But thus far, Congress has demonstrated an unfamiliarity with how DNS works, embracing filtering requirements that would see top-level domains filtered for infringing activity on one of their subdomains.¹¹⁴ In other words, legislators’ enthusiasm to enact substantive law when they lack knowledge concerning the actual process of the DNS hints at a worrisome trend in Internet regulation. A DNS filter—when one considers the extent of material that could be blocked under an upper-level domain seizure—is a tool that should be employed only under circumstances that guarantee compliance with the First Amendment.

V. CONCLUSION

The government’s chosen strategy to combat intellectual property infringement on the Internet leans heavily on the conceptualization of criminal infringement requiring strong legal enforcement mechanisms.¹¹⁵ The legitimate interest in protecting intellectual property, though, is being lost amidst the controversy over what is justifiably seen as the government’s tendency to undervalue how much people have come to rely on the Internet as a forum for unregulated speech. The massive

111. See Brief of Amicus Curiae Google Inc., *supra* note 108, at 2-4.

112. Compare Steve Crocker et al., *Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill* (May 2011), <http://www.shinkuro.com> (follow link under “News: Paper Released”) (“[T]he mandated DNS filtering provisions found in [PIPA] raise very serious technical and security concerns.”), with Daniel Castro, *PIPA/SOPA: Responding to Critics and Finding a Path Forward*, INFO. TECH. & INNOVATION FOUND. (Dec. 5, 2011), <http://www.itif.org/publications/pipasopa-responding-critics-and-finding-path-forward> (addressing “claims by opponents of [PIPA and SOPA] that the bills would ‘break the Internet’ or lead to censorship and find[ing] them unfounded [and responding] in detail to opposition about the proposed DNS filtering countermeasure”).

113. See Crocker et al., *supra* note 112, at 12.

114. See *id.* at 10.

115. See generally Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 235-41 (2002) (discussing the “criminal prosecution of intellectual property offenses”); Grace Puyn, *The 2008 Pro-IP Act: The Inadequacy of the Property Paradigm in Criminal Intellectual Property Law and Its Effect on Prosecutorial Boundaries*, 19 DEPAUL J. ART, TECH. & INTELL. PROP. L. 355, 356 (2009) (describing the “enhance[ment] and consolidat[ion] of criminal penalties in copyright and trademark law” in recent years).

turnaround in support for SOPA, hopefully, is illustrative of a newfound congressional awareness of how much is at stake in censoring and otherwise regulating the Internet. What is clear is that the current embrace of top-level domain seizures pursuant to *ex parte* orders is too severe in its restriction of expression to be constitutional, unless it is accompanied by provisions addressing lack of due process. A judge's finding of probable cause is some protection, but not enough when one considers the myriad public policy interests that are at stake.