

APR 28 2011



U.S. Immigration  
and Customs  
Enforcement

The Honorable Ron Wyden  
United States Senate  
Washington, D.C. 20510

Dear Senator Wyden:

Thank you for your February 2, 2011 letter to Eric Holder, Attorney General of the United States, and me. You wrote regarding "Operation In Our Sites," a law enforcement operation that combats federal criminal copyright and trademark violations on the Internet.

The U.S. Department of Justice (DOJ) has been a full partner in Operation In Our Sites as the prosecutors of the enforcement actions, and as the policy arm of the Administration for intellectual property theft enforcement. DOJ will respond in a separate letter to the questions that fall within its purview. As you know, U.S. Immigration and Customs Enforcement (ICE) cannot answer questions relating to ongoing criminal investigations or matters in litigation, but 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. 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?**

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 through 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 that had been offering pirated material voluntarily stopped offering copyrighted material illegally. This is general deterrence not often seen in criminal enforcement.

Indeed, of the first nine domain name seizures in Operation In Our Sites in June 2010, only two of the sites returned under different domain names with pirated copyrighted content. This level of specific deterrence, and lack of recidivism, is rare in law enforcement.

As you know, 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 IP addresses of those individuals that hit the banner, but the collective number of "hits" indicates public awareness has increased about the criminal laws against copyright violation and trademark infringement.

- 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?**

ICE defers to DOJ on the specific number of indictments obtained following court-authorized domain name seizures conducted through Operation In Our Sites. Two individuals have been criminally charged, hundreds of thousands of dollars in illicit proceeds have been seized, and numerous criminals have been identified through investigation.

Due process is available to the operators of the seized domain names through the procedure provided by Congress in the *Prioritizing Resources and Organization for Intellectual Property Act of 2008* ("PRO IP Act" or "Act"), Pub. L. No. 110-403. To this end, a domain name owner is able to: (1) mail a letter to ICE seeking return of the domain name; (2) file a petition in a U.S. District Court seeking to compel ICE to return the domain name; (3) file a motion for return of property with a federal magistrate judge; and (4) challenge the administrative forfeiture of the site, even if the seizure itself is not challenged. In all such challenges, the government bears the burden of proof in any court proceeding.

- 3. What is the process for selecting a domain name for seizure and, specifically, what criteria are used?**

All of the domain names seized through court order 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 other individuals' protected trademarked goods and copyrighted materials. Of the 120 domain names seized by ICE throughout Operation In Our Sites, almost 100 were engaged in the sale of counterfeit hard goods, including DVDs and luxury goods, while the remaining sites illegally offered copyrighted first-run movies, music, and software.

- a. Does the Administration make any distinction between domain names that are operated overseas and those that are operated in the U.S.?**

In Operation In Our Sites, ICE does not distinguish between domain names that are operated overseas and those that are operated in the United States.

- 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?**

Because there is ongoing investigation and litigation concerning some of the seized domain names, ICE defers to DOJ on this question.

- c. What standard does the Administration use to ensure that domains are not seized that also facilitate legitimate speech?**

The investigations target websites that specifically engage in criminal trademark infringement or criminal copyright violations. These investigations may lead to seizure of domain names after a court has authorized a judicial seizure warrant for the specific site based upon the criminal investigation.

- 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?”**

ICE works with DOJ prosecutors before presenting evidence of criminal trademark violations or criminal copyright infringement to a federal magistrate judge. It is the court, not ICE or DOJ that determines, by a standard of probable cause, that the operator of the website has engaged in criminal conduct. Further, as noted in the response to Question 2 above, the operators of the seized domain names may challenge the evidence in court. As of April 25, 2011, no court challenge has been mounted to the seizure of 120 domain names under Operation In Our Sites.

- 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?**

ICE cannot render an advisory opinion on this hypothetical. We only investigate knowing counterfeiting or infringement in violation of existing criminal law.

- 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?**

ICE cannot render an advisory opinion on this hypothetical. We only investigate knowing counterfeiting or infringement in violation of existing criminal law.

- 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?**

ICE defers to DOJ, as the question is directed to them.

- 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?**

ICE conducted a law enforcement investigation of Rojadirecta.org, pursuant to established U.S. criminal law and presented findings of the investigation to a federal magistrate judge. The court issued a seizure warrant for a violation of U.S. law, specifically criminal copyright infringement. ICE did not consult with the Department of State or the United States Trade Representative before executing the court ordered seizure warrant.

- 8. In an affidavit written by Special Agent [name omitted], 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 the domain name and its rationale for not providing this domain name operator, and others, due process.**

The domain name specifically noted above is involved in litigation, so ICE cannot answer questions concerning this seizure. For explanation of the due process provided, please see the answer in Question 2 above.

- 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?**

ICE cannot provide a list of all domain names seized, as part of investigations by any other agency, because such a list is not within our custody and control. However, a list of the 120 domain names seized during Operation In Our Sites, pursuant to court order, is attached. The affidavits presented to federal judges in support of these domain name seizures are voluminous, numbering hundreds of pages. However, such affidavits are publicly available, and in Question 8, you specifically reference one of the affidavits.

- 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?**

ICE does not normally keep a list of meetings, as it holds hundreds of meetings with American businesses each year to discuss intellectual property theft, specifically criminal trademark violations and criminal copyright infringement occurring on the Internet.

However, as requested, we have compiled a list of meetings related to Operation In Our Sites and attached it to this letter. The list includes not only American companies but non-profits, trade associations, public interest groups, congressional staff, academics, and

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other members of the public. Most of these meetings were conducted across the United States or at the National Intellectual Property Rights Coordination Center (IPR Center), an ICE-led task force bringing together relevant federal agencies engaged in intellectual property theft enforcement.

Thank you for your interest in Operation In Our Sites. Please do not hesitate to contact me 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

Enclosures



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