

11-3390-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PUERTO 80 PROJECTS, S.L.U.,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA AND
DEPARTMENT OF HOMELAND SECURITY,
IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

***AMICI CURIAE* BRIEF OF ELECTRONIC FRONTIER FOUNDATION,
CENTER FOR DEMOCRACY AND TECHNOLOGY, AND PUBLIC
KNOWLEDGE IN SUPPORT OF PETITIONER-APPELLANT**

Corynne McSherry
(*Counsel of Record*)
Matthew Zimmerman
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Phone: (415) 436-9333
Fax: (415) 436-9993
corynne@eff.org

Attorneys for Amici Curiae

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

 A. “Operation In Our Sites” 2

 B. Seizure in the Form of Website Redirection. 3

 C. Collateral Damage. 5

III. ARGUMENT 9

 A. As the District Court Itself Recognized, the Seizure Implicates Clear
 Speech Interests. 9

 B. The Government’s Seizure of Petitioner’s Domain Names Violated the
 Procedural Requirements of the First Amendment. 11

 1. The Seizures Operate As Prior Restraints. 11

 2. A Mere Showing of “Probable Cause” Does Not Justify a Prior
 Restraint. 13

 3. The Lack of a Prior Adversarial Hearing Renders the Domain Name
 Seizure Invalid. 14

 4. Whether or Not the Seizure Amounted to the Kind of “Substantial
 Hardship” Contemplated by Congress in Enacting Section 983 Is
 Irrelevant. 15

 C. The Government’s Seizure of Petitioner’s Domain Names Violated the
 Substantive Requirements of the First Amendment. 15

 1. Intermediate Scrutiny Applies to Government Seizures of Domain
 Names Allegedly Associated with Criminal Copyright Infringement,
 Where Such Seizures Implicate Non-Infringing Content. 16

 2. The Government’s Overbroad Seizures Unnecessarily Interfered with
 Speech Interests. 16

D. The Seizure Warrant Ignored the Judgment of Two Spanish Courts, Disregarding Important International Norms.....	19
1. The Seizure Order Should Not Have Issued Without Consideration of the Foreign Judgment of Non-Infringement.	20
2. The Rojadirecta Seizure Sends a Dangerous Signal.....	21
IV. CONCLUSION	22

TABLE OF AUTHORITIES

Federal Cases

<i>Ackermann v. Levine</i> , 788 F.2d 830 (2d Cir. 1986).....	20, 21
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	11
<i>Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg, S.A.</i> , 528 F.3d 162 (2d. Cir 2008).....	20
<i>Bantam Books</i> , 372 U.S. 58 (1963).....	11, 12
<i>Bd. of Educ. v. Pico</i> , 457 U.S. 853 (1982).....	9
<i>Blount v. Rizzi</i> , 400 U.S. 410 (1971).....	13
<i>Capital Cities Media, Inc. v. Toole</i> , 463 U.S. 1303 (1983).....	12
<i>Center for Democracy & Technology v. Pappert</i> , 337 F. Supp. 2d 606 (2004).....	16
<i>Ctr. for Democracy and Tech. v. Pappert</i> , 337 F. Supp. 2d 606 (E.D. Pa. 2004).....	7
<i>Cunard S.S. Co. v. Salen Reefer Servs. AB</i> , 773 F.2d 452 (2d Cir. 1985).....	20
<i>Fort Wayne Books v. Indiana</i> , 489 U.S. 46 (1989).....	13, 14, 15
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965).....	12
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990).....	12

<i>Heller v. New York</i> , 413 U.S. 483 (1973)	14
<i>Hynes v. Mayor & Council of Borough of Oradell</i> , 425 U.S. 610 (1976)	17
<i>Kenner Prods. Co. v. Societe Fonciere et Financiere Agache-Willot</i> , 532 F.Supp. 478 (S.D.N.Y. 1982)	20
<i>Kingsley Books, Inc. v. Brown</i> , 354 U.S. 436 (1957)	12
<i>Marcus v. Search Warrant of Property</i> , 367 U.S. 717 (1961)	14
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	9
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	17
<i>New York v. P.J. Video, Inc.</i> , 475 U.S. 868 (1986)	13
<i>Pariante v. Scott Meredith Literary Agency</i> , 771 F. Supp. 609 (S.D.N.Y. 1991)	21
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	10
<i>Sarl Louis Feraud Int'l v. Viewfinder, Inc.</i> , 489 F.3d 474 (2d Cir. 2007)	20
<i>Schneider v. New Jersey</i> , 308 U.S. 147 (1939)	19
<i>Se. Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	12
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	12

Tahan v. Hodgson,
662 F.2d 862 (D.C. Cir. 1981) 21

Telenor Mobile Commc 'ns AS v. Storm LLC,
584 F.3d 396 (2d Cir. 2009)..... 20

Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994) 16

United States v. O'Brien,
391 U.S. 367 (1968) 16

Va. State Bd. Of Pharmacy v. Va Citizens Consumer Council,
425 U.S. 748 (1976) 9, 19

Vill. of Schaumburg v. Citizens for a Better Env't,
444 U.S. 620 (1980) 17

Federal Statutes

18 U.S.C. § 981 11

18 U.S.C. § 983 10, 15

18 U.S.C. § 2319 14

18 U.S.C. § 2323 2, 3, 11

PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008)..... 3

Treatises

William Patry, *Patry on Copyright* (2010)..... 12

Legislative Materials

145 Cong. Rec. H4854-02 (daily ed. June 24, 1999) (statement of Rep. Hyde).... 10

CORPORATE DISCLOSURE STATEMENT¹

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Electronic Frontier Foundation, Center for Democracy and Technology, and Public Knowledge (collectively, “*Amici*”) state that none of *Amici* has a parent corporation and that no publicly held corporation owns 10% or more of the stock of any of *Amici*.

¹ In accordance with Fed. R. App. P. 29(c)(5), no party’s counsel or other person authored, in whole or in part, the contents of this brief, or contributed money toward the drafting of this brief.

STATEMENT OF *AMICI*

This brief is submitted pursuant to Fed. R. App. P. 29(b). Petitioner-Appellant has consented to its filing and Respondents take no position regarding the filing.

The Electronic Frontier Foundation (EFF) is a nonprofit civil liberties organization that has worked for over 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its almost 15,000 dues-paying members have a strong interest in assisting the courts and policy-makers to help ensure that copyright law serves the interests of creators, innovators and the general public.

The Center for Democracy & Technology (CDT) is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT advocates balanced copyright policies that provide appropriate protections to creators without curtailing the openness and innovation that have been vital to realizing the democratizing potential of new digital media.

Public Knowledge (“PK”) is a Washington, D.C. based not-for-profit public interest advocacy and research organization. PK promotes balance in intellectual property law and technology policy to ensure that the public can benefit from

access to knowledge and the ability to freely communicate and innovate in the digital age.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case raises a novel issue of extraordinary importance: the novel and important issue of whether the First Amendment permits the seizure of the domain names of websites that contain both allegedly infringing content and clearly non-infringing expressive materials, based solely on a finding of probable cause, without a prior adversarial hearing, and without consideration of whether the burden on speech interests is more than necessary to further an important government interest. *Amici* urge the Court to find that it does not.

Careful First Amendment scrutiny of the seizure in this case is particularly crucial given its context. This is the first opportunity any appellate court has had to consider the speech implications of a new government campaign involving the mass seizure of domain names under the guise of intellectual property law enforcement. Unfortunately, that campaign is causing significant collateral damage, as happened here. The government's seizure of the Rojadirecta domain names was an unlawful prior restraint that violated both the procedural and the substantive requirements of the First Amendment. The Southern District of New York erred in failing to fully consider those requirements, let alone recognize them. Indeed, the district court's cursory analysis not only failed to justify its ruling, it directly contradicted black-letter law.

Further, because the issuing judge apparently did not consider the findings of two Spanish courts that Puerto 80 has not violated copyright law, the seizure order and the denial of Puerto 80's subsequent petition has sent a dangerous signal to foreign governments that the U.S. executive and judicial branches are willing to disregard the liability determinations of foreign courts, inviting them to do the same.

The government's seizure of the Rojadirecta domain names, and the district court's refusal to order their return, was both unconstitutional and unsound. This Court should reverse the district court's decision and order that the domain names be returned.

II. BACKGROUND

The ramifications of this case go well beyond the petition at issue. The Rojadirecta seizure was part of a broader enforcement campaign, the speech implications of which have, thus far, escaped close judicial scrutiny.

A. "Operation In Our Sites."

Over the past few years, responding to pressure by major intellectual property owners and their representatives, the U.S. government has increased dramatically its efforts to stamp out infringing activities online. One of the principal legal tools the government is wielding is 18 U.S.C. § 2323. As amended

by the PRO-IP Act of 2008,² it purportedly authorizes *in rem* warrants for seizure of property used to commit infringement.

In June 2010, Immigration and Customs and Enforcement of the Department of Homeland Security (ICE) launched “Operation In Our Sites” seeking and executing warrants against nine domain names associated with websites that allegedly offered unauthorized movie downloads.³ In November 2010⁴ and February 2011⁵, the government seized a combined 92 additional domain names, alleging the sale of counterfeit goods and illegally copied DVDs, and linking to unauthorized streamed sports broadcasts.

B. Seizure in the Form of Website Redirection.

The term “seizure” is something of a misnomer in this context. One normally thinks of seizure in connection with the appropriation of real goods, such as counterfeit handbags or cars used in the commission of a crime. In these cases, however, the government has used section 2323 to obtain judicial orders requiring

² PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008).

³ “*Operation In Our Sites*” Targets Internet Movie Pirates, U.S. Immigration and Customs Enforcement Newsroom (June 30, 2010), <http://www.ice.gov/news/releases/1006/100630losangeles.htm>.

⁴ *ICE Seizes 82 Website Domains Involved in Selling Counterfeit Goods as Part of Cyber Monday Crackdown*, U.S. Immigration and Customs Enforcement Newsroom (Nov. 29, 2010), <http://www.ice.gov/news/releases/1011/101129washington.htm>; see also Corynne McSherry, *U.S. Government Seizes 82 Websites: A Glimpse at the Draconian Future of Copyright Enforcement?*, Electronic Frontier Foundation (Nov. 29, 2010), <http://www.eff.org/deeplinks/2010/11/us-government-seizes-82-websites-draconian-future>.

⁵ *New York Investigators Seize 10 Websites That Illegally Streamed Copyrighted Sporting and Pay-Per-View Events*, U.S. Immigration and Customs Enforcement Newsroom (Feb. 2, 2011), <http://www.ice.gov/news/releases/1102/110202newyork.htm>.

service providers to lock domain names and to direct traffic to those domains to a government web page announcing they have been seized.

To understand precisely what has occurred, it is helpful to clarify the terms “websites,” “IP addresses,” and “domain names.” A “website” is a collection of related web pages, images, videos etc., hosted together on a web server. An “IP address” is a unique, numerical sequence — like “205.178.190.22” or “208.132.238.34” — assigned to every computer connected to the Internet that functions much like a street address or telephone number for the computer to which it is assigned. A domain name is an easy-to-remember text representation (often a word or phrase) that is linked through the “domain name system” to the IP address. A series of domain name servers contains massive databases that list the proper IP address for each domain name.

To analogize to the “real world,” a website is akin to a building, such as the Empire State Building. An IP address is like the address of the building, “350 5th Avenue, New York, NY 10001,” while the domain name is the commonly known way to refer to the building — *e.g.*, the words “Empire State Building.” Finally, the “domain name system” is like a “yellow pages” directory that one can use to look up “Empire State Building” and learn that it is located at “350 5th Avenue, New York, NY 10001.” Thus, the court order authorizing the seizure of the domain names in this case is akin to ordering the publisher of the yellow pages to

transfer ownership of the listing for “Empire State Building” (which points visitors to “350 5th Avenue, New York, NY 10001”) so that they may order it erased or, as actually occurred, point visitors to a different address in which a notice of infringement has been posted. To complete the analogy, the seizure replaces the listing for the Empire State Building with the statement “The Empire State Building is closed.”

C. Collateral Damage.

The Operation’s “success” has come at a high price for speech. Domain names are necessary instrumentalities of speech, and as such the legality of their seizure cannot be fully assessed under the narrow criteria used to assess other seizures that do not implicate protected speech. It is hardly surprising, then, that while many of the seized domain names were associated with websites that were dedicated to infringing activity, there have been a number of reports of overbroad takedowns and/or fundamental flaws in the affidavits upon which the judges issuing the seizure orders have relied. This is in contrast to claims made by the government that they were only targeting sites and services that were “flagrantly violating federal copyright laws.”⁶

For example, the November 2010 seizures included several music blogs that were not dedicated to infringing activities, even if some portion their sites’ content

⁶ Ben Sisario, *Music Websites Dispute Legality of Their Closing*, N.Y. Times (Dec. 19, 2010), <http://www.nytimes.com/2010/12/20/business/media/20music.html>.

may arguably have run afoul of copyright law. One site, OnSmash.com, was a popular music blog that included links to hip-hop music. According to the site owners, much of the music was provided by the musicians themselves or their labels.⁷ While these musicians may or may not have been authorized to make their music available in this way (the artists may not own the actual copyright), OnSmash can hardly be faulted for supposing that it was permitted to support the links absent a complaint. More importantly, OnSmash complied with takedown notices under the Digital Millennium Copyright Act.⁸ In short, it was not a “pirate” site — it was instead a site helping to enforce copyright while simultaneously promoting creativity while complying with the DMCA takedown process. Other music blogs, such as dajaz1.com, fell into the same boat.⁹

Perhaps the most egregious example of collateral damage resulting from a domain seizure occurred in a contemporaneous ICE campaign using the exact domain seizure process at issue in this case (but targeting child pornography rather than infringement). In February 2011, ICE seized the “mooo.com” domain for allegedly pointing to illegal content. The seizure temporarily blocked over 84,000 subdomains of mooo.com.¹⁰ Mooo.com is a domain used by FreeDNS, a service

⁷ Ben Sisario, *Piracy Fight Shuts Down Music Blogs*, N.Y. Times (Dec. 13, 2010), <http://www.nytimes.com/2010/12/14/business/media/14music.html>.

⁸ 17 U.S.C. § 512(c).

⁹ Sisario, *supra* note 7.

¹⁰ Thomas Claburn, *ICE Confirms Inadvertent Web Site Seizures*, Information Week (Feb. 18, 2011).

that allows users to register subdomains, which they can then point to Internet content hosted at any IP address. No content is hosted immediately under the moo.com domain; all content — including personal blogs, discussion forums, small business sites, and sites where academic researchers share papers and professional information — is hosted under subdomains that take the form “username.moo.com.”¹¹ The content hosted under any particular subdomain is wholly distinct from the content hosted under other subdomains. But because of illegal content allegedly present at one such subdomain, *all* were blocked when the “parent domain,” moo.com, was seized. This is the *exact* form of overblocking that led a district court to find a Pennsylvania Internet blocking law unconstitutional in *Ctr. for Democracy and Tech. v. Pappert*, 337 F. Supp. 2d 606, 652-53 (E.D. Pa. 2004).¹² While the reason for redirection was somewhat different, *Amici* fear the “Operation In Our Sites” and moo.com seizures bespeak a similar institutional disregard for collateral impact of the government’s online seizures.

Moreover, the government also appears to base its decisions regarding potential targets not just on its own investigation but also on one-sided sources of

<http://www.informationweek.com/news/security/vulnerabilities/229218959>. A subdomain is a division of a domain, such as “subdomain.example.com.”

¹¹ See, e.g., William’s Personal Web Server & Random Thoughts, <http://greyghost.moo.com> (last visited June 19, 2011); Bluebird Jewelry Design by Stephanie Waldie, <http://cowbell.moo.com/catalog/index.php> (last visited June 19, 2011).

¹² See *infra* Part III, section C.1.

information. For example, the government affidavit that led to the music blog seizures described above cites repeatedly to “discussions” with, and reports prepared by, the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA), and the International Federation of the Phonographic Industry (IFPI).¹³ These sources may not have informed the government of the myriad of non-infringing (and, at the very least, noncriminal) activities on the sites, and that the source of some song files might have been the labels themselves, as happened, for instance, with dajaz1.com.¹⁴

Leading Congressional representatives have expressed deep concern over the ICE seizures.¹⁵ In an open letter to ICE, Senator Ron Wyden questioned ICE procedures, stating “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.”¹⁶ And, in a statement issued corollary to ICE’s response to a similar letter, Representative Zoe Lofgren was concerned the agency had

fail[ed] to address legitimate concerns about “Operation In Our Sites.” Domain seizures without due process are a form of censorship. In this instance, our government has seized domains with nothing more than

¹³ See Appl. and Aff. for Seizure Warrant [of Andrew T. Reynolds, signed Nov. 17, 2010], No. 10-2822, (C.D. Cal. Nov. 17, 2010), available at <http://www.docstoc.com/docs/67610787/45705510-Operation-in-Our-Sites-2-0>.

¹⁴ Sisario, *supra*.

¹⁵ Nate Anderson, *Senator: Domain Name Seizures “Alarming Unprecedented,”* Ars Technica (Feb. 2, 2011), <http://arstechnica.com/tech-policy/news/2011/02/senator-us-domain-name-seizures-alarming-unprecedented.ars>.

¹⁶ Letter from Sen. Ron Wyden to John Morton, Director, ICE, and Eric Holder, Attorney General (Feb. 2, 2011), available at <http://wyden.senate.gov/download/?id=103d177c-6f30-469b-aba8-8bbfdd4fd197>.

the rubber stamp of a magistrate, without any prior notice or adversarial process, leaving the authors of these sites with the burden of proving their innocence. While this might be enough for the seizure of stolen cars or knock-off handbags, it is not enough for web sites and speech on the Internet.¹⁷

Simply put, Petitioner and *Amici* are not alone in their concern that these seizures raise issues that require careful judicial scrutiny.

III. ARGUMENT

The district court concluded that the Rojadirecta seizure survives First Amendment scrutiny – and thus does not amount to a “substantial hardship” under the statute – because visitors can access site content via other means. SPA at 4. The Supreme Court, and decades of constitutional jurisprudence, say otherwise.

A. As the District Court Itself Recognized, the Seizure Implicates Clear Speech Interests.

The First Amendment not only “embraces the right to distribute literature,” it also “necessarily protects the right to receive it.” *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (“the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”); *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). This

¹⁷ *Lofgren, Wyden Question Response to Seizure Inquiries*, http://lofgren.house.gov/index.php?option=com_content&task=view&id=637&Itemid=125 (last visited June 19, 2011); *see also* Nate Anderson, *Silicon Valley Congresswoman: Web Seizures Trample Due Process (and Break the Law)*, *Ars Technica* (Mar. 14, 2011), <http://arstechnica.com/tech-policy/news/2011/03/ars-interviews-rep-zoe-lofgren.ars>.

Constitutional right to receive information applies specifically to information disseminated over the Internet. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating law that restricted adults' right to access information on the Internet).

Petitioner's site, previously accessible through the seized domain name, had hundreds of thousands of registered users and readers from around the world, including the United States. *See* J.A., DN 36-3 at A-191; J.A., DN 36-1 at A-14. Accordingly, the government's domain name seizure implicated the public's First Amendment interests in receiving documents and information by preventing access to them.

The Order below concedes as much: the district court did not dispute that "First Amendment considerations" existed, but merely found that such "consideration" did not amount to a substantial hardship. SPA at 4. That conclusion, however, was based not on any First Amendment analysis. Rather, it apparently was based on an assumption that § 983 could be applied in isolation and that the section requires the return of property only where "lives and livelihoods" are "in peril." *Id.* (quoting 145 Cong. Rec. H4854-02 (daily ed. June 24, 1999) (statement of Rep. Hyde))

This was clear error. Every statute must pass constitutional scrutiny; if the government's actions implicate speech interests, they must satisfy the First

Amendment. If the court had considered the substantial case law presented to it by Petitioner and *Amici*, it should have come to an entirely different conclusion.

B. The Government’s Seizure of Petitioner’s Domain Names Violated the Procedural Requirements of the First Amendment.

1. The Seizures Operate As Prior Restraints.

The government’s use of 18 U.S.C. §§ 2323(a)(1) (A)-(B) and 18 U.S.C. § 981 to obtain pre-judgment process to block access to domain names (and the internet content to which they point) constitutes a prior restraint of speech. “The term ‘prior restraint’ is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 549-50 (1993) (citations and internal quotation marks omitted and emphasis in original). Compare *Bantam Books*, 372 U.S. 58, 70 (1963) (holding agency practice of “requesting” book stores remove objectionable material “subject[s] the distribution of publications to a system of prior administrative restraints”). That is precisely what happened here and in the seizure campaign in general—the seizures’ entire purpose is to prevent future communications between the targeted websites and Internet users who attempt to contact those websites.

Moreover, as Petitioners argue, Opening Br. at 26-32, the government cannot sidestep the prior restraint analysis on the excuse that it based its actions on allegations of copyright infringement, given that it has not managed to articulate a

cognizable theory of copyright liability and that it did not file a civil or criminal copyright claim against Puerto 80. If it had, the judicial review that normally occurs prior to, for example, the issuance of an injunction, would have occurred – including an opportunity for notice and an adversarial hearing. *See generally* William Patry, *Patry on Copyright* 22:7-22:73 (2010) (discussing injunction procedures and standard). Having opted out of the traditional contours of copyright law, the government cannot seek shelter within them now.

Prior restraints are subject to a strong presumption of invalidity under the First Amendment. *See, e.g., Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958). Thus, any such restraint must “take[] place under procedural safeguards designed to obviate the dangers of a censorship system.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)). The Supreme Court has only permitted prior restraint schemes “where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint.” *Bantam Books*, 372 U.S. at 70-71 (citing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957)). *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990) (“[T]he availability of prompt judicial review [is necessary to] satisfy the ‘principle that the freedoms of expression must be ringed about with adequate bulwarks.’” (quoting *Bantam Books*, 372 U.S. at 66)).

Here, the government obtained a seizure order based not on a judicial finding of illegality but rather on an *ex parte* proceeding that required only a showing of probable cause. Such bare procedure is insufficient to satisfy the Constitution when the property to be seized is an instrumentality of speech.

2. A Mere Showing of “Probable Cause” Does Not Justify a Prior Restraint.

The Supreme Court has recognized that among “the special rules applicable to removing First Amendment materials from circulation” is “the admonition that probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films.” *Fort Wayne Books v. Indiana*, 489 U.S. 46, 65-66 (1989). The Court has noted that its cases “firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.” *Id.* at 66. *See also, e.g., New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *Blount v. Rizzi*, 400 U.S. 410, 420 (1971) (courts cannot prohibit the distribution of materials via U.S mail based solely on a probable cause determination of obscenity). Thus, a court cannot deny access to expressive materials it decides are *probably* illegal; it must determine that they actually *are* illegal.

That did not happen here. Instead the government sought and obtained authority to seize the sites based solely on a showing of “probable cause” that the domain names were “used or intended to be used to commit or facilitate the

commission of criminal infringement of copyrights in violation of [18 U.S.C. § 2319].” *See* J.A., DN 36-4 at A-220. That determination simply does not suffice.¹⁸

Indeed, the government could not have made such a case, for the reasons set forth in Petitioner’s brief and for the even simpler reason that, as the district court recognized, the websites contained clearly non-infringing content.

3. The Lack of a Prior Adversarial Hearing Renders the Domain Name Seizure Invalid.

The civil forfeiture process additionally fails to require an adversarial hearing before the domain name seizure was authorized. The Supreme Court has held that a “publication may not be taken out of circulation completely until there has been a determination of [illegality] after an adversary hearing.” *Fort Wayne Books*, 489 U.S. at 63; *see also Heller v. New York*, 413 U.S. 483, 492-93 (1973); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 735 (1961).

The process at issue here does exactly what *Fort Wayne Books* prohibits — it denies access to certain web site content, removing it from “circulation” within the domain-name system, without a prior hearing. When the goal or effect of the seizure is to block the public’s access to a challenged work — as is clearly the objective here — the adversarial hearing *must* take place before the seizure. *See*

¹⁸ As Petitioners note in their Opening Brief at 29-30, the government’s initial and subsequent claims of infringing activity did not establish probable cause in any event.

Fort Wayne Books, 489 U.S. at 63. As no such procedure is contemplated by the statute, let alone occurred here, a seizure authorized pursuant to that statutory scheme is unconstitutional if it encompasses non-infringing speech.

4. Whether or Not the Seizure Amounted to the Kind of “Substantial Hardship” Contemplated by Congress in Enacting Section 983 Is Irrelevant.

The district court based its denial of the petition in part on the conclusion that cutting off access to content was not the kind of hardship envisioned by Congress in enacting section 983(f). Of course it was not: when the provision was enacted it doubtless never occurred to Congress that the civil forfeiture procedures would be used to seize domain names. Indeed, that is part of what is so dangerous about ICE’s activities — the agency is using a novel tactic that, thus far, has allowed it to avoid the normal safeguards for free speech. But that does not render such safeguards inapplicable, and they require the government to show its prior restraint on speech was permissible. For the reasons set forth above, it did not and has not.

C. The Government’s Seizure of Petitioner’s Domain Names Violated the Substantive Requirements of the First Amendment.

Even if the procedural requirements of the First Amendment had been met under this seizure regime – and they were not – the substantive requirements of the First Amendment were not satisfied. Accordingly, for this independent reason, the

government's seizure was improper and Puerto 80's domain name must be returned.

1. Intermediate Scrutiny Applies to Government Seizures of Domain Names Allegedly Associated with Criminal Copyright Infringement, Where Such Seizures Implicate Non-Infringing Content.

The substance of regulations that impact speech are unrelated to the content of that speech are subject, at minimum, to an intermediate level of scrutiny. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994); *see also Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606, 652-53 (2004) (applying scrutiny test to regulatory burdens on Internet Service Providers). As set forth by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968), intermediate scrutiny requires that a regulation “[1] furthers an important or substantial governmental interest; [2] the governmental interest is unrelated to the suppression of free expression; and [3] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377. *See also Pappert*, 337 F. Supp. 2d at 653. The government's domain name seizure here should be analyzed under at least intermediate scrutiny.

2. The Government's Overbroad Seizures Unnecessarily Interfered with Speech Interests.

The seizure here – and the seizure campaign in general – has gone far beyond what might be necessary to further any permissible government interest.

While the government may pursue actions that further important interests, “it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980) (citing *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976)). “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone” *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).

Here, the government alleged that links (located on pages accessible through Petitioner’s domain names) to infringing content — *i.e.*, pointers to content accessible elsewhere on the Internet — constituted criminal copyright infringement. J.A., DN 36-4 at A-220. By seizing Petitioner’s domain names, however, the government blocked access to *all* content contained on Petitioner’s site, including obviously non-infringing content, such as user-created forums, discussions, and technical tutorials. This was precisely the kind of “prophylactic” approach the First Amendment forbids.

Indeed, the government has alternative and less burdensome means to address any legitimate interests that it may wish to further via the seizure campaign.¹⁹ For example, in most instances it can seek to identify and prosecute the individuals who allegedly engaged in the criminal copyright infringement. The

¹⁹ As Petitioners note in their Opening Brief at 27-32, in this case at least it appears that the government has not been able to articulate a viable theory of civil or criminal copyright liability, much less prove it.

copyright holders themselves can similarly seek to use civil copyright law to obtain redress or, where they have a good faith belief material is infringing, take advantage of the notice and takedown provisions of the Digital Millennium Copyright Act. In this case, the copyright holders and/or the government could seek the cooperation of Spanish authorities in policing Puerto 80's activities. Admittedly, that might require convincing a Spanish court to reconsider its prior rulings, but that is not the type of obstacle that could justify resorting to prior restraint tactics and brushing off First Amendment concerns. In any event, use of such alternative means would have approached the alleged harm in a more careful manner that would have safeguarded the First Amendment interests at stake. *See Maryland v. Macon*, 472 U.S. 463, 468 (1985) ("The First Amendment imposes special constraints on searches for and seizures of presumptively protected material, and requires that the Fourth Amendment be applied with 'scrupulous exactitude' in such circumstances.") (internal citation omitted).

And, contrary to the district court's conclusion (*see* Opening Br. at SPA 3-4), the fact that some or all of the information available through the targeted domain names may still be available to the public, by (for example) using another domain name or by typing in the site's numerical IP addresses directly, does not change the analysis. The Supreme Court has repeatedly held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the

plea that it may be exercised elsewhere.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); *accord Va. State Bd. of Pharmacy*, 425 U.S. at 757 n.15 (1976) (“We are aware of no general principle that freedom of speech may be abridged when the speaker’s listeners could come by his message by some other means . . .”). The government’s action in this case failed to sufficiently target alleged wrongdoers, and ultimately suppressed far more speech than the First Amendment would permit. The district court failed to consider, let alone apply, this controlling Supreme Court precedent. Accordingly, it should be reversed.

D. The Seizure Warrant Ignored the Judgment of Two Spanish Courts, Disregarding Important International Norms.

Two Spanish courts have found Puerto 80’s activities, specifically the operation of the Rojadirecta websites, legal. Opening Br. at 5. The issuing court did not appear to consider these rulings before issuing the warrant or denying Petitioner’s motion. Either the government chose to not to share this fact, which should have emerged in any reasonable preliminary investigation, or the government itself was unaware of it, which suggests it did not conduct such an investigation. Principles of comity and public policy dictate that the court should have been given an opportunity to consider the matter.

1. The Seizure Order Should Not Have Issued Without Consideration of the Foreign Judgment of Non-Infringement.

Decisions of foreign courts are not binding on the U.S. judiciary; however, it is a “well-settled rule” that unless findings offend fundamental standards of procedural fairness or public policy, foreign judgments are generally conclusive. *See Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 408 (2d Cir. 2009) (citing *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986)); *Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg, S.A.*, 528 F.3d 162, 171-72 (2d. Cir 2008) (comity “generally appropriate where the foreign ‘proceedings do not violate the laws or public policy of the United States and if the foreign court abides by fundamental standards of procedural fairness.’”) *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985) (“Comity will be granted to *the decision* or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.” (emphasis added)). Normally the issue arises where parties seek to enforce foreign judgments, but the principles apply more broadly. *See, e.g., Kenner Prods. Co. v. Societe Fonciere et Financiere Agache-Willot*, 532 F.Supp. 478, 479 (S.D.N.Y. 1982) (finding principles of international comity as well as U.S. public policy required granting motion for suspension pending French bankruptcy determination).

The standard for exceptions is high and rarely met. *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 479 (2d Cir. 2007); *Ackermann*, 788 F.2d at 841. Indeed, comity principles apply even where a U.S. legal proceeding would have produced a different result, either procedurally or on the merits. *See, e.g., Sarl Louis Feraud Int'l*, 489 F.3d at 479; *Pariente v. Scott Meredith Literary Agency*, 771 F. Supp. 609, 616 (S.D.N.Y. 1991).

In the case of *Rojadirecta*, that standard was not applied, much less met. There is no reason to believe the Spanish rulings were procedurally unsound or offensive to public policy. Indeed, on the limited facts available in the record, U.S. copyright law may have dictated the same outcome, at least under criminal law. *See* Opening Br. at 28-32. At the very least, a court should have given appropriate consideration to the matter before any warrant issued.

2. The Rojadirecta Seizure Sends a Dangerous Signal.

As this Court has noted, respect for foreign judgments is good policy: “The increasing internationalization of commerce requires ‘that American courts recognize and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice and fair play.’” *Ackermann*, 788 F.2d at 845 (citing *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981)). Such respect promotes the fair treatment of foreign entities and citizens, and encourages other countries to accord U.S. business and citizens the same respect. By choosing

instead to ignore the judgments of foreign courts, the U.S. Government has undermined that policy.

The effect may be felt well beyond the commercial context. Simply put, if the United States courts allow — with no adversarial hearing and on a low legal standard — the seizure of foreign-based content that is lawful in the home country, then that will set an example for other countries to seek to seize U.S.-based speech that is perfectly lawful in this country. As one example, U.S.-based websites have provided a crucial safe haven for political speech, including speech that is critical of foreign governments, in part because U.S. law offers strong protections for political commentary. If such a website were seized by a foreign government (even though the content is hosted in the U.S.), that action would likely be subject to intense criticism, including disapproval by the U.S. government. Unfortunately, it would be all too easy for the foreign censor to cite to the circumstances of this case as reason to ignore such criticism. Having gone down the path of seizing websites hosted around the world, we will be less able to complain when other countries turn around and do the same thing to speech hosted here.

IV. CONCLUSION

For the past year, U.S. agencies have taken it upon themselves to seize over 140 domain names, including several that contained non-infringing speech, with little judicial scrutiny and no effort to meet well-established First Amendment

requirements. It is time to call a halt to this unlawful and ill-advised activity.

Amici urge the Court to reverse the district court's denial of Petitioner's request for return of property and confirm that, where a domain name includes non-infringing speech, it may not be seized unless and until the First Amendment is satisfied.

Respectfully submitted,

Date: September 23, 2011 By /s/ Corynne McSherry
Corynne McSherry
Matthew Zimmerman
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Phone: (415) 436-9333
Fax: (415) 436-9993
corynne@eff.org

David Sohn, Senior Policy Counsel
CENTER FOR DEMOCRACY AND
TECHNOLOGY
1634 I Street, NW, Suite 1100
Washington, DC 20006
Phone: (202) 637-9800
Fax: (202) 637-0968

Sherwin Siy
Deputy Legal Director
Kahle/Austin Promise Fellow
PUBLIC KNOWLEDGE
1818 N St. NW, Suite 410
Washington, DC 20036
202.861.0020

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. Pro. 29(d) and 32(a)(7)(B) because it contains 5,459 words, excluding the parts of the brief exempted by Fed. R. App. Pro. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. Pro. 32(a)(5) and the type style requirements of Fed. R. App. Pro. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: September 23, 2011

/s/ Corynne McSherry

Corynne McSherry
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
cindy@eff.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 23, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 23, 2011

/s/ Corynne McSherry
Corynne McSherry
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
cindy@eff.org

Attorneys for Amici Curiae