Has the Quest to Quelch Piracy Gone Too Far?: Government Overreach in Forfeiture of Linking Websites

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I. INTRODUCTION

Although I am considering introducing a bill on domain name seizures for infringement, that does not mean I accept the practice as

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legal or [c]onstitutional. – Rep. Zoe Lofgren[1]

On January 31, 2011, just a few days before the Super Bowl, Immigrations and Customs Enforcement ("ICE") agents seized Rojadirecta.com and Rojadirecta.org (collectively "Rojadirecta")[2] as part of its "Operation: In Our Sites" initiative to protect intellectual property ("IP") rights.[3] Rojadirecta is a popular online sports forum where users can post anything from gripes about a botched pass to predictions for the football championship.[4] Users can also post videos. Rojadirecta organizes the posts by sporting event, but it does not monitor each post nor does it check each video's origin. As such, users can—and, allegedly, do—post videos that infringe on valid copyrights.

Pursuant to ICE's seizure, the government filed a complaint against Rojadirecta, alleging that the site facilitates criminal copyright infringement and thus is subject to civil forfeiture.[5] The owners of Rojadirecta, a Spanish company called Puerto 80 Projects, S.L.U. ("Puerto 80"), challenged ICE's seizure and moved to dismiss the forfeiture action.[6] After over a year of continuances, amended pleadings, and hearings, the government dropped the case and returned the domain names so that Puerto 80 could resume its operation.[7]

Although dropping a case is not in itself remarkable, dropping *this* case raises interesting questions. Does the civil forfeiture regime provide for forfeiture of websites like Rojadirecta? Can criminal copyright law be stretched to support this effort to combat piracy? Should sites like Rojadirecta, subjected to seizure, fight back? Is the government's action here indicative of future plans to take action against contributory infringement? After all, no court has directly ruled on whether a domain name may be civilly forfeited for criminal copyright infringement. Did the government, in seizing these domain names, have a legal leg to stand on?

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1. Zoe Lofgren, *Rep Zoe Lofgren Asks Reddit Users to Crowdsource Domain Name Seizure Legislative Proposal*, CONGRESSWOMAN ZOE LOFGREN (Nov. 19, 2012), http://www.lofgren.house.gov/latest-news/rep-zoe-lofgren-asks-reddit-users-to-crowdsource-legislative-proposals-on-domain-name-seizures/ [hereinafter *Lofgren Proposal*].

2. Both the Rojadirecta.com and Rojadirecta.org domain names lead to the same website/content.

3. *See The U.S. Government Withdraws Complaint Against the Rojadirecta Domains and the Court Orders Their Return*, ROJADIRECTA (BLOG) (August 30, 2012), http://blog.rojadirecta.me.

4. *See* ROJADIRECTA (FORUM), http://forum.rojadirecta.es/forum.php (last visited Dec. 29, 2013).

5. *See* Verified Complaint, United States v. Rojadirecta.org, No. 11 Civ. 4139, 2011 WL 2428753 (S.D.N.Y. June 17, 2011) [hereinafter Verified Complaint].

6. *See* Memorandum of Points and Authorities in Support of Claimant's Motion to Dismiss, United States v. Rojadirecta.org, No. 11-cv-4139, 2011 WL 8200848 (S.D.N.Y. Aug. 5, 2011) [hereinafter First Motion to Dismiss].

7. *See* ROJADIRECTA (BLOG), *supra* note 3.

This Comment will argue that the government had no legal basis in seizing Rojadirecta and that the government improperly used forfeiture to avoid fruitless criminal prosecutions and to take down pesky, though innocent, websites. First, this Comment will outline the civil forfeiture structure, emphasizing its controversial mix of low legal standards and costly penal effect. Second, this Comment will explain how Operation: In Our Sites has been using civil forfeiture as its primary weapon to combat online IP infringement. Next, Section Three will explain the convoluted procedural history of Rojadirecta's case—a means by which the government was able to forestall adjudication on the merits—and will further argue that, had the district court reached the merits of the case, there would be no way the government's theory could prevail based on the facts alleged. Section Four will parallel examples from the cultural property context, where both the government and the judiciary have been criticized for misapplying law, or for not examining whether certain elements were met, in the name of returning priceless artifacts to their home countries. Finally, Section Five will caution that the government may be taking steps to legalize domain name forfeiture, which further emphasizes that it is not yet legal and foreshadows the drastic lengths to which the government will go to quelch copyright infringement.

II. The Civil Forfeiture Structure

Civil forfeiture is a legal regime by which the government can seize property that is connected to the commission of a criminal act.[8] Therefore, while forfeiture proceedings are civil in nature, civil forfeiture is innately tied to criminal law.[9] However, a major distinction is that civil forfeiture is by nature *in rem*, and thus is not tied to the person who committed the criminal act.[10] This contentious structure, as used in the IP context, creates the risk that technological innovation could be needlessly stilted without the government having to establish criminal fault. The first subsection will explain the policy behind forfeiture and the second subsection will describe the procedure involved in a civil forfeiture action. Finally, the third subsection will explain how civil forfeiture differs from criminal forfeiture, with a focus on the incongruous burdens that the government must prove.

8. 37 C.J.S. Forfeitures § 46 (2012).

9. *Id.* at § 47 (defining a civil forfeiture as a "hybrid" procedure of mixed civil and criminal law elements).

10. *Id.* at § 46 (explaining that an *in rem* civil forfeiture action is brought against the property, rather than against the owner of the property; therefore, property can be forfeited even if the owner did not violate the law).

A. *The Policy Behind Forfeiture*

Forfeiture, particularly civil forfeiture, serves several important functions. First, forfeiting infringing items, which are essentially contraband, ensures that they cannot be sold or redistributed.[11] Forfeiture also prevents the relevant property from being used to commit further crimes.[12] Additionally, forfeiture serves as a powerful deterrent[13]—it is this policy consideration that perhaps outweighs all others in the Rojadirecta case.

B. *The Procedure of Civil Forfeiture Actions*

The authority to bring a civil forfeiture action generally is found in 18 U.S.C. § 981.[14] Additionally, 18 U.S.C. § 2323 specifically provides for the forfeiture of property used to facilitate infringement.[15] Forfeiture proceedings, however, are governed by 18 U.S.C. § 983.[16] The first step in a civil forfeiture proceeding is that the government obtains a seizure warrant based on probable cause that the *res* is being used to facilitate a crime.[17] After securing the warrant, the government seizes the *res* and serves notice on its owner. The owner may then file a claim with the appropriate official after the seizure.[18] If no claim is filed, the property is administratively forfeited to the government.[19] If the owner does file a claim, however, the government has ninety days to file a civil forfeiture action in district court, or else it must return the property.[20] The government has the burden to prove by a preponderance of the evidence that the *res* is subject to forfeiture.[21] If the theory behind forfeiture is that the property is being used to facilitate a crime, the government must also show a substantial connection between the crime and the property.[22] If the owner does not appear in court, the proceeding is defaulted and the *res* is forfeited.

However, Congress enacted 18 U.S.C. § 983(f) as part of the Civil

11. U.S. DEP'T OF JUSTICE, PROSECUTING INTELLECTUAL PROPERTY CRIMES MANUAL 357 (4th ed. 2013), *available at* http://www.justice.gov/criminal/cybercrime/docs/prosecuting_ip_crimes_manual_2013.pdf [hereinafter DOJ MANUAL].

12. *Id.* at 357–58.

13. *Id.* at 358.

14. 18 U.S.C. § 981 (2012).

15. 18 U.S.C. § 2323(a)(1)(B) (2012).

16. *See id.* at (a)(2).

17. *See* § 981(b)(2).

18. 18 U.S.C. § 983(a)(2)(A) (2012).

19. *See, e.g.*, *Operation In Our Sites Protects American Online Shoppers, Cracks Down on Counterfeiters*, IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 28, 2011), http://www.ice.gov/news/releases/1111/111128washingtondc.htm.

20. 18 U.S.C. § 983(a)(3).

21. *Id.* at (c)(1).

22. *Id.* at (c)(3).

Asset Forfeiture Reform Act of 2000 ("CAFRA"), to allow an owner to seek immediate release of seized property where the government's continued possession of the property would pose a substantial hardship to the owner.[23] Of course, contraband may not be released.[24] However, Section 983(f) will also not provide for the release of property that is "likely to be used to commit additional criminal acts if returned to the claimant."[25] As such, motions for release under Section 983(f) in the context of allegedly infringing domain names may raise room for debate as to whether release would lead to more alleged IP infringement.

C. *The Distinction Between Civil and Criminal Forfeiture*

Section 2319A of Title 18 of the United States Code provides for mandatory forfeiture and destruction of all infringing items upon a defendant's conviction.[26] From a procedural standpoint, criminal forfeiture has more safeguards because it comes only after the government has proved beyond a reasonable doubt that the defendant was guilty of an offense and that the forfeited property was connected to the offense. Criminal forfeiture thereby raises no due process concerns.

Because civil forfeiture is *in rem*, however, the owner of the property does not need to be party to the suit. In fact, civil forfeiture predicated on criminal copyright infringement does not even require that the forfeited property be the property of the infringer. Forfeiture of third-party property is possible, so long as the property owner does not assert an "innocent owner" defense.[27] A claimant only has to put on the "innocent owner" defense after the government has met its burden of proving by a preponderance of the evidence that the property was used to commit or facilitate a criminal offense, and that the property was substantially connected to the offense.[28] This showing shifts the burden to the claimant.[29]

In theory, the preponderance of the evidence standard should not be difficult for the innocent owner to overcome. However, the financial burdens of disputing seizures in court, paired with the lack of personal punishment and stigma connected to criminal charges, give little incen-

23. *See* Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 107 (2001).

24. *See id.*

25. 18 U.S.C. § 983(f)(8).

26. 18 U.S.C. § 2319A(b)–(c) (2012).

27. *See* 18 U.S.C. § 983(d)(1) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.").

28. *Id.* at (c)(3).

29. *Id.* at (d)(1).

tive to actually challenge the seizure of property. Consequently, a domain name owner with limited means and, perhaps, a foggy understanding of IP law might not find it worthwhile to file a claim, letting the domain name be administratively forfeited. If, conversely, the domain name forfeiture were tied to criminal charges, the property owner likely would fight much more zealously to assert his innocence.

The concept of *in rem* civil forfeiture has been called a "fiction."[30] A leading treatise on forfeiture even begins by commenting: "Forfeitures are not favored; the law and equity abhor a forfeiture. Forfeitures are considered harsh, oppressive, odious, penal in nature, and to be avoided when possible."[31] Nevertheless, the government continues to use civil forfeiture to confiscate, thereby obviating the need for a criminal prosecution.

III. OPERATION: IN OUR SITES

Operation: In Our Sites is an IP enforcement program created by the National Intellectual Property Rights Coordination Center ("IPR Center") and managed by ICE's Homeland Security Investigations ("HSI").[32] Operation: In Our Sites specifically targets websites that sell or distribute counterfeit and pirated items over the internet.[33] The program's mission statement declares:

> IP thieves are increasingly using the Internet as a means of advertising, promoting, offering and selling their illegal products. Through Operation In Our Sites, the IPR Center and its partner agencies aggressively pursue those who steal from American businesses and ultimately the American workers who work to produce the real goods and products. IP theft results in lost American jobs, stolen business profits, and lost pension and health care payments. Perhaps most seriously, it creates potential risk to consumers' health and safety.
>
> Those selling counterfeit and pirated products, whether in a storefront or on the Web, are violating federal criminal laws. If the IPR Center receives credible information about intellectual property rights violations and our law enforcement investigation determines there has been criminal wrongdoing, we will work with the U.S. Department of Justice to prosecute, convict, and punish individuals as well as seize website domain names, profits, and other property from IP thieves.[34]

In June 2010, as part of its first phase of Operation: In Our Sites, ICE

30. 37 C.J.S. Forfeitures § 4 (2012).

31. *Id.* at § 1 (internal citations omitted).

32. *See Operation In Our Sites*, NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., http://www.iprcenter.gov/reports/fact-sheets/operation-in-our-sites/view (last visited Dec. 29, 2013).

33. *Id.*

34. *Id.*

seized nine domain names of sites that allegedly "offer[ed] first-run movies, often within hours of their theatrical release[s]."[35] Next, in "Version 2.0," ICE seized eighty-two domain names on November 29, 2010—that date was Cyber Monday, the busiest online shopping day of the year.[36] This time, the seized domain names allegedly had been used to sell counterfeit goods, in violation of both copyright and trademark laws.[37]

The seizure of Rojadirecta came pursuant to the third phase of Operation: In Our Sites.[38] This phase seized ten domain names that allegedly "illegally streamed copyrighted sporting and pay-per-view events."[39] In his official statement, United States Attorney for the Southern District of New York Preet Bharara said:

> The illegal streaming of professional sporting events over the Internet deals a financial body blow to the leagues and broadcasters who are forced to pass their losses off to the fans in the form of higher priced tickets and pay-per-view events. With the Super Bowl just days away, the seizures of these infringing websites reaffirm our commitment to working with our law enforcement partners to protect copyrighted material and put the people who steal it out of business.[40]

Notably, all ten domain names were "linking" sites—sites that do not host illegal content directly, but rather collect and catalog links to other websites that feature illegal copies of copyrighted content.[41] "Linking" sites make more effective targets because of their popularity: "[T]hey allow users to quickly browse content and locate illegal streams that would otherwise be more difficult to find."[42] ICE's takedown is analogous to cutting down a beehive, rather than killing each individual bee.

As of January 31, 2013, Operation: In Our Sites has led to the seizure of more than 2,000 websites.[43] And as of December 20, 2012,

35. *"Operation In Our Sites" Targets Internet Movie Pirates*, NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR. (June 30, 2010, 12:00 AM), http://www.iprcenter.gov/partners/ice/news-releases/operation-in-our-sites-targets-internet-movie-pirates.

36. *Operation In Our Sites* 2.0, NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., http://www.iprcenter.gov/news-releases/video/operation-in-our-sites-2.0 (last visited Feb. 11, 2013).

37. *ICE Seizes 82 Website Domains Involved in Selling Counterfeit Goods as Part of Cyber Monday Crackdown*, IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 29, 2010), http://www.ice.gov/news/releases/1011/101129washington.htm.

38. *New York Investigators Seize 10 Websites That Illegally Streamed Copyrighted Sporting and Pay-Per-View Events*, IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 2, 2011), http://www.ice.gov/news/releases/1102/110202newyork.htm.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *ICE, CBP, USPIS Seize More Than $13.6 Million in Fake NFL Merchandise During*

more than 690 of those sites have been forfeited.[44] However, there is no comprehensive list of the websites that have been forfeited. Indeed, ICE and Operation: In Our Sites have been widely criticized for their secrecy, even being accused of flat-out lying.[45] For example, in June 2011, Erik Barnett, Assistant Deputy Director of ICE, claimed that "[Site owners] can challenge the seizure, but no one has yet."[46] In response to this statement, Techdirt released a list of sites, obtained from "a confidential source with knowledge of these things," whose owners were indeed attempting to challenge the seizures.[47] The list included Rojadirecta, discussed in more detail below. Although this list cannot be verified, and its source may be dubious, ICE's failure to be forthright about its forfeiture statistics has certainly raised some eyebrows.

IV. THE CASE OF ROJADIRECTA

Rojadirecta is a "sports broadcast index," linking visitors to streaming sporting events hosted by third parties.[48] These third parties stream video that is copyrighted by NBA, MLB, NFL, and other sporting leagues.[49] Rojadirecta hosts no broadcasts itself.[50] In early 2011, according to Alexa.com (a site that ranks websites by usage), Rojadirecta.org and Rojadirecta.com were ranked the 2,380th and 2,326th most popular websites in the world, respectively, and the 119th and 109th most popular websites in Spain, respectively.[51] Rojadirecta's popularity made it a clear target for forfeiture, sending a worldwide message that the United States government intends to stop piracy at any cost.

A. *The Procedural History of* United States v. Rojadirecta.org

On January 31, 2011, ICE obtained a seizure warrant from the Honorable Frank Maas, United States Magistrate Judge for the Southern Dis-

'Operation Red Zone,' IMMIGRATION & CUSTOMS ENFORCEMENT (Jan. 31, 2013), http://www.ice.gov/news/releases/1301/130131neworleans.htm.

44. *Houston HSI Seizes 89 Websites Selling Counterfeit Goods*, IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 20, 2012), http://www.ice.gov/news/releases/1212/121220houston.htm.

45. Mike Masnick, *ICE Declares 'Mission Accomplished' on Domain Seizures*, TECHDIRT (June 10, 2011, 10:30 AM), http://www.techdirt.com/articles/20110608/20310614626/ice-wants-european-countries-to-join-domain-seizure-party.shtml.

46. *Id.*

47. Mike Masnick, *The List of Sites Challenging Domain Seizures*, TECHDIRT (June 13, 2011, 10:47 AM), http://www.techdirt.com/articles/20110612/21573514664/list-sites-challenging-domain-seizures.shtml.

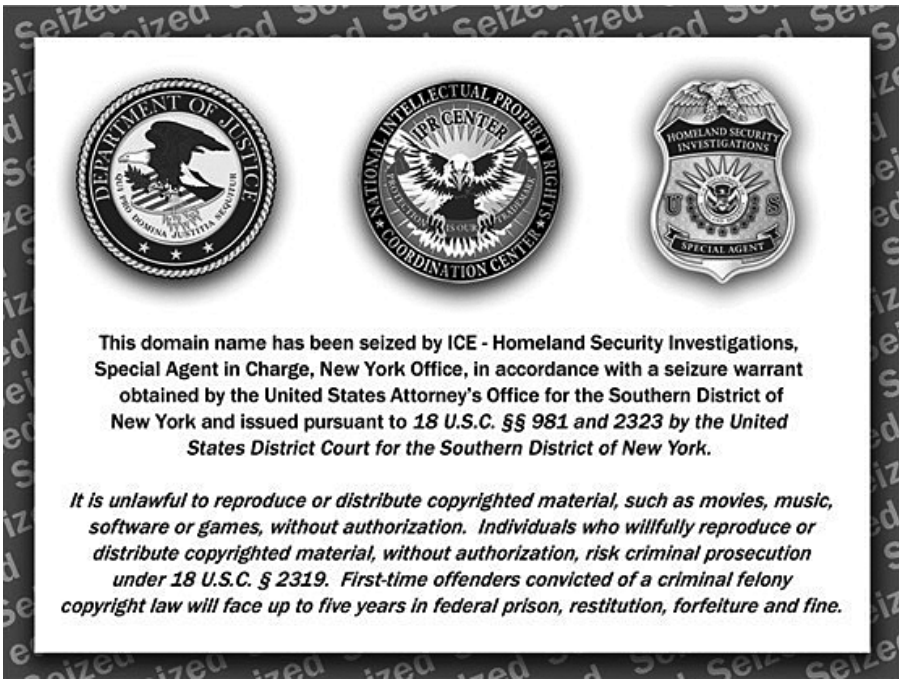
48. *See U.S. Resume Controversial File-Sharing Domain Seizures (Updated)*, TORRENTFREAK (Feb. 1, 2011), http://torrentfreak.com/us-resume-file-sharing-domain-seizures-110201.

49. *Id.*

50. *Id.*

51. Verified Complaint, *supra* note 5, at 10.

trict of New York, to seize the two Rojadirecta domain names.[52] Pursuant to the warrant, the Rojadirecta domain names were seized.[53] The content of the website was changed to show only the following image:[54]



The text reads:

> This domain name has been seized by ICE – Homeland Security Investigations, Special Agent in Charge, New York Office, 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.
>
> It is unlawful to reproduce or distribute copyrighted material, such as movies, music, software or games, without authorization. Individuals who willfully reproduce or distribute copyrighted material, without authorization, risk criminal prosecution under 18 U.S.C. § 2319. First-time offenders convicted of a criminal felony copyright law will

52. *Id.* at 2.

53. Rojadirecta's blog claims that the actual seizure occurred on January 31, 2011, *see* ROJADIRECTA (BLOG), *supra* note 3, but the complaint alleges the seizure occurred on February 1, 2011, *see* Verified Complaint, *supra* note 5, at 1.

54. *See* Bianca Bosker, *Rojadirecta.org One of Several Sites SEIZED By U.S. Authorities*, HUFFINGTON POST (May 25, 2011, 7:30 PM), http://www.huffingtonpost.com/2011/02/02/rojadirecta-org-seized_n_817458.html.

face up to five years in federal prison, restitution, forfeiture and fine.[55]

On March 22, 2011, Puerto 80 took the first step toward having the Rojadirecta domain names returned by filing Seized Asset Claim Forms with the Department of Homeland Security.[56] Separately, on June 13, 2011, Puerto 80 petitioned for immediate return of the domain names pursuant to 18 U.S.C. § 983(f).[57] This petition alleged, among other things, that the government's seizure violated Puerto 80's First Amendment rights and was an impermissible "prior restraint" on free speech, amounting to unconstitutional censorship.[58] The district court denied the petition, and Puerto 80 appealed to the Second Circuit Court of Appeals to assess the constitutionality of these seizures.[59] The Second Circuit never ruled on the constitutional aspects of the case because, as explained below, the government returned the Rojadirecta domain names, mooting the appeal.[60]

Pursuant to Section 983(a)(3)(A), Assistant United States Attorneys Christopher D. Frey and David I. Miller filed the forfeiture complaint on June 17, 2011.[61] The complaint alleged that Rojadirecta was a "linking" website.[62] The complaint continued to allege that Rojadirecta "displayed" categories of links to copyrighted content and that the links "changed" and "were added" as the day progressed.[63] It did not allege that Puerto 80 was responsible for these displays and changes. Indeed, the complaint even noted that "the content ran on a live stream from another website," without alleging that Puerto 80 had any connection to the other website.[64]

Puerto 80 filed a motion to dismiss on August 5, 2011, arguing that the complaint failed to allege a theory of criminal copyright infringement from which probable cause to seize Rojadirecta could be established.[65] On December 7, 2011, the Honorable Paul A. Crotty granted

55. *Id.*

56. Brief for the United States, Puerto 80 Projects, S.L.U. v. United States, No. 11-3390, 2011 WL 5833572, at *6 (2d Cir. Nov. 15, 2011).

57. *See id.* at *2.

58. *Id.* at *7.

59. Opening Brief and Special Appendix for Petitioner-Appellant Puerto 80 Projects, S.L.U., Puerto 80 Projects, S.L.U. v. United States, No. 11–3390, 2011 WL 4440567, at *4 (2d Cir. Sep. 16, 2011).

60. For a thorough assessment of the constitutionality of domain name seizures, particularly in the case of Rojadirecta, see Guy W. Huber, *"Unfriending" the Internet: U.S. Government Domain Name Seizures and a Democratic Web*, 15 TUL. J. TECH. & INTELL. PROP. 243 (2012).

61. Verified Complaint, *supra* note 5, at 1.

62. *Id.* at 6.

63. *Id.* at 8.

64. *Id.*

65. *See* First Motion to Dismiss, *supra* note 6, at 1.

the motion to dismiss without prejudice, giving the government the opportunity to amend its complaint.[66] On January 6, 2012, the government filed its amended complaint,[67] and on February 14, 2012, Puerto 80 filed another motion to dismiss.[68] However, before the district court could rule on the motion to dismiss, the government filed a voluntary dismissal on August 29, 2012.[69]

B. *The Legal Merits of the Forfeiture Complaint*

Because the case never made it to discovery, one could only speculate as to whether the government could have won its forfeiture action. However, accepting the facts in the government's amended complaint as true, it is likely that websites such as Rojadirecta, where users post videos and where no content is copied nor stored on the site's server, are not within the scope of forfeitable property because of the impracticable factual investigations that would be required to satisfy the government's burden of proof. As the following subsections will show, the government did not adequately allege criminal copyright infringement in the first place, so the argument that the government's reading of "facilitate" within the civil forfeiture statute was unconstitutionally broad does not even need to be addressed.[70]

i. The Complaint Could Not Show That Puerto 80 Committed Direct Criminal Copyright Infringement

In order to succeed in its forfeiture action, the government would have to prove by a preponderance of the evidence that Rojadirecta facilitated criminal copyright infringement in violation of 17 U.S.C. § 506.[71]

66. Order Granting Motion to Dismiss, United States v. Rojadirecta.org, No. 11-cv-4139 (S.D.N.Y. Dec. 7, 2011) (ECF No. 28).

67. Verified Amended Complaint, United States v. Rojadirecta.org, No. 11-cv-4139, 2012 WL 2869487 (S.D.N.Y. Jan. 6, 2012) [hereinafter Amended Complaint].

68. Memorandum of Law in Support of Claimant Puerto 80 Projects, S.L.U.'s Motion to Dismiss Plaintiff's Amended Complaint, United States v. Rojadirecta.org, No. 11-cv-4139, 2012 WL 2869495 (S.D.N.Y. Feb 14, 2012) [hereinafter Second Motion to Dismiss].

69. Notice of Voluntary Dismissal, United States v. Rojadirecta.org, No. 11-cv-4139 (S.D.N.Y. Aug. 29, 2012) (ECF No. 55).

70. This argument was not only raised by Puerto 80 in the § 983(f) claim, but also in both Motions to Dismiss. Indeed, most scholarly debate about ICE's seizure scheme centers on this argument. *See, e.g.*, Huber, *supra* note 60.

71. Section 506 defines criminal copyright infringement as infringement willfully committed

> (A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

17 U.S.C. § 506(1)(A)–(C) (2012).

The basic elements of infringement, however, are the same as in the civil context; the criminal aspect comes solely from the additional requirements in Section 506(a).[72] Therefore, we must first look to the civil statute, 17 U.S.C. § 501, to determine whether the complaint alleged basic infringement.

Paragraph six of the Amended Complaint alleges that illegal streaming of copyright-protected content can be accomplished in one of three ways: 1) by capturing the output of a television and directing that output to a computer, "where it is simultaneously and continuously encoded and uploaded in a 'stream' to so-called illegal streaming websites"; 2) by hacking the authorized online streams of the copyright holders and then directing those streams to illegal streaming websites; or 3) by videotaping a television or computer screen to capture the desired programming, and then uploading that tape to illegal streaming websites.[73] Any of these three methods would violate the copyright holder's exclusive rights of reproduction and public performance, as protected by 17 U.S.C. § 106.[74] Both the initial and amended complaints also alleged violations of the distribution right, 17 U.S.C. § 106(3), but neither complaint alleged that any copies were made on viewers' computers.[75] In order to violate the distribution right, an electronic transfer must make a tangible "copy" in the computer's hard drive.[76] Therefore, streaming a copy does not "distribute" that copy within the meaning of the Copyright Act. As such, the government's contention that Rojadirecta facilitated criminal infringement of the distribution right has no legal basis.

Nevertheless, the copyright holders of the allegedly infringing videos have had their rights of reproduction and public performance directly violated. However, Puerto 80 is not the entity responsible for violating these rights. Rather, Rojadirecta users provided links to third-party websites where someone—presumably the owners of those sites—had used one of the previously mentioned methods to create an illegal stream. Indeed, the amended complaint even admitted that the allegedly unauthorized copyrighted content "ran on a live stream *from another website*" and was merely linked to Rojadirecta.[77] Because the complaint did not allege that Puerto 80 was itself responsible for reproducing the

72. *See* 5–15 NIMMER ON COPYRIGHT § 15.01 (2013).

73. Amended Complaint, *supra* note 67, at 2–3.

74. 17 U.S.C. § 106(1) gives the copyright owner the exclusive right to reproduce the work in copies or phonorecords. 17 U.S.C. § 106(4) gives the owner of a copyrighted audiovisual work (here, the video of a sporting event) the exclusive right to perform the work publicly.

75. Verified Complaint, *supra* note 5, at 3; Amended Complaint, *supra* note 67, at 3.

76. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1162 (9th Cir. 2007) (holding that Google's HTML instructions, which do not themselves cause infringing images to be copied, do not violate the distribution right).

77. Amended Complaint, *supra* note 67, at 11 (emphasis added).

videos, the government could not have proven that Puerto 80 committed direct criminal copyright infringement.[78] It follows that Rojadirecta could not have been subjected to forfeiture if prosecutors had brought an *in personam* action against Puerto 80; instead, the government was seeking to use civil forfeiture to obtain the property of an innocent owner.

ii. There is No Legal Basis for Contributory Criminal Copyright Infringement

If the Rojadirecta forfeiture claim were predicated on any action of Puerto 80, such action would not give rise to probable cause of criminal infringement. As shown above, Puerto 80 has not committed any direct infringement. This subsection discusses why, even if Puerto 80 could be considered a contributory infringer,[79] contributory infringement is not a valid legal basis for civil forfeiture.

While 18 U.S.C. § 2323 provides for forfeiture of property used in violation of Title 17 of the United States Code, there is no statutory provision for contributory copyright infringement. Contributory *civil* copyright infringement has arisen as a common-law cause of action, but it was never codified. Consequently, there is no such thing as contributory *criminal* copyright infringement. While there is a statutory basis for conspiracy to criminally infringe,[80] this would require that the direct infringer and the contributory infringer act in concert. No United States court has ever held a person or corporation guilty of contributory criminal copyright infringement, despite the content industry's lobbying for this kind of punishment.[81] Moreover, even if there were some legal basis for contributory criminal copyright infringement, the government would probably have to prove two levels of *mens rea*—the direct infringer's and the contributor's—while, as discussed in the next section, the government failed to allege either level in the Rojadirecta case.

78. *Cf.* CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 546 (4th Cir. 2004) ("Because LoopNet, as an Internet service provider, is simply the owner and manager of a system used by others who are violating CoStar's copyrights and is not an actual duplicator itself, it is not *directly* liable for copyright infringement.").

79. Puerto 80 would likely not even be considered a contributory infringer in a civil action. *Cf.* Flava Works, Inc. v. Gunter, 689 F.3d 754, 757 (7th Cir. 2012) (describing myVidster—a linking website like Rojadirecta—as the "equivalent to stealing a copyrighted book from a bookstore and reading it. That is a bad thing to do (in either case) but it is not copyright infringement.").

80. 18 U.S.C. § 371 (2012) (general conspiracy statute); *see also* United States v. Dove, 585 F. Supp. 2d 865, 867 (W.D. Va. 2008) (outlining conviction under § 371 for conspiracy to commit criminal copyright infringement).

81. *See generally* Salil K. Mehra, *Keep America Exceptional! Against Adopting Japanese and European-Style Criminalization of Contributory Copyright Infringement*, 13 Vand. J. Ent. & Tech. L. 811 (2011).

iii. The Complaint Did Not Allege Who Was Responsible For Direct Criminal Copyright Infringement

Because the complaint did not allege who was responsible for reproducing and performing the copyrighted works,[82] the complaint was inadequate as a matter of law to show that *mens rea* was present to elevate the infringement from civil to criminal. In order to show that infringement occurred "willfully" in a criminal case, the government would have to prove beyond a reasonable doubt that "the act was committed by a defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law . . . ."[83] For civil forfeiture, therefore, the government must show by a preponderance of the evidence that the infringer was acting "willfully." Common logic dictates that it is impossible to assess what a person knew or did not know when the person has not even been identified. As such, the government could not have proved that the infringer acted willfully by reproducing copyrighted material and posting links to the copies on Rojadirecta. Clearly, then, by failing to identify the third-party infringer, the government failed to allege an essential element of its claim. Moreover, if the government hoped to have a factual basis to satisfy this allegation, it seems likely that intensive investigation of Puerto 80, and of those who posted the links to infringing content, would be required. If the government were attempting to use civil forfeiture as an easier, less burdensome way of shutting down Rojadirecta, this benefit would be entirely lost because of the expense of investigation.

iv. The Complaint Did Not Allege That Puerto 80 Failed to Comply With the Digital Millennium Copyright Act (DMCA)

Even assuming (without suggesting) that the government met its initial burden of showing that a third party willfully committed copyright infringement, and that Rojadirecta was substantially connected to this infringement, the pleadings in this case indicate that the government would not have been able to rebut Puerto 80's potential "innocent owner" defense in light of the DMCA.

Because no court has ever directly ruled on forfeiture of linking websites, there is no precedent on how the "innocent owner" provision

82. The Second Motion to Dismiss interpreted the Amended Complaint as alleging only that Puerto 80 directly infringed the distribution right by linking to infringing copyright, as facilitated by Rojadirecta. *See* Second Motion to Dismiss, *supra* note 68, at 1. However, this interpretation is not evident from the Amended Complaint, and this Comment posits that the Amended Complaint was still vague in its allegations.

83. United States v. Cross, 816 F.2d 297, 300 (7th Cir. 1987); *see also* DOJ Manual, *supra* note 11, at 26 (warning that a lower standard of *mens rea* could cause the "net" of criminal sanctions "[to] be cast too widely") (internal citation omitted).

of 18 U.S.C. § 939 should be read in conjunction with the safe harbor provisions of the DMCA, codified at 17 U.S.C. § 512. An "innocent owner" under Section 939(d) is one who either lacks knowledge of the illicit activities giving rise to the forfeiture or who has knowledge of the activity but has affirmatively attempted to stop it.[84] However, the provision has been construed to allow showings of "willful blindness" to defeat an "innocent owner" defense.[85] So, for example, a mother who found her son growing marijuana in the house and destroyed the plant she found, but who did not actively search for other plants and did not alert the police, could not claim an "innocent owner" defense because she was willfully blind to the ongoing criminal offense.[86]

The DMCA does not, however, attach liability for "willful blindness." To the contrary, for "information location tools" such as Rojadirecta's index of hyperlinks, only actual knowledge or knowledge of facts from which "infringing activity is apparent" will suffice to establish liability.[87] And, unlike the marijuana mom scenario, prior knowledge cannot lead to liability if the website owner expeditiously removed or disabled access to the infringing material.[88] Indeed, courts interpreting Section 512 have consistently held that mere knowledge of potential or prevalent infringement does not remove a website from the safe harbor—in essence, the only effective way to attach liability is to serve a notice that complies with the requirements in Section 512(c)(3).[89] This position is further bolstered by Section 512(m)'s explicit decree that service providers have no affirmative duty to monitor or seek out infringing material.[90]

The government's amended complaint did not allege that any specific takedown notices were issued. Rather, the complaint alleged that the sports leagues sent general notices "requesting that the Rojadirecta Website cease all unauthorized use of copyrighted content."[91] And, while the complaint alleged many "captures" of infringing material,[92]

84. *See* United States v. One 1988 Checolet 410 Turbo Prop Aircraft, Dominican Republic Registration Tail No. H1698CT, 282 F. Supp. 2d 1379, 1382 (S.D. Fla. 2003).

85. *See id.* (rejecting a pure actual knowledge test).

86. United States v. 16328 S. 43rd E. Ave., Bixby, Tulsa County, Okla., 275 F.3d 1281, 1285 (10th Cir. 2002) (applying 21 U.S.C. § 881, the analog of 18 U.S.C. § 2323 for drug offenses).

87. 17 U.S.C. § 512(d)(1)(A)–(B) (2012).

88. *Id.* at (d)(1)(C).

89. *See* UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1108–09 (C.D. Cal. 2009) (finding that "imputed" knowledge would make the DMCA's notice-and-takedown provisions "completely superfluous"). *But see* Viacom Intern., Inc. v. YouTube, Inc., 676 F.3d 19, 34–35 (2d Cir. 2012) (suggesting in dicta that "willful blindness" may apply in "appropriate circumstances," but not elaborating on what those circumstances might be).

90. 17 U.S.C. § 512(m).

91. Amended Complaint, *supra* note 67, at 15.

92. *Id.* at 13–14, 16–17.

the complaint never alleged that the copyright holders nor the government followed up on these captures with specific notices requesting the takedown of these specific videos. Instead, the government included the following vague policy statement, presumably to justify the failure to request specific takedowns:

> The problem of piracy of live sports broadcasting over the Internet is particularly pernicious in light of the fact that the value of the copyright holder's content is extremely perishable. There is significant value to consumers in being able to access that content while the event is still in progress. Unlike other video content offered online, including television programs and motion pictures, which often remain popular well after their debut, sports fans' interest in viewing live sporting events is greatest while the event is happening. In addition, some sporting events - such as wrestling and boxing - involve bouts that may end within a matter of a few minutes. Thus, even if a website is notified by a copyright holder of the infringement and takes the infringing content down within 15 minutes, the damage is already done because the pirated telecast has already been seen and all of the value of the live content has been extracted.[93]

Even if the government's policy concern is valid, it still runs contrary to the DMCA, and Puerto 80's failure to *prevent* users from linking to infringing videos does not mean that Puerto 80 was not an "innocent owner." As such, if Puerto 80 had raised such a defense, it is likely that the DMCA would be the governing standard and that Rojadirecta would be protected by the safe harbor of Section 512.

v. The Complaint Did Not Properly Plead United States Jurisdiction

The complaint did not even allege that the third-party websites were hosted by servers in the United States—if the servers were in a foreign country, they would be outside the territorial scope of the Copyright Act. The "place" where infringement occurs is wherever the server is located.[94] Therefore, if the infringing material is stored in Canada, for example, a live stream (meaning no copy is made) of the material on a computer in the United States is technically not infringing in the United States. In the Rojadirecta case, the complaint did not identify any of the third-party websites, did not identify where these websites' servers were located, and did not identify where these websites were registered. The complaint merely alleged that viewers live streamed in the United States

93. *Id.* at 4–5.

94. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1159–60 (9th Cir. 2007) (applying the "server test").

and that the domain names were registered in the United States.[95] This alone does not constitute infringement. No court has ever applied civil forfeiture to an allegedly criminal act that did not take place in the United States—this would be outside the scope of 18 U.S.C. § 2323. And, significantly, Rojadirecta had faced copyright suits in Spanish courts twice, and the Spanish courts held Puerto 80's conduct to be legal.[96] Therefore, the government's complaint was inadequate to show that Puerto 80, or anyone connected to Rojadirecta, violated United States copyright law. All in all, the government's complaint was severely lacking, and it seems likely that the civil forfeiture suit could not have been meritorious.

V. MISSTATEMENTS OF LAW IN THE CULTURAL PROPERTY CONTEXT

The government's overreaching application of copyright law is most certainly rooted in a good-faith desire to eliminate the scourge of widespread digital infringement, particularly in cases where infringement is occurring abroad. In a recent article, authors Andrew L. Adler and Stephen K. Urice noticed a similar problem in the cultural property context: "Cultural property policy in the United States has become increasingly lawless, for lack of a better term."[97] Adler and Urice have identified the government's tendency to "aggressively restrict the movement of cultural property into the United States" as part of a policy of preserving history in the property's home country.[98] The authors do not question the wisdom of this policy, but rather object to the disjunction between, on one hand, the executive branch's one-sided enforcement of the policy, and, on the other hand, the judiciary's and the legislature's careful balance in enacting and interpreting the relevant law so as to provide the fairest outcome in cultural property cases.[99] This Section will summarize this cultural property conundrum and compare it to the latest slew of civil forfeiture actions in the copyright infringement context.

Part I of the Adler/Urice article highlights two civil forfeiture actions, referred to as the French Automobile case and the Egyptian Sarcophagus case.[100] In these two actions, the prosecution failed, as a mat-

95. *See* Amended Complaint, *supra* note 67, at 8–9.

96. Second Motion to Dismiss, *supra* note 68, at 16.

97. Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117, 117 (2011).

98. *See id.* at 120.

99. *Id.*

100. *Id.* at 125 (citing United States v. 1 (One) French 1919 Vehicle, No. 08-01825 (W.D. Wash. Dec. 23, 2008), and United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus, No. 09-23030 (S.D. Fla. Oct. 8, 2009)).

ter of law, to allege and prove certain crucial elements of the National Stolen Property Act ("NSPA") violations upon which the forfeiture claim was predicated.[101] Nevertheless, because the claimants raised no opposition, both cultural objects were ultimately returned to their respective countries of origin.[102]

A. *Proper Interpretation of the NSPA*

The NSPA prohibits "the transporation, transmission, or transfer of any goods worth $5000 or more in interstate or foreign commerce, knowing the same to have been stolen."[103] Just like the criminal copyright infringement statute in the Rojadirecta case, the NSPA permits the government to bring an *in rem* civil forfeiture action upon probable cause that the property was connected to an NSPA violation.[104] Though NSPA violations are frequently domestic (violating the "interstate commerce" provision), certain legal issues arise when the government has applied the NSPA to cultural property.[105] The primary issue has been whether a foreign nation's declaration of ownership over undiscovered antiquities—in the form of a "patrimony law" or "vesting statute"—renders such goods "stolen" under the NSPA.[106] Only three appellate decisions, which will be discussed below, have addressed this issue.[107]

The first, *United States v. Hollinshead*, tacitly accepted the prosecution's theory that a Guatemalan artifact was "stolen" by virtue of the Guatemalan patrimony law.[108] There, the issue of whether the patrimony law rendered the artifact "stolen" was not preserved on appeal, so the Ninth Circuit Court of Appeals accepted the proposition as true, without actually deciding.[109] Second, in *United States v. McClain*, the issue of the NSPA's definition of "stolen" as it relates to a foreign patrimony law was, in fact, before the court.[110] Here, the Fifth Circuit Court of Appeals performed a thorough analysis and eventually held that a national declaration of ownership over cultural property, paired with a subsequent illegal exportation of that property, rendered the property "stolen" under the NSPA.[111] In so holding, the court emphasized the distinction between 1) a patrimony law that actually vests ownership, and 2) a law that restricts

101. *Id.*
102. *Id.*
103. 18 U.S.C. § 2314 (2012).
104. *See* Adler & Urice, *supra* note 97, at 126.
105. *See id.*
106. *Id.*
107. *Id.*
108. *See* 495 F.2d 1154 (9th Cir. 1974).
109. *See* Adler & Urice, *supra* note 97, at 127.
110. *See* 545 F.2d 988 (5th Cir. 1977).
111. *Id.* at 1000–01.

exportation of, but does not purport to claim title to, property.[112] The latter, the court held, was merely an exercise of "police power" and thus, when that law was violated, the property was not "stolen."[113] The court further justified this reading of the NSPA as being consistent with the rule that the United States does not enforce the export laws of another country, absent a treaty or statute providing otherwise.[114]

In the third case, *United States v. Schultz*, the Second Circuit Court of Appeals relied heavily on *McClain* but modified its holding slightly.[115] *Schultz* held that "the NSPA applies to property that is stolen from a foreign government, where that government *asserts actual ownership* of the property pursuant to a valid patrimony law."[116] For present purposes, the difference in holdings is less important than the *Schultz* and *McClain* courts' similar reliance on the distinction between ownership and export restrictions.[117]

B. *The French Automobile Case and the Egyptian Sarcophagus Case: The NSPA Gone Wrong*

In December 2008, federal prosecutors in the Western District of Washington sought to forfeit an antique French automobile by bringing an *in rem* civil forfeiture action pursuant to 19 U.S.C. § 1595a(c)(1)(A).[118] This statute provides for civil forfeiture of goods that were "stolen, smuggled, or clandestinely imported or introduced" in violation of the NSPA.[119] The prosecution based its forfeiture action on the theory that the automobile was "taken" from France "in violation of the French Heritage Code."[120] However, the English translation of the relevant French Heritage Code provision states: "The export out of France of items classified as Historical Monuments is forbidden, without

112. *Id.* at 996–97, 1002.

113. *Id.* at 1002.

114. *Id.* at 996.

115. *See* Adler & Urice, *supra* note 97, at 129 n.63 ("Although most of the literature assumes that Schultz adopted McClain wholesale, we believe that Schultz's reliance on Egypt's active, domestic enforcement of its patrimony law meaningfully distinguishes the case from McClain, where such enforcement was absent.") (citation omitted).

116. 333 F.3d 393, 416 (2d Cir. 2003) (emphasis added).

117. *See id.* at 410 ("We believe that, when necessary, our courts are capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property.").

118. Adler & Urice, *supra* note 97, at 130 n.66 (citing Verified Complaint for Forfeiture in Rem, United States v. 1 (One) French 1919 Vehicle, No. 08-01825 (W.D. Wash. Dec. 23, 2008)).

119. 19 U.S.C. § 1595a(c)(1)(A) (2012).

120. *See* Adler & Urice, *supra* note 97, at 131 (citing affidavit in prosecution's verified complaint).

detriment to the provisions regarding . . . temporary export . . . ."[121] Therefore, as Adler and Urice point out, the prosecution's forfeiture claim was based on a foreign statute that did not even purport to vest ownership in the country of origin.[122] Accepting the government's claim amounted to the enforcement of France's export laws, which is contrary to the central rationale in *McClain* and *Schultz*.[123] Indeed, the prosecution even referred to the French Heritage Code as an export restriction, seemingly unaware that this fact completely undermines the contention that the automobile was "stolen" under the NSPA.[124] Because France never declared itself the owner of the automobile, the government failed to allege any theft whatsoever, rendering its civil forfeiture claim unfounded.[125] Nevertheless, the opposition never asserted this point and, instead, agreed to return the automobile to France voluntarily.[126]

Similarly, federal prosecutors in the Southern District of Florida brought a civil forfeiture action against an Egyptian sarcophagus in October 2009.[127] The sarcophagus had been created between 1070 and 960 B.C., but its owner had no documentation of when it was exported from Egypt.[128] Again, the prosecution's theory for forfeiture was premised on *McClain* and *Schultz*, even though the complaint did not actually cite the NSPA.[129] The complaint recited a series of Egyptian antiquities laws, presumably to establish Egypt's ownership of the sarcophagus.[130] The Egyptian laws progressed over time from an 1835 prohibition on exportation, to an eventual declaration of national ownership.[131] In support of its claim for forfeiture, the government made the conclusory assertion that because Egypt had some sort of patrimony law since 1874, and because the sarcophagus was "removed from Egypt in violation of Egyptian law," then the sarcophagus was "stolen" and subject to forfeiture.[132] However, the government never alleged *when*

121. *See id.* at 131 n.74.

122. *See id.* at 131.

123. *Id.*

124. *See id.* at 131–32.

125. *Id.* at 132.

126. *See id.* at 125 n.40 (citing Government's Motion to Dismiss Civil Case, Attached Stipulation for Settlement of Civil Forfeiture Action at ¶¶ 6–10, United States v. 1 (One) French 1919 Vehicle, No. 08-01825 (W.D. Wash. Feb. 10 2009)).

127. *See id.* at 125 n.40 (citing Verified Complaint for Forfeiture in Rem, United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus, No. 09–23030 (S.D. Fla. Oct. 8, 2009)).

128. *See id.* at 132–33.

129. *See id.* at 133.

130. *See id.*

131. *See id.*

132. *See id.* at 134.

the sarcophagus was removed from Egypt.[133] Therefore, the court could have not possibly known which law to apply—if the sarcophagus had been removed prior to any valid patrimony law, the removal would have merely violated an export law, just as in the French automobile case.[134] If the claimant in the forfeiture action had raised this objection in a motion to dismiss, the court would have had to grant the motion because the complaint failed to allege this critical fact. But the claimant never filed a responsive pleading, and the sarcophagus was forfeited by a default judgment.[135]

The parallel between these cultural property forfeitures and the forfeitures pursuant to Operation: In Our Sites is clear. Prosecutors overreached by failing to adequately plead the factual elements of the law, but claimants did not fight for their rights. Courts did not independently find the pleadings insufficient. Consequently, property owners have lost what was rightfully theirs based on cases that lacked the necessary factual development, at best. Now that Rojadirecta has fought back, the government's underdeveloped theory has been exposed. Indeed, it seems possible that the government dropped the case purely to prevent an adjudication on the merits. Moreover, in both the cultural property and IP context, the investigation needed to fulfill a factually sufficient pleading that would make forfeiture impracticable. In short, the broad policy goals of preventing widespread infringement and of protecting cultural artifacts may be noble goals, but they cannot excuse conclusory pleadings with underdeveloped facts.

VI. Legislative Action Surrounding Domain Name Seizures for Infringement

Lawmakers have been considering expanding IP protection to serve the aforementioned policy goals. Following the passage of the Prioritizing Resources and Organization for Intellectual Property Act of 2008 ("Pro-IP Act"),[136] subsequent bills proposing more stringent IP regulations have been circulated throughout Congress. None of these bills have passed. This Section will discuss these recent legislative attempts: the Combating Online Infringement and Counterfeits Act of 2010 ("COICA"),[137] the Preventing Real Online Threats to Economic Creativ-

133. *Id.*

134. *See id.* at 134–135.

135. *Id.* at 125 n.40 (citing Default Judgment of Forfeiture, United States v. One Ancient Egyptian, Yellow Background, Wooden Sarcophagus, No. 09-23030 (S.D. Fla. Dec. 30, 2009)).

136. Pub. L. No. 110-403, 122 Stat. 4256 (codified in scattered sections of 15 U.S.C., 17 U.S.C., and 18 U.S.C. (2008)) [hereinafter Pro-IP Act].

137. S. 3804, 111th Cong. (2010) [hereinafter COICA].

ity and Theft of Intellectual Property Act of 2011 ("PIPA"),[138] and the Stop Online Piracy Act ("SOPA").[139] The failure of these bills to be passed into law further bolsters the conclusion that the current state of the law does not support the forfeiture of linking websites. To understand the relevance of these failed bills, however, the Pro-IP Act must first be explained.

A. *The Pro-IP Act*

The Pro-IP Act, passed in 2008, enhanced criminal penalties for all areas of IP, including copyright infringement.[140] Notably, the Pro-IP Act repealed 17 U.S.C. § 509, which outlined forfeiture procedures, in favor of the more detailed and stringent forfeiture structure of 18 U.S.C. § 2323.[141] However, Representatives Chris Cannon of Utah and Zoe Lofgren of California opposed this new structure and urged that the bill be revised.[142] Representative Cannon, for example, outlined the overreaching scope of the forfeiture scheme: "[I]f you have got a kid who downloads music improperly, your computer may be seized."[143] He continued to call the bill as drafted "an extraordinary assertion of Federal authority over what we do with our personal lives and our computers and our equipment."[144] Similarly, Representative Lofgren criticized the bill, as well as Congress's "unbridled zeal" for IP regulation in general, as an unbalanced shift to benefit corporate interests while criminalizing "innocent intermediaries."[145] Despite these prescient concerns, only eleven members of the House voted against the Pro-IP Act.[146] The bill was passed into law on October 13, 2008, with the forfeiture scheme as drafted now legally in place.[147]

The Pro-IP Act drew immediate criticism for effectuating Representatives Cannon and Lofgren's fears. For example, the broad prosecutorial authority given to the Department of Justice ("DOJ") under the Act was particularly worrisome.[148] The new civil forfeiture

138. S. 968, 112th Cong. (2011) [hereinafter PIPA].

139. H.R. 3261, 112th Cong. (2011) [hereinafter SOPA].

140. *See generally* Title II of the Pro-IP Act, *supra* note 136.

141. *See* Grace Pyun, *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, 377 (2009).

142. *See* 154 CONG. REC. H10229, H10237 (daily ed. Sept. 27, 2008) (statements of Rep. Cannon and Rep. Lofgren).

143. *Id.*

144. *Id.*

145. *Id.*

146. *See* "Background on Domain Name Seizures," *available at Lofgren Proposal*, *supra* note 1.

147. *See generally* Pro-IP Act, *supra* note 136.

148. *See, e.g.*, Pyun, *supra*, note 141, at 385–93.

provisions incentivize DOJ prosecutors to become more involved in civil matters, even using civil forfeiture as a sort of screening device to see which cases would lead to a meritorious criminal prosecution.[149] As initially conceived, the civil forfeiture structure would be a way for the IP rightholder to bring private suit to recover infringing property without needing government intervention.[150] In fact, Pro-IP Act drafter Senator Patrick Leahy intended to include a provision by which the Attorney General could initiate civil IP enforcement actions at his discretion, but this provision was stricken without legislative comment.[151] Nevertheless, the civil forfeiture regime has proved to effectuate this very plan by implementing prosecutorial involvement in what would otherwise be a private matter.[152] This blurred boundary between private and governmental IP enforcement demonstrates the government's willingness to protect the content industry's interests over the rights of the general public.[153]

B. *COICA*

In 2010, presumably encouraged by the passage of the Pro-IP Act, Senator Leahy introduced Senate Bill 3804—COICA—to "provide the Justice Department with an important tool to crack down on Web sites dedicated to online infringement."[154] A web site "dedicated to infringing activities" is first defined as one that is already forfeitable under 18 U.S.C. § 2323.[155] These sites would be subjected to domain name disabling.[156] However, COICA further broadens the scope of offending sites by providing that a website is also "dedicated to infringing activities" if it is:

> (i) [P]rimarily designed, has no demonstrable, commercially significant purpose or use other than, or is marketed by its operator, or by a person acting in concert with the operator—
>
> (I) to offer goods or services in violation of title 17 United States Code, or that enable or facilitate a violation of title 17, United

149. *Id.* at 386–87 (explaining that civil forfeiture could potentially obviate the need for criminal prosecution and its higher procedural burdens).

150. *See id.* at 386–89.

151. *See id.* at 387.

152. *See id.* at 387–88; *see also* DOJ Manual, *supra* note 11, at 370 ("Prosecutors may need to participate in these civil proceedings in order to preserve evidence relevant to an incipient or ongoing criminal case; to contest the issuance of an order; to preserve an ongoing investigation; or to inform the mark-holder of his ability to initiate a parallel civil case to seize, forfeit, and destroy equipment used to manufacture the counterfeit trademark goods.").

153. *See* Pyun, *supra* note 141, at 387–88.

154. 156 CONG. REC. S7207 (daily ed. Sept. 20, 2010) (statement by Sen. Leahy).

155. COICA, *supra* note 137, at § 2(a)(1)(A).

156. Ann Chaitovitz et al., *Responding to Online Piracy: Mapping the Legal and Policy Boundaries*, 20 COMMLAW CONSPECTUS 1, 18 (2011).

> States Code, including but not limited to offering or providing access in a manner not authorized by the copyright owner or otherwise by operation of law, copies or phonorecords of, or public performances or displays of works protected by title 17, in complete or substantially complete form, by any means, including by means of download, streaming, or other transmission, provision of a link or aggregated links to other sites or Internet resources for obtaining access to such copies, phonorecords, performances, displays, goods, or service . . . and
>
> (ii) . . . when taken together, such activities are the central activities of the Internet site or sites accessed through a specific domain name.[157]

Unlike the Pro-IP Act, the remedy against this second class of sites is injunctive relief, not forfeiture.[158] Nevertheless, the breadth of website regulation under COICA was astonishing.

This expanded definition of actionable websites was intended to be a "much-needed aggressive step" in fighting piracy, as technology had advanced just beyond the reach of current statutes.[159] For example, file-sharing websites have made infringing copies readily available, while making it difficult to identify who is responsible for the acts of piracy.[160] However, opponents of the bill cautioned that, while the bill would effectively decrease piracy, it would also be an impermissible censorship that would hinder innocent parties' ability to communicate, as well as a potential threat to technological innovation.[161]

In November 2010, the Senate Judiciary Committee unanimously voted to approve COICA,[162] but the bill was put on hold and eventually died at the close of the Congressional session.[163] Nevertheless, the substance of COICA was ripe for resurrection.

C. *PIPA and SOPA*

At the start of the 112th Congress, Senator Leahy introduced PIPA as a reincarnation of COICA.[164] PIPA attempted to address the concerns

157. COICA, *supra* note 137, at § 2(a)(1)(B); *see also id.* at § 2(c) (authorizing *in rem* actions against such sites).

158. *Id.* at § 2(g)(1).

159. Ashley S. Pawliz, *The Bill of Unintended Consequences: The Combating Online Infringement and Counterfeit Act*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 283, 302 (2011).

160. *Id.*

161. *Id.* at 304.

162. *See* Sam Gustin, *Web Censorship Bill Sails Through Senate Committee*, WIRED (Nov. 18, 2010, 2:50 PM), http://www.wired.com/epicenter/2010/11/coica-web-censorship-bill/.

163. *See* Jeffrey A. Lindenbaum & David Ewen, *Catch Me If You Can: An Analysis of New Enforcement Measures and Proposed Legislation to Combat the Sale of Counterfeit Products on the Internet*, 32 PACE L. REV. 567, 619 (2012).

164. *See id.*

of COICA opponents by taking a somewhat less rigid stance. For example, the definition of a site "dedicated to infringing activities" now included a site with "*no significant use* other than engaging in, enabling in, or facilitating [copyright infringement]"[165]—a narrower scope than COICA's "primarily designed" or "marketed . . . to offer" standard. Nevertheless, PIPA faced as much opposition as COICA did, and after a massive online protest against the bill, Senate Majority Leader Harry Reid delayed voting on PIPA indefinitely.[166]

SOPA was "the House of Representatives' version of PIPA."[167] Though PIPA was narrower in scope than COICA, SOPA is broader. First, SOPA continued to use the "primary purpose" test, rather than PIPA's "no other significant use" test, for targetable websites.[168] Suffering the same fate as PIPA, on January 20, 2012, the House Judiciary Committee announced that it would postpone consideration of the legislation until there was "wider agreement on a solution."[169]

PIPA's focus targeted only the most egregious of infringers.[170] Therefore, if the distribution or availability of infringing goods were incidental to the site's legal commercial purpose, the site would be beyond PIPA's scope.[171] Consequently, if PIPA had been passed, surely many website owners subject to suit would have claimed that their infringement was incidental and not the sole reason for the site's existence. Indeed, even though PIPA was never passed, Rojadirecta made this very assertion in its motions to dismiss.

Even if PIPA sought only to regulate the most extreme of infringers, its methods for doing so were extremely contentious. PIPA authorized the Attorney General to order third parties such as financial transaction providers (for example, PayPal) and "information location tools" (for example, Google) to cut off the alleged infringers.[172] SOPA also utilized these methods, essentially seeking to blackball any allegedly infringing site.[173] Notably, these two bills severely undermine the safe harbor provisions of the DMCA by targeting sites that may readily comply with DMCA takedown procedures.[174] Again, despite these bills

165. PIPA, *supra* note 138, at § 2(7)(A) (emphasis added).

166. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 21, 2012, at B6.

167. *See* Mike Belleville, *IP Wars: SOPA, PIPA, and the Fight Over Online Piracy*, 26 TEMP. INT'L & COMP. L.J. 303, 320 (2012).

168. SOPA, *supra* note 139, at § 103(a)(1)(B)(i).

169. Weisman, *supra* note 166.

170. *See* Chaitovitz et al., *supra* note 156, at 18.

171. *Id.*

172. *See* PIPA, *supra* note 138, at §§ 3(d)(2)(B), 3(d)(2)(D).

173. Belleville, *supra* note 167, at 320.

174. *Id.* at 321.

never being passed, Rojadirecta was in fact "cut off" by Google following a complaint from Major League Baseball.[175] Even though Google did eventually reinstate Rojadirecta within its search engine, the fact that Google blocked Rojadirecta in the first place shows that Google may not have been operating consistently with the DMCA, but rather may have attempted to comply with SOPA in anticipation of the bill passing.

D. *Failed Legislative Attempts as Reflective of the Current State of Infringement Enforcement Law*

COICA, PIPA, and SOPA were all struck down for heavily weighing the content industry's interests over the interests of the free-speaking public and the technological innovators. Nevertheless, government actions such as ICE's seizures suggest that bills like these are far from dead. Even staunch opponent of domain name seizure Zoe Lofgren has implied a sort of *de facto* enactment, seeking legislation that would regulate the due process rights that accompany domain name seizure.[176] While Lofgren may be right in seeking legislative procedural protection in the face of potentially unlawful seizures, this does little to mitigate the real source of the problem. Lofgren—perhaps through another Reddit initiative—should be more aggressive by, say, proposing an amendment to 18 U.S.C. § 2323 to clarify that sites like Rojadirecta are not forfeitable.

Still, the amended complaint in the Rojadirecta case suggests that the government believes that the provisions of COICA, PIPA, and SOPA are the current state of the law. For example, as it stands, domain name forfeiture for criminal copyright infringement requires no analysis of the "primary purpose" or the "substantial use" of the website. Rather, the current regime is a sort of strict liability analysis: if the elements of criminal copyright infringement can be shown by a preponderance of the evidence, and if the domain name facilitates criminal copyright infringement, then it does not matter what the domain name's purpose is. However, the government's complaint, pleading that "more than half" of Rojadirecta was "dedicated to making infringing content available"[177] seems to be predicated on this requirement in the failed COICA, PIPA, and SOPA bills. Additionally, the government's allegation that

175. *Google and MLB's Mistakes Result in the Removal of Rojadirecta.es From the Search Engine*, ROJADIRECTA (BLOG) (Apr. 22, 2011), http://blog.rojadirecta.me/.

176. *See Lofgren Proposal*, *supra* note 1 ("Although I am considering introducing a bill on domain name seizures for infringement, that does not mean I accept the practice as legal or [c]onstitutional. Nonetheless, since these seizure actions are occurring, I thought it worthwhile to explore a legislative means providing appropriate protections for free expression and due process.").

177. Amended Complaint, *supra* note 67, at 9–10.

Rojadirecta "purposefully aggregated and organized" the hyperlinks is irrelevant to current copyright law but would perhaps have some significance under the unpassed bills.

VII. CONCLUSION

Digital copyright infringement is indisputably one of the most widespread crimes in the United States, and the content industry is justified in seeking federal assistance to preserve IP rights. Still, ICE's use of civil forfeiture to target aggregating, but innocuous, websites (rather than going after each individual infringer) is legally unfounded.

As this Comment argues, the government's theory behind the Rojadirecta forfeiture attempt was convoluted and underdeveloped. Who was the alleged copyright infringer? Puerto 80? An unidentified third party? How could the government have possibly met the "willfulness" element as required for civil forfeiture when it had not even named whose "will" was to be examined? As it turns out, no matter who the government tried to blame, Rojadirecta would have still been beyond the bounds of the civil forfeiture regime. The interpretation of domain name forfeiture that the government advanced would have encompassed technological mainstays such as Google or Yahoo—a result surely not intended by Congress.

Looking to the future, owners of seized domain names should be more assertive and should at least challenge ICE's actions, if only in hopes of getting a clear judicial determination that these actions are unfounded. On the other hand, Operation: In Our Sites needs to be more narrowly focused to take down direct criminal infringers only. If the government seeks to forfeit sites like Rojadirecta, the solution is Congressional enactment of a bill like COICA, SOPA, or PIPA. Until that happens, any such seizure would have to be founded on a misapplication of law. And, like in the cultural property context, prosecutors must not let their quest to quelch piracy supersede the necessity of alleging and proving the basic elements of a crime.