

RIAA Tries To Downplay Its Role In The Feds' Unjustifiable Censorship Of Dajaz1

from the *that's-prompt?* dept

by **Mike Masnick** Tue, May 8th 2012 8:14am

Last week, we had the story about the unsealing [<http://www.techdirt.com/articles/20120502/16575418746/judge-lets-feds-censor-blog-over-year-so-riaa-could-take-its-sweet-time.shtml>] of the court records in the Dajaz1.com case [<http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml>]. That revealed that the main reason why the feds (almost certainly illegally) held onto the domain name for over a year was that ICE had asked the RIAA for the evidence it needed (i.e., that Dajaz1 actually infringed -- criminally -- on its members' copyrights), and the RIAA had taken its sweet time responding.

Ben Sisario, over at the NY Times, has an article noting the official RIAA statement [http://www.nytimes.com/2012/05/07/business/media/hip-hop-site-dajaz1s-copyright-case-ends-in-confusion.html?_r=2] on the matter. Both Ben and the RIAA itself were kind enough to send me the full RIAA statement:

"We referred this particular site to ICE for investigation because of its long history engaging in the unauthorized distribution of copyright content prior to its commercial release. ICE conducted its own independent investigation of the site and ICE along with the Justice Department concluded that there was a basis for seizing the domain name. Rights holders and the RIAA were requested to assist law enforcement and made every attempt to do so in a complete and prompt manner. As we stated previously, we were disappointed with the decision to not seek forfeiture but we respect that this is a judgment that properly lies with the government."

For what it's worth, I also asked the RIAA if it could provide me the date on which it actually responded to ICE's questions, and I was told, politely, that the RIAA had "nothing further to add for now."

Beyond that, however, the RIAA's statement is ridiculous. First, it admits that it was the one who told ICE to seize this domain -- as had been suspected all along, but now has been admitted. At the very least, this raises significant questions about the all-too-close

relationship between the federal government and the RIAA. The RIAA claims that "ICE conducted its own independent investigation," but that's clearly untrue. In both the original affidavit and the unsealed documents last week, ICE makes it clear that it relied heavily on the RIAA's statements. As we noted soon after the affidavit came out, ICE's "investigation" consisted of downloading four songs and asking Carlos Linares, the VP of Anti-Piracy Legal Affairs for the RIAA, if they were infringing. He said yes, and that was good enough for ICE to move forward with the seizure. Of course, as we pointed out, on one of the songs, Linares had no right to speak for the artist, since it wasn't even an RIAA artist. On the other songs, it appeared that the RIAA did not check with the labels' own promotions people who had sent the tracks.

That said, the really ridiculous claim here is that the RIAA helped in a "complete and prompt manner." If that were true, then 10 months after the domain was seized, ICE wouldn't be whining to a judge that it needed to censor the blog for another two months because the RIAA wasn't responding or providing the necessary evidence. It's hard to square the RIAA's statements with the government's.

Dajaz1's lawyer, Andrew P. Bridges, however, had a few things to add [<http://dajaz1.com/our-response-to-unsealed-court-documents-in-dajaz1-domain-seizure/>], and responded, in detail, about how ICE's original claim to being able to seize the domain in the first place was clearly against what the law allows:

The owner of Dajaz1.com appreciates the fact that the United States Government, on studying the matter further with all the information the RIAA could furnish, determined that there was in fact no probable cause to seek a forfeiture of the domain it had seized and held for a year.

That exoneration, however, did not remedy the harms caused by a full year of censorship and secret proceedings — a form of “digital Guantanamo” — that knocked out an important and popular blog devoted to hip hop music and has nearly killed it.

The original seizure was unjustified. The delay was unjustified. The secrecy in extensions of the forfeiture deadlines was unjustified.

Five details are notable here.

First, the seizure occurred pursuant to language the PRO-IP Act authorizing seizures of property used in connection with the making of, or trafficking in, “articles” in violation of copyright law. In that context, “articles” are physical items. The law does not authorize seizure of domains that link to other sites. So from the beginning this seizure was entirely legally unjustified, no matter what the allegations about infringement.

SEC. 2323. FORFEITURE, DESTRUCTION, AND RESTITUTION.

(a) CIVIL FORFEITURE.-

(1) PROPERTY SUBJECT TO FORFEITURE.-The following property is

subject to forfeiture to the United States Government:

(A) Any article, the making or trafficking of which is, prohibited under section 506 of title 17, or section 2318, 2319, 2319A, 2319B, or 2320, or chapter 90, of this title.

(B) Any property used, or intended to be used, in any manner or part to commit or facilitate the commission of an offense referred to in subparagraph (A).

(C) Any property constituting or derived from any proceeds obtained directly or indirectly as a result of the commission of an offense referred to in subparagraph (A).

Second, seizing a blog for linking to four songs, even allegedly infringing ones, is equivalent to seizing the printing press of the New York Times because the newspaper, in its concert calendar, refers readers to four concerts where the promoters of those concerts have failed to pay ASCAP for the performance licenses.

Third, RIAA's grand and sweeping attacks on dajaz1.com suggest that RIAA's powers of demonization far exceed its ability to substantiate its malicious statements with specific and credible facts.

Fourth, when I explained that the blog publisher had received music from the industry itself, a government attorney replied that authorization was an "affirmative defense" that need not be taken into account by the government in carrying out the seizure. That was stunning.

Fifth, when discussing the secret extensions with the U.S. Attorney's office in Los Angeles, I repeatedly asked the government attorney to inform the court that my client opposed any further extensions and asked for an opportunity to be heard. Not once did the government reveal those requests or positions to the court. The government should be embarrassed for keeping that information from the court.

*This entire episode shows that neither the government nor the recording industry deserves any additional powers with new so-called "antipiracy" legislation, especially in the context where copyright law has been expanded and new anti-piracy remedies have been crafted ***16 times*** since 1982. This episode shows that the copyright establishment and the government are very much the "rogues" that deserve to be reined in.*

That's a pretty meaty response, especially given the weak statement from the RIAA. All five of those points could be worthy of separate posts, delving into the details. For now, however, I'll just focus on two of the points. First, the fact that the government thinks that the use of authorized works is merely a *defense* to accusations of copyright infringement suggests a DOJ that is out of control with power, and completely out of touch with both the basics of the First Amendment and the Copyright clause, both of which would disagree with the government's statements here. There are already *civil* cases on the books, stating that claims need to take into account legitimate uses of the

work before filing suit. However, in this case, it's even worse, because we're talking about a *criminal* issue, where (1) the presumption of innocence is supposed to be in effect and (2) for criminal infringement the behavior *must* be willful. As such, the fact that the tracks were authorized is not a *defense*, it's a key part of the question of willfulness. The government *must* consider that information *prior* to shutting down a site.

The second point is Bridge's comment about the RIAA's "power of demonization" and failure to actually deliver. This is a really important point, because it demonstrates just how much ICE and parts of the DOJ appear to be captured by this private entity with a history of hysterical overreactions. If the feds were truly independent, none of this would have happened. Instead, the feds appear to have relied heavily on what quickly became clear were... well, let's just say "misguided" claims by the RIAA. We detailed how misguided the claims were just weeks after the seizure. From the evidence shown so far, it appears that rather than admit that it screwed up, ICE and the DOJ simply went running to the RIAA again, asking for more help in getting them out of the mess they had caused. And the RIAA couldn't deliver.

It's truly amazing that ICE and the RIAA still can't even admit how wrong they were here, let alone give an apology to Dajaz1.com. I guess that would be tantamount to admitting just how badly they violated the site's free expression and due process rights.