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Megaupload: A Lot Less Guilty Than You Think

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The recent Department of Justice decision to indict Megaupload for copyright infringement and related offenses raises some very thorny questions from a criminal law perspective. A few preliminaries: I'm responsible for the musings below, but I thank Robert Weisberg of Stanford Law School for taking the time to talk through the issues and giving me pointers to some relevant cases. Also, an indictment contains unproven allegations, and the facts may well turn out to be different, or to imply different things in full context.

DMCA SAFE HARBOR: BELIEVE IT AND IT WILL BECOME REAL: As a matter of criminal law, the discussion of whether Megaupload did what it needed to do to qualify for the DMCA Safe Harbor misses the point. Did they register an agent? Did they have a repeat infringer policy? These are all interesting CIVIL questions. But from a criminal law perspective, the important question is did Defendants BELIEVE they were covered by the Safe Harbor? This is because criminal infringement requires a showing of willfulness. The view of the majority of Federal Courts is that "willfulness" means a desire to violate a known legal duty, not merely the will to make copies.

In other words, for criminal liability, it doesn't really matter whether the service qualifies, so long as Defendants believed it qualified. If so, they were not intentionally violating a known legal duty, and so their conduct would not satisfy the willfulness element of the offense. For criminal liability after the DMCA safe harbor, as in horseshoes, close may be good enough.

SECONDARY COPYRIGHT LIABILITY AND CRIMINAL LAW:

The heart of this case is whether and when an enterprise can be held criminally liable for the conduct of its users. (For example, both copyright infringement claims (Counts 4 and 5) identify aiding and abetting as a basis for the charge.)

Aiding and abetting is something like the civil liability inducement theory the U.S. Supreme Court created in the 2005 Grokster case. Experts opine that the indictment makes out a pretty good inducement case against Megaupload. But the first question from a defense perspective has to be "Can the Grokster theory of CIVIL liability even be the basis for CRIMINAL copyright claims?" This has never been decided by any Court.

However, the pending Second Circuit case of Puerto 80 Projects v. USA ("Rojadirecta"), raises the issue squarely. There, the plaintiff is challenging the ICE seizure of its Rojadirecta domain names based on an allegation of criminal copyright infringement. For background on the case, and on the ICE domain seizures, check out Techdirt's coverage.

Rojadirecta's lawyers at Durie Tangri have challenged the U.S. Government's assertion that criminal liability arises from linking to infringing content. The lawyers argue that judge-made secondary infringement liability theories, including Grokster style inducement, cannot be the basis for a criminal copyright violation because the criminal copyright statute doesn't mention secondary liability. Congress considered and rejected statutes that would have created such liability, in COICA and PROTECT IP. In sum, due process doesn't allow incarceration under a civil legal theory that the Supreme Court dreamed up in 2005. The issues yet to be decided in Rojadirecta apply to the Megaupload case as well.

AGREEMENT + CIVIL VIOLATION = PRISON?: Count 2 is a conspiracy to commit copyright infringement claim, and references unknown parties as members of the conspiracy. Conspiracy entails an agreement to commit an offense and an overt act in furtherance of that agreement. The act in furtherance need not itself be illegal, but there must be an agreement to do an illegal act. The list of overt acts show that the object of the conspiracy was infringement by Mega users. If Defendants agreed with each other to induce others to infringe, and Rojadirecta's lawyers are correct that inducement is not a crime, there's a conspiracy only to violate a CIVIL law. If the idea is that Mega conspired with its users to infringe, those users may or may not have been criminally infringing copyright. They were located all over the world, and may or may not have acted willfully, i.e. intended to violate U.S. law. Again, the government would basically have alleged an agreement to violate a U.S. CIVIL law, including by many people who are not subject to U.S. rules.

Is it a federal crime to conspire to induce others to violate a U.S. civil law?

The answer to that is an obvious "no". The conspiracy statute itself makes clear that the object of the conspiracy must be an offense or fraud against the United States, in other words, a federal crime. 18 U.S.C. 371. It is true that Oliver North and John Poindexter were prosecuted for conspiracy to violate Boland Amendment, which prohibited Defense Department spending on the Nicaraguan Contras, but was not itself a crime. And there is a 1979 case (U.S. v. Ruffin, 613 F.2d 408 (2nd cir. 1979), where the defendant was convicted of conspiracy when he convinced an unwitting person to divert federal funds to the defendant's personal benefit. But both cases

constituted fraud involving U.S.taxpayer dollars, which is also a basis for conspiracy liability. Civil violations simply are not.

For these reasons, prosecuting this case against Mega, especially if Defendants get good criminal lawyers who also understand copyright law, is going to be an uphill battle for the government.

A few other points. Some direct infringement convictions look easy, but COUNT 4 IS WEIRDLY INCOMPLETE: I agree with the copyright law experts interviewed by Ars Technica that the most damning allegations in the indictment are the claims of direct infringement, particularly for the prerelease movies. Interestingly, the indictment identifies four films that the defendants supposedly distributed before release: The Green Hornet, Thor, Bad Teacher, Twilight–Breaking Dawn Part 1. But Count 4 only charges one such act of prerelease infringement, the movie Taken. What about the other films? Why were those not also charged?

Finally, this case is extremely interesting from a JURISDICTIONAL standpoint. One of the very first issue to be litigated will be extradition to the United States. Does the United States have jurisdiction over anyone who uses a hosting provider in the Eastern District of Virginia? What about over any company that uses PayPal? That's a very broad claim of power, and I expect it will be vigorously contested.