

MEGAUPLOAD AND CRIMINAL CHARGES

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ABSTRACT

The January 2012 arrest in New Zealand of Kim Dotcom following his indictment in an American federal court raises a number of questions about the ability of American law to reach across the internet and into other nations. Dotcom, a citizen of Germany and Finland and a permanent resident of New Zealand, was the founder of Megaupload, which ran websites that allowed users to share files such as movies and music, much of which was under American copyright. Although Dotcom and his fellow Megaupload executives had almost no personal connections to America, the United States government has alleged that Megaupload's use of servers in America to host data is sufficient to subject Dotcom and his colleagues to the jurisdiction of American criminal law through the doctrine of extraterritorial jurisdiction. This article examines the concept and use of extraterritorial jurisdiction, looks at the process of extradition of Dotcom and his co-defendants, and discusses the impact of the Megaupload prosecution on other Internet sites.

Key words: Megaupload, Kim Dotcom, Extradition, Extraterritorial jurisdiction.

SUMMARY.- 1. United States Jurisdiction over Megaupload; 1. 1. General Jurisdiction; 1. 2. Extra-territorial Jurisdiction. 2. Extradition; 2. 1. Availability of Extradition; 2. 2. Process for Extradition. 3. Effects on other Sites. 4. Conclusion.

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In 2005, Kim Dotcom¹ founded Megaupload Limited (“Megaupload”), best known for the high traffic websites megaupload.com and megavideo.com, as an online Hong Kong-based company operating a number of online services related to file storage, viewing, and sharing. Users could upload material to Megaupload’s sites, which then would create a link that could be distributed by the users. The sites, which included video, music, and pornography, did not provide search capabilities but rather relied on others to publish the links.² At one point, megaupload.com was estimated to be the 13th most frequently visited website on the Internet.³ Megaupload’s income derived from premium subscriptions and online advertising, which generated more than \$175 million annually.⁴ The FBI said Dotcom personally made \$40 million from Megaupload in 2010 alone.⁵

Megaupload’s domain names were seized and the sites shut down by the United States Department of Justice (“DOJ”) on January 19, 2012, following the indictment and arrests of Dotcom and six other executives.⁶ The DOJ alleged that Megaupload ran a massive online piracy scheme by facilitating and encouraging the copying and sharing of pirated material. The United States claimed that Megaupload fostered copyright infringement of movies “often before their theatrical release, music, television programs, electronic books, and business and entertainment software on a massive scale.”⁷ The DOJ estimated that the harm to copyright holders caused by Megaupload’s file sharing was “well in excess of \$500 million.”⁸ Government authorities called the indictments “one of the largest criminal copyright cases

¹ The colorful history of Kim Dotcom and details of his January 19, 2012 arrest in New Zealand, are widely reported, but beyond the scope of this article. *See, e.g.,* Mike Flacy, *Megaupload Owner Found Hiding in Safe Room with Sawed-off Shotgun*, Digital Trends, Jan. 21, 2012, available at <http://www.digitaltrends.com/web/megaupload-owner-found-hiding-in-safe-room-with-sawed-off-shotgun/>; *Dotcom Kingpin Nabbed in Dramatic Mansion Raid*, ABC News, Jan. 21, 2012, available at: <http://www.abc.net.au/news/2012-01-21/details-of-dotcom-kingpin27s-dramatic-arrest-revealed/3786170>; Sean Gallagher, *Mega-man: The Fast, Fabulous, Fraudulent Life of Megaupload's Kim Dotcom*, Ars Technica, Jan. 25, 2012, available at: <http://arstechnica.com/tech-policy/2012/01/mega-man-the-bizarre-rise-and-sudden-downfall-of-kim-dotcom/>

² Flacy, *supra*.

³ One internet brand protection company published a report citing megaupload.com and megavideo.com as, along with rapidshare.com, the top three websites classified as “digital piracy.” https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf

⁴ *United States v. Dotcom, et al.*, E.D. Va ,Criminal No. 1:12-CR-3, Superseding Indictment, Dkt. 34, ¶ 4.

⁵ ABC News, *supra*.

⁶ The indictment was handed down in the United States District Court for the Eastern District of Virginia. *United States v. Dotcom, et al.*, E.D. Va ,Criminal No. 1:12-CR-3.

⁷ David Kravets, *Feds Shutter Megaupload, Arrest Executives*, Wired, Jan. 19, 2012, available at: <http://www.wired.com/threatlevel/2012/01/megaupload-indicted-shuttered/>

⁸ *Id.*

ever brought,” and said that they were the result of a two year investigation in conjunction with authorities in New Zealand, Hong Kong, the Netherlands, Great Britain, Germany, Canada, Australia, and the Philippines.⁹

Megaupload’s indicted executives have ties to Hong Kong, various European countries, and New Zealand.¹⁰ None is a citizen or resident of the United States. The government contended that Megaupload had numerous servers in the United States, including 525 in Virginia, and that Megaupload employees were aware that these servers were hosting and distributing copyrighted material.¹¹ These servers, and payments from individuals in America, appear to be the primary connection Megaupload has with the United States.

On February 16, 2012, a Superseding Indictment against Megaupload, an associated company, Dotcom, and the six other executives was handed down in the United States District Court for the Eastern District of Virginia. This charging document accused the defendants of racketeering conspiracy in violation of 18 U.S.C. § 1962(d) – the Racketeer Influenced and Corrupt Organizations Act (“RICO”)¹² – conspiracy to commit copyright infringement in violation of 18 U.S.C. §371, conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), two counts of criminal copyright infringement in violation of 17 U.S.C. §506, and wire fraud and aiding and abetting wire fraud in violation of 18 U.S.C. §§2 and 134.

⁹ Ben Sisario, *7 Charged as F.B.I. Closes a Top File-Sharing Site*, N.Y. Times, Jan. 19, 2012, available at: <http://www.nytimes.com/2012/01/20/technology/indictment-charges-megaupload-site-with-piracy.html>

¹⁰ Those executives are citizens or residents of Germany, Slovakia, Hong Kong, Estonia, Turkey, the Netherlands and New Zealand.

¹¹ Nate Anderson, *Why the Feds Smashed Megaupload*, Ars Technica, Jan. 19, 2012, available at: <http://arstechnica.com/tech-policy/2012/01/why-the-feds-smashed-megaupload/> (“When making payments through its ‘uploader rewards’ program, employees sometimes looked through the material in those accounts first. ‘10+ Full popular DVD rips (split files), a few small porn movies, some software with keygenerators (warez),’ said one of these notes. . . . In a 2008 chat, one employee noted that ‘we have a funny business... modern days [sic] pirates :),’ to which the reply was, ‘we’re not pirates, we’re just providing shipping services [sic] to pirates :).’ Employees send each other e-mails saying things like, ‘can u pls get me some links to the series called ‘Seinfeld’ from MU [Megaupload],’ since some employees did have access to a private internal search engine. Employees even allegedly uploaded content themselves, such as a BBC Earth episode uploaded in 2008.”)

¹² RICO provides substantial criminal penalties for persons who engage in a “pattern of racketeering activity” or “collection of an unlawful debt” and who have a specified relationship to an “enterprise” that affects interstate or foreign commerce. Under the RICO statute, “racketeering activity” includes state offenses involving murder, robbery, extortion, and several other serious offenses, punishable by imprisonment for more than one year, and more than one hundred serious federal offenses including extortion, interstate theft, narcotics violations, mail fraud, securities fraud, currency reporting violations, certain immigration offenses, and terrorism related offenses. A “pattern” may be comprised of any combination of two or more of these state or federal crimes committed within a statutorily prescribed time period. Moreover, the predicate acts must be related and amount to, or pose a threat of, continued criminal activity. An “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in fact although not a legal entity. Section 1962(d) makes it a crime to conspire to commit any of the three substantive RICO offenses.

The questions of if, and when, the United States can reach across the globe to exercise jurisdiction over non-U.S. citizens who live outside the United States are far from clear. This article discusses the law surrounding such extraterritorial jurisdiction. As discussed below, changing technologies and an increasingly interconnected world are making traditional concepts such as general and extra-territorial jurisdiction increasingly difficult to apply (and perhaps increasingly irrelevant).¹³

1. UNITED STATES JURISDICTION OVER MEGAUPLOAD

It is common to discuss the reach of U.S. criminal laws as binary: if the underlying conduct occurred (at least in part) in the United States, jurisdiction is “general.” If not, certain offenses may permit the application of extra-territorial jurisdiction: *i.e.*, the enforcement of a nation’s criminal law to conduct that occurs outside of that nation’s territorial limits. However, the distinction between these bases of jurisdiction is not always clear, and is further complicated by a due process “nexus” analysis that U.S. courts may apply to the application of a criminal statute to a particular defendant. Moreover, in the area of technology, where information may be stored in, accessed from, or pass through various locations, the distinctions may be increasingly difficult to apply and perhaps increasingly less relevant.

The facts surrounding Megaupload and the defendants’ activities are complex, and the application of extraterritorial jurisdiction over copyright infringement offenses is not thoroughly addressed in U.S. case law. Because the argument for jurisdiction over this matter based on conduct allegedly occurring in the United States – general jurisdiction – is at least theoretically simpler than the argument in favor of extra-territorial jurisdiction, this article will first focus on general jurisdiction, then discuss the possibility of extra-territorial jurisdiction. However, as noted, and as the discussion below makes clear, the distinction between these jurisdictional bases is far from clear.

1.1. General Jurisdiction

¹³ This article also briefly looks at the process of extradition and the impact of the Megaupload case on other Internet sites.

In the context of the Megaupload matter, the government is likely to argue that each of the charges against the defendants is based on conduct occurring within the United States. Generally, where the conduct establishing the essential elements of an offense occurred in the United States, the issue of whether the offense applies extra-territorially is not presented.

For example, in *Pasquantino v. United States*, the U.S. Supreme Court affirmed defendants' convictions for a scheme to defraud the government of Canada of liquor importation tax revenues, in violation of 18 U.S.C. § 1343, the wire fraud statute.¹⁴ The Supreme Court rejected the defendants' argument that such application of the wire fraud was extra-territorial in nature, explaining:

[the defendants] used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States This *domestic element* of [defendants'] conduct is what the Government is punishing in this prosecution¹⁵

In sum, the Court held that even though some of the relevant conduct occurred outside the United States, the general jurisdiction of the criminal law over activity occurring in United States territory was sufficient to permit the defendants to be charged.

It is also well settled that the mail fraud statute, 18 U.S.C. § 1341, applies generally to use of the United States mails for mailings between the United States and a foreign country, and that the wire fraud statute, 18 U.S.C. § 1343, correspondingly applies to wire transmissions between the United States and a foreign country without implicating extra-territorial jurisdiction.¹⁶ Such applications are not generally considered to be extra-territorial in nature, because one end of the communication is within the territory of the United States.

Similarly, courts have repeatedly held in RICO cases that where the alleged predicate acts occurred in the United States, application of the RICO statute does not implicate extra-

¹⁴ 544 U.S. 349, 371-72, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005).

¹⁵ *Id.* at 371 (emphasis added).

¹⁶ See, e.g., *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003); *United States v. Kim*, 246 F.3d 186, 190 (2d Cir. 2001); *United States v. Gonzalez*, 748 F.2d 74, 78-79 (2d Cir. 1984); *United States v. Tinkel*, 331 F.2d 204, 205-06 (2d Cir. 1964); *Johnson Elec. N. Am., Inc.*, 98 F. Supp. 2d at 484-86; *Thai Airways Int'l Ltd.*, 842 F. Supp. at 1571; *United States v. Approximately \$25,829,681.80 in Funds*, 1999 WL 1080370 at * 3 (S.D.N.Y. Nov. 30, 1999); *C.A. Westel de Venezuela*, 1992 WL 209641 at **17-20.

territorial jurisdiction even though other relevant conduct occurred outside the United States.¹⁷

1.2. Extra-territorial Jurisdiction

The principle of “extra-territoriality” permits a sovereign nation to criminalize conduct that occurs outside the nation’s territorial limits. It is well established under U.S. law that “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”¹⁸ “There is no [general] constitutional bar to the extraterritorial application of penal laws,”¹⁹ although as discussed below there may be certain due process limitations to reaching particular defendants who have no or few ties to the United States.

1.2.1. Standard

As a general matter, determining whether a U.S. criminal law applies outside the territorial jurisdiction of the United States is a question of determining whether Congress intended it to so apply when it enacted the law. Determining whether Congress had such an intent “is a matter of statutory construction.”²⁰ Certain principles govern that question.

First, it is presumed “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”²¹ This presumption of domestic application only protects against “unintended clashes between our

¹⁷ See, e.g., *Black*, 469 F. Supp. 2d at 545; *Marzook*, 426 F. Supp. 2d at 826; *Johnson Elec. N. Am.*, 98 F. Supp. 2d at 485; *Thai Airways Int’l Ltd.*, 842 F. Supp. at 1571; *Kensington Int’l Ltd. v. Societe Nationale Despetroles do Congo*, 2006 WL 846351 at *12-13 (S.D.N.Y. March 31, 2006); *United States v. Approximately \$25,829,681.80 in Funds*, 1999 WL 1080370 at ** 3-4 (S.D.N.Y. Nov. 30, 1999); *C.A. Westel de Venezuela*, 1992 WL 209641 at * 17-20.

¹⁸ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

¹⁹ *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984); accord *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991).

²⁰ *Arabian Am. Oil Co.*, 499 U.S. at 248.

²¹ *Id.* at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)); *Smith v. United States*, 507 U.S. 194, 204-05 (1993).

laws and those of other nations which could result in international discord,” and rests on the notion that when Congress legislates, it “is primarily concerned with domestic conditions.”²²

Second, U.S. courts will ask if this general presumption against the extra-territorial application of U.S. criminal laws is overcome as to a particular statute. The presumption can be overcome in one of two ways: either by an express statement of extra-territorial application²³ or because the courts find that, even in the absence of such an express statement, Congress intended for the law to apply outside of the United States.²⁴

Express statements of extra-territorial jurisdiction are, of course, easy to identify. In determining whether Congress implicitly extended a statute to apply outside the United States, however, the courts are forced to enter the ever murky area of determining unexpressed legislative intent. The U.S. Supreme Court gave some guidance almost 100 years ago in *United States v. Bowman*,²⁵ where it held that the presumption against extra-territorial effect of legislation does not apply to criminal statutes which “are, as a class, not logically dependent on their locality for the Government’s jurisdiction, but are enacted because of the right of the Government to defend-itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.”²⁶ The Supreme Court recognized that, in certain cases, “to limit [a given statute’s] locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.”²⁷ Further, the Supreme Court has observed, when the “probable place” for the commission of an offense lies outside the United States this indicates that Congress intended to apply that offense extraterritorially.

While *Bowman* specifically dealt with fraud against the United States, courts of appeals have found extra-territorial application for a host of criminal laws where the charged conduct occurred outside the United States and the statutes did not specify extra-territorial

²² *Arabian Am. Oil Co.*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir. 2006).

²³ *Arabian*, 499 U.S. at 248.

²⁴ See, e.g., *United States v. Bowman*, 260 U.S. 94, 97-98 (1922) (“The necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.”).

²⁵ 260 U.S. 94, 98, 43 S. Ct. 39, 67 L. Ed. 149 (1922)

²⁶ *United States v. Ayes*, 762 F. Supp. 2d 832, 838 (E.D. Va. 2011) (citing *Bowman*, 260 U.S. at 98.)

²⁷ *Bowman*, 260 U.S. at 98.

effect.²⁸ As a lower U.S. federal court recently explained: “Where the power of the Congress is clear, and the language of exercise is broad, there is no duty to construe a criminal statute narrowly on the issue of extraterritoriality.”²⁹

1.2.2. Application

²⁸ For a survey of cases applying *Bowman* to non-fraud criminal cases, see Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australian Bank*, 67 N.Y.U. Ann. Surv. Am. L. 137 (2011). Such cases include:

Julio Leija-Sanchez, the kingpin of a document-forgery ring in Illinois, arranged for the murder of his rival in Mexico by Mexican assassins. *United States v. Leija-Sanchez*, 602 F.3d 797 (7th Cir. 2010) (violent crimes in aid of racketeering activity, 18 U.S.C. § 1959). Floridian Kent Frank paid minor girls in Cambodia to engage in sexual conduct and took their photographs. *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010) (obtaining custody of a minor with the intent to produce child pornography, 18 U.S.C. § 2251A(b)(2)(A)). Pablo Aguilar impersonated an INS agent in Mexico, reconnoitered a prospective visa-applicant, and accepted cash and jewelry in exchange for the promise of visas for her children, a job for her son, and INS confiscated property. *United States v. Aguilar*, 756 F.2d 1418 (9th Cir. 1985) (inducing aliens to enter the United States, 18 U.S.C. § 1324(a)(4)). Three men conspired to transport 140 aliens into the United States from Central America, getting only as far north as the outskirts of Monterrey, Mexico, before being apprehended by Mexican authorities. *United States v. Villanueva*, 408 F.3d 193 (5th Cir. 2005) (conspiracy to bring undocumented aliens into the United States, 8 U.S.C. § 1324(a)(2)(B)(ii)).

Members of the Guadalajara Narcotics Cartel tortured and killed an American novelist and his friend in Mexico, mistaking them for American DEA agents. *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994) (violent crimes in aid of racketeering activity, 18 U.S.C. § 1959). A group of Japanese companies conspired in Japan to fix the price of facsimile paper in North America. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997) (price-fixing, 15 U.S.C. §§ 1 *et seq.*).

Each of these descriptions corresponds to the allegations of the U.S. government in criminal prosecutions in U.S. courts for violations of U.S. laws. In each case, the defendants were charged based on conduct that occurred outside the territorial borders of the United States, even though none of the statutes at issue specify that they apply extraterritorially. And in each case, attorneys for the United States convinced a court of appeals that the ambiguous statute should be read to apply to extraterritorial conduct based on a broad reading of the Supreme Court’s 1922 decision in *United States v. Bowman*.

Clopton, 1-2.

²⁹ *United States v. Hasan*, 747 F. Supp. 2d 642, 683 (E.D. Va. 2010) (citing *United States v. Erdos*, 474 F.2d 157, 159 (4th Cir. 1973) (internal quotation marks omitted)).

Determining whether a law is given extra-territorial effect, then, demands looking at each statute individually to determine whether a charged violation of that statute may be brought based on foreign conduct. Although the theoretical distinction between general and extra-territorial jurisdiction is clear, in practice the application is far from clear. And the theoretical distinction is particularly difficult to apply in the area of technology and communications, where contacts with a given jurisdiction may be complex, unpredictable and at times not even known to the participants.

In the Megaupload case, for example, 18 U.S.C. § 1956, the U.S. money laundering, clearly applies extraterritorially.³⁰ Similarly, 18 U.S.C. § 1343, the U.S. wire fraud, is often said to apply extraterritorially,³¹ but frequently what that means is applying it to communications with one end in the United States—an application that would seem to be general, not extra-territorial. And an application that is increasingly complex given how communications are routed these days and how information is stored and accessed. 18 U.S.C. § 371, conspiracy, can apply extra-territorially where the underlying offense reaches extra-territorial activity,³² but that can simply transfer the same ambiguity about whether an application is truly extra-territorial from the underlying statute to the conspiracy statute.

With respect to 17 U.S.C. § 506, copyright infringement, it is a more difficult question whether it extends extra-territorially, and what that means. For example, in 2007, the United States Attorney's Office for the Eastern District of Virginia secured a guilty plea from Hew Griffiths ("Griffiths") for criminal copyright infringement and conspiracy to commit criminal copyright infringement.³³ Griffiths was a British national who resided in Australia and had

³⁰ "There is extraterritorial jurisdiction over the conduct prohibited by this section if . . . the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$ 10,000." 18 U.S.C. § 1956(f). Here, the government has alleged series of transactions valued at upwards of \$66 million. Superseding Indictment ¶ 84. Thus, these alleged offenses fall within the extraterritorial purview of § 1956(f).

³¹ *Pasquantino*, 544 U.S. at 371-72 (observing that even if defendants' conduct in violation of the wire fraud statute, 18 U.S.C. § 1343, could be deemed to have occurred outside the United States, the statute's prohibition of frauds executed "in interstate or foreign commerce" indicates that "this is surely not a statute in which Congress had only domestic concerns in mind" (internal quotation marks omitted)). See also *United States v. Kim*, 246 F.3d 186, 190 (2d Cir. 2001) ("Here, the language of § 1343 explicitly addresses its application to foreign communications.").

³² The statutory bases for charging conspiracy may be applied extraterritorially where the underlying substantive statutes reach extraterritorial offenses. See *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984). See also *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990) ("[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction.") (internal quotation marks and citation omitted).

³³ Department of Justice ("DOJ") Press Release, *Extradited Software Piracy Ringleader Pleads Guilty*, Apr. 20, 2007, available at: <http://web.archive.org/web/20080215202016/http://www.justice.gov/criminal/cybercrime/griffithsPlea2.pdf>

never been to America.³⁴ He was alleged, however, to have been a ringleader of an international software pirating ring with servers worldwide, including in the United States.³⁵ Thus, while some would view this as an extra-territorial application, others would say that the presence of U.S. servers makes this an application (if a somewhat novel one) of territorially-based general jurisdiction.

In another case, Richard O'Dwyer ("O'Dwyer"), a citizen and resident of Britain, is likely to be extradited to the United States from Great Britain to stand trial for criminal copyright infringement and conspiracy to commit criminal copyright infringement.³⁶ O'Dwyer is alleged to be the owner and operator of a website which hosted links to pirated films and television programs.³⁷ Notably, O'Dwyer claims that the servers that he used were not located in the United States,³⁸ which perhaps makes this a more likely case to be considered extra-territorial application. But his website was certainly accessible from, and accessed by people in, the United States, further muddying the question of whether the law is being applied extra-territorially.³⁹

Finally, it is unclear at present whether 18 U.S.C. § 1962, RICO, applies extra-territorially. "The RICO statute is silent as to any extraterritorial application."⁴⁰ It seems likely, though, that RICO would apply extra-territorially in situations in which the predicate racketeering offenses apply extra-territorially, although, as with conspiracy, this may simply be transferring the ambiguity about whether the underlying statutes apply extra-territorially to the RICO statute. In *Pasquantino*, the Court observed that because the wire fraud statute, 18 U.S.C. § 1343, "punishes frauds executed 'in interstate or foreign commerce,'" it "is surely not a statute in which Congress had only 'domestic concerns in mind.'" 544 U.S. at 371-72 (citations omitted). RICO, like the wire fraud statute, proscribes specified conduct by "any person employed by or associated with any enterprise engaged in, or the activities of which

³⁴ Richard Ackland, *Another One Sacrificed in the Name of Alliance*, Sydney Morning Herald, Feb. 16, 2007, available at: <http://www.smh.com.au/news/opinion/another-one-sacrificed-in-the-name-of-alliance/2007/02/15/1171405371677.html>

³⁵ DOJ Press Release, *supra*.

³⁶ *Richard O'Dwyer Case: TVShack Creator's US Extradition Approved*, BBC News, Mar. 13, 2012, available at: <http://www.bbc.co.uk/news/uk-england-south-yorkshire-17355203>

³⁷ *Id.*

³⁸ Peter Walker, *Student Who Ran File Sharing Site TVShack Could Face Extradition to US*, Guardian, June 17, 2011, available at: <http://www.guardian.co.uk/law/2011/jun/17/student-file-sharing-tvshack-extradition>

³⁹ Although O'Dwyer's case has not been addressed on the merits, a British magistrate judge has approved O'Dwyer's extradition to the United States. *United States v. O'Dwyer*, [2012] Westminster Mag. Ct., (Eng), available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/us-v-odwyer-ruling.pdf>

⁴⁰ *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

affect, interstate or *foreign* commerce.” 18 U.S.C. § 1962(c) (emphasis added). This requirement suggests that Congress did not design RICO with only domestic concerns in mind.

As noted above, the Supreme Court has observed, when the “probable place” for the commission of an offense lies outside the United States this indicates that Congress intended to apply that offense extraterritorially.⁴¹ Because RICO’s definition of “racketeering activity,” 18 U.S.C. § 1961(1), includes many predicate offenses that typically are committed outside the United States, it is possible that RICO may apply extraterritorially. In support of this contention, courts have found at least fifty-six RICO predicate offenses as applying extraterritorially.⁴² The preponderance of RICO predicate criminal offenses which apply extraterritorially indicate that RICO can, if not need, be applied extraterritorially itself when the “probable place” for the commission of those predicate offenses is outside the United States.

In such a context, the court in *United States v. Noriega*, held that RICO applied extraterritorially to Panamanian strongman Manuel Noriega’s drug trafficking offenses that occurred almost entirely in Panama, because that conduct was alleged to have resulted in direct effects within the United States.⁴³ The *Noriega* court held that “[a]s long as the racketeering activities produce effects or are intended to produce effects in this country, RICO applies.”⁴⁴ Again, however, producing effects within the United States would be viewed by many as general, not extra-territorial jurisdiction.⁴⁵

⁴¹ See *Bowman*, 260 U.S. at 99; accord *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004); *United States v. Plummer*, 221 F.3d 1298, 1305 (11th Cir. 2000).

⁴² [Criminal RICO: 18 U.S.C. §§ 1961-1968 A Manual for Federal Prosecutors].

⁴³ 746 F. Supp. 1506, 1512-19 (S.D. Fla. 1990).

⁴⁴ *Noriega*, 746 F. Supp. at 1517. The *Noriega* court reached this conclusion, in part, on the Congressional intent behind RICO. The court observed that Congress stated it intended RICO to provide:

new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place **on all available fronts**.

Noriega, 746 F. Supp. at 1517, quoting RICO’s Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., S. Rep. No. 91-617, p. 76 (emphasis in original).

In sum, although the case law is unclear, it seems likely that criminal RICO offenses will have extra-territorial application provided that the relevant predicate offenses have extra-territorial reach. The Superseding Indictment in this case lists the relevant predicate offenses as criminal copyright infringement, money laundering, and wire fraud. As discussed above, money laundering and wire fraud certainly have what at least some would view as extra-territorial application, and criminal copyright infringement has recently been applied in a manner at least some would view as extra-territorial.

1.2.3. A due process limitation?

Further complicating the general/extra-territorial jurisdiction analysis, at least some U.S. federal circuit courts of appeals (the intermediate level U.S. federal courts) state that while there may be no general limit of Congress' ability to apply a statute extra-territorially, constitutional due process requirements mean that a nexus must exist between the defendant's conduct and the United States before a defendant can be criminally charged here. The United States Courts of Appeals for the Second, Fourth, and Ninth Circuits have held that, "while Congress may clearly express its intent to reach extraterritorial conduct, a due process

It is important to note, though, that the extraterritorial application of RICO in the criminal context may be different from its extraterritorial applicability in the civil context. In *Morrison v. National Australia Bank Ltd.*, the Supreme Court limited the extraterritorial effect of Section 10(b) of the Securities and Exchange Act of 1934, and reiterated that "when a statute gives no clear indication of an extraterritorial application, it has none." 130 S. Ct. 2869, 177 L. Ed. 2d 535 (June 24, 2010). The Court looked to the "focus" of a statute, which is not necessarily the "bad act" prohibited by the statute, but rather "the object [] of the statute's solicitude." The impact of *Morrison* has not just been felt in the context of securities fraud cases, but in civil RICO actions as well. See *In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595 (VM) (S.D.N.Y. Sept. 13, 2010) (dismissing claims even though the stock transactions at issue here were "initiated in the United States"); *Cedeno, et al. v. Intech Group, Inc.*, 09 Civ. 9716 (S.D.N.Y. Aug. 25, 2010) (RICO does not "evidence any concern with foreign enterprises," and thus does not apply extraterritorially to claims by a foreign plaintiff against a RICO enterprise comprised of the "[t]he foreign exchange regime of the government of Venezuela."). As a result of *Morrison*, it appears that civil RICO actions may not have extraterritorial application. In *United States v. Philip Morris USA, Inc.*, the court dismissed the government's civil RICO claims against a British tobacco firm based on the holding in *Morrison*. 99-cv-02496 (D.D.C. Mar. 28, 2011). *C.f. Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (holding that though Congress did not intend civil RICO to apply extraterritorially, "we have no occasion to address -- and express no opinion on -- the extraterritorial application of RICO when enforced by the government pursuant to Sections 1962, 1963 or 1964(a) and (b)").

⁴⁵ As an obvious example, if someone standing in Country A near the border of Country B shoots and kills a person standing a few feet away in Country B, most people would not consider application of Country B's murder statute to be extra-territorial in nature.

analysis must be undertaken to ensure the reach of Congress does not exceed its constitutional grasp.”⁴⁶

According to these courts, to apply a federal criminal statute to a defendant extraterritorially without violating due process, “there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.”⁴⁷ Regarding the nexus requirement, the Ninth Circuit has also noted:

The nexus requirement serves the same purpose as the minimum contacts test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country.⁴⁸

Under this test, courts will “look for real effects or consequences accruing in the United States.”⁴⁹

The interplay between extra-territorial jurisdiction and this nexus test is far from clear. An analytical distinction could be that where the criminal conduct itself occurs in the United States jurisdiction is general rather than extra-territorial, but for purposes of due process, certain non-criminal contacts may be sufficient. But even this is not entirely clear. For example, the Fourth Circuit has also noted that “[m]inimal contact with the United States should not automatically render conduct domestic.”⁵⁰ Thus, it appears that while the nexus requirement does not require that criminal acts – or even any of the elements of a criminal act – be perpetrated in the United States, it *does* require that the results of the defendant’s conduct

⁴⁶ *United States v. Mohammad-Omar*, 323 Fed. Appx. 259, 261 (4th Cir. 2009) (unpublished per curiam opinion) (applying the nexus requirement to find no due process violation in extraterritorial application of United States drug laws), *cert. denied*, 130 S. Ct. 282, 175 L. Ed. 2d 188 (2009). *See also United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990); *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 727-29 (E.D. Va. 2003) (applying the due process nexus requirement, and finding no violation, where the defendant, while in Iran, violated Virginia court orders by removing his daughter from her mother’s custody). The approach requiring a nexus with the United States is not taken by all circuits, though. *See United States v. Suerte*, 291 F.3d 366, 377 (5th Cir. 2002) (rejecting the nexus requirement as part of the due process protection against “arbitrary or fundamentally unfair” prosecution in cases arising under the Maritime Drug Law Enforcement Act); *accord United States v. Perez Oviedo*, 281 F.3d 400, 403, 44 V.I. 353 (3d Cir. 2002); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1054-57, 28 V.I. 365 (3d Cir. 1993). The Megaupload prosecution was brought in Virginia, though, a state within the Fourth Circuit, making the nexus requirement applicable here.

⁴⁷ *Yousef*, 327 F.3d at 111 (quoting *Davis*, 905 F.2d at 248-49).

⁴⁸ *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (internal quotation marks and citation omitted).

⁴⁹ *United States v. Campbell*, 798 F. Supp. 2d 293, 306 (D.D.C. 2011).

⁵⁰ *In re French*, 440 F.3d 145, 149 (4th Cir. 2006).

be felt in the United States. But even this is unclear in situations where a defendant may not know (or even be able to know) whether a given act will “touch” the United States by being routed electronically through the United States.

In this case, the government alleges that Megaupload’s servers were located in Dulles, Virginia, and Ashburn, Virginia, both of which are located in the Eastern District of Virginia.⁵¹ The government also alleges that Megaupload used servers located in Harrisonburg, Virginia, Phoenix, Arizona, Los Angeles, California, and Washington, D.C., and that all of these servers were used to reproduce and distribute copyrighted material.⁵² Additionally, the government contends that Megaupload used PayPal, Inc. (“PayPal”), a payment and money transfer company headquartered in the United States, to receive money from the United States, and the Eastern District of Virginia in particular.⁵³

In this case, it is likely that the extensive use of servers in the United States is sufficient to satisfy the nexus requirement—indeed, it might be sufficient to consider application of the statutes to be general rather than extra-territorial. Alternately, if the physical location of the distribution of material on Megaupload’s servers is insufficient, it seems likely that Megaupload’s actions outside the United States were intended to produce effects here, as exemplified by the collection of payments from American subscribers and advertising fees for American viewers. Thus, Megaupload likely has the sufficient nexus with the United States to satisfy the due process requirements of exercising extraterritorial jurisdiction and, as noted, may be considered within the general rather than extra-territorial jurisdiction of those statutes.⁵⁴

2. EXTRADITION

2.1. Availability of Extradition

⁵¹ Superseding Indictment ¶ 39.

⁵² *Id.* ¶¶ 39, 40, 55.

⁵³ *Id.* ¶ 42.

⁵⁴ *See Yousef*, 327 F.3d at 112 (finding no due process violation because “it cannot be argued seriously that the defendants’ conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair”).

Extradition from New Zealand to the United States is governed by the Treaty on Extradition between the United States and New Zealand, which entered into force in 1970. Under that treaty, each nation “agrees to extradite to the other . . . persons found in its territory who have been charged with or convicted of any of the offenses [listed in the treaty] committed within the territory of the other.”⁵⁵

The treaty also states that “[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for any offense other than an extraditable offense disclosed by the facts on which his surrender was granted. . . .”⁵⁶ This provision requires the United States to demonstrate that each of the charged offenses is an extraditable offense under the treaty. Such offenses, though, are to “to be interpreted liberally so as not to hinder the working and narrow the operation of international extradition arrangements.”⁵⁷

The offenses enumerated in the treaty include certain fraud and property offenses.⁵⁸ The treaty permits extradition for the offense of “[o]btaining property, money or valuable securities by false pretenses or by conspiracy to defraud the public or any person by deceit or falsehood or other fraudulent means. . . .”⁵⁹ This treaty provision roughly tracks the language of 18 U.S.C. § 1343, which prohibits using the wires for the purpose of “obtaining money or property by means of false or fraudulent pretenses.”⁶⁰ As such, the treaty permits extradition for an offense which requires fewer elements than wire fraud, and should also permit extradition for wire fraud.

The treaty also permits extradition for the offense of “[r]eceiving and transporting any money, valuable securities or other property knowing the same to have been unlawfully obtained.”⁶¹ This treaty provision is related to the money laundering statute, 18 U.S.C. § 1956, which prohibits a person, knowing that property involved in a transaction was unlawfully obtained, from conducting any transaction with the intent of carrying on unlawful activity.

⁵⁵ 22 U.S.T. 1, Art. I.

⁵⁶ *Id.* Art. XIII.

⁵⁷ *Edwards v. United States of America*, [2002] 3 NZLR 222. See also A Review of the United Kingdom’s Extradition Arrangements, Sept 30, 2011, available at: <http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review?view=Binary>

⁵⁸ 22 U.S.T. 1, Art II.

⁵⁹ *Id.*, Art. II, 16.

⁶⁰ 18 U.S.C. § 1343.

⁶¹ 22 U.S.T. 1, Art. II, 19.

The treaty also permits extradition for “attempts to commit, conspiring to commit, or participation in, or inciting, counseling, or attempting to procure any person to commit, or being an accessory after the fact to, any of the offenses mentioned in this Article.”⁶²

There appear to be no cases yet determining if criminal copyright infringement is an extraditable offense, but there does not appear to be language closely tracking 17 U.S.C. § 506 in Article II of the treaty. On the other hand, a New Zealand court may look to Section 101B of New Zealand’s Extradition Act. Under that provision, any offence which is punishable by imprisonment of more than four years is deemed to be extraditable, and under the New Zealand Copyright Act the distribution of an infringing work is punishable by up to five years in prison.⁶³ If a New Zealand court chooses to look to the Extradition Act, then, the copyright infringement charges against Dotcom and his codefendants may be extraditable.

The status of RICO as an extraditable offense under the treaty is unclear. In 2002, the New Zealand Court of Appeals ruled that RICO offenses were too broad to be generally included in the list of extraditable offenses listed in Article II of the treaty, endorsing “a restrictive and cautious approach to umbrella crimes such as racketeering.”⁶⁴ Thus, a New Zealand court is likely to look to the predicate acts, of the RICO violation as charged. In this case, wire fraud and money laundering are likely to be considered extraditable offenses, given the *Edwards* standard of liberal interpretation. The question of whether criminal copyright enforcement is an extraditable offense is an open one.

⁶² *Id.*, Art. II.

⁶³ That section provides, in pertinent part:

For the purposes of this Act . . . the following offences are deemed to be offences described in any extradition treaty . . .

(c) any offence against any enactment if—

- (i) it is punishable by imprisonment for a term of 4 years or more; and
- (ii) the offence for which extradition is requested is alleged to involve an organised criminal group (as defined in article 2(a) of the [United Nations Convention against Transnational Organised Crime (“TOC”)]); and
- (iii) the person whose extradition is sought is, or is suspected of being, in or on his or her way to the requested country.

Extradition Act, Public Act 1999 No 55.

Relying on this argument would force the United States to demonstrate that Dotcom and his codefendants are members of an “organized criminal group” under the TOC, which consists of a structured group of three or more persons acting in concert with the aim of committing serious crime. Although this adds another burden for the United States, it would not likely be an onerous one.

⁶⁴ *United States v. Cullinane*, CA417/01, 18December 2002, New Zealand Court of Appeals Report for 2002, 83-84, available at <http://www.courtsofnz.govt.nz/from/judicial-reports/documents/CourtofAppealReport2002.PDF>

2.2. Process for Extradition

In order to secure extradition, the requesting government must bring, with 45 days, a petition in support of the treaty requirement that “[e]xtradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found . . . to justify his committal for trial if the offense of which he is accused had been committed in that place”⁶⁵

In this case, the United States brought such a petition on March 2, 2012, in the North Shore District Court in Auckland, New Zealand. The hearing to determine whether Dotcom and a number of his codefendants will be extradited is scheduled for August 20, 2012. Although the North Shore District Court has not yet made the United States petition public, and no documents in support or opposition of that petition have yet been filed, Dotcom has pledged to fight extradition.⁶⁶ Experts have suggested that if Dotcom and the other defendants do fight extradition, “it could take a year or more to bring them to the U.S.”⁶⁷

3. EFFECT ON OTHER SITES

The impact of the Megaupload arrests and site closures was immediate and dramatic, and other, potentially longer-lasting, effects may still be unfolding.

Within a day of the Megaupload arrests and site closures, popular competitor file-sharing sites FileServe and FileSonic “immediately disabled link sharing for uploaded content. According to a notice posted on [filesonic.com]: ‘All sharing functionality on FileSonic is now disabled. Our service can only be used to upload and retrieve files that you have uploaded personally.’”⁶⁸ Users “can still upload files for personal storage, but can’t

⁶⁵ 22 U.S.T. 1, Art. IV.

⁶⁶ Eriq Gardner, *Megaupload Founder Kim Dotcom Defends Himself as He Fights Extradition*, Hollywood Rep., Mar. 5, 2012, available at: <http://www.hollywoodreporter.com/thr-esq/megaupload-kim-dotcom-defends-himself-296911>

⁶⁷ Matthew Barakat, *Robert Bennett, Renowned Attorney, to Represent Megaupload*, Associated Press, Jan. 23, 2012, available at: <http://www.billboard.biz/bbbiz/industry/legal-and-management/robert-bennett-renowned-attorney-to-represent-1005953752.story>

⁶⁸ Mathew J. Schwartz, *Megaupload Takedown Questioned By Users*, Lawyers, Information Week, Jan. 23, 2012, available at: <http://www.informationweek.com/news/security/client/232500305>

create public links to enable others to access those files. . . . Another cyberlocker, Uploaded.to, is just blocking all traffic from U.S. Internet addresses.”⁶⁹

A fourth file-sharing site, Hotfile, is currently defending itself from a preexisting lawsuit by the Motion Picture Association of America.⁷⁰ The Megaupload arrests and site shutdowns have provided plaintiffs with additional ammunition; “[f]ilm studios are asking a [U.S.] District Court for a summary judgment against Hotfile, saying the file sharing site’s business model is identical to that of Megaupload. . . .”⁷¹ Yet another file-sharing site, RapidShare, seems to be attempting to position itself as the legitimate alternative to its competitors:

RapidShare argues that its service is fundamentally different. The company promotes non-infringing uses of its service and actively polices its site for illegal content. On Wednesday, at an event at the National Press Club, RapidShare formalized its anti-piracy stance with a new document. Its “Responsible Practices for Cloud Storage Services” outlines the steps the company takes to fight infringement on its site.⁷²

RapidShare has also “slow[ed] download speeds for non-paying users, in an effort to drive pirates away.”⁷³ It is worth noting that this repositioning comes from a site that, along with two sites belonging to Megaupload, was identified by some observers as being one of the three largest sites responsible for copyright infringement.⁷⁴ Representatives for RapidShare have stated in interviews “that it is ‘not concerned’ by the government crackdown on Megaupload, . . . [but] RapidShare’s most recent move shows that the post-Megaupload world

⁶⁹ Julian Sanchez, *The Megaupload Chilling Effects Hit*, Cato Institute, Jan. 23, 2012, available at: <http://www.cato-at-liberty.org/the-megaupload-chilling-effects-hit/>

⁷⁰ Jacqui Cheng, *MPAA Sues Hotfile for “Staggering” Copyright Infringement*, Ars Technica, Feb. 8, 2011, available at: <http://arstechnica.com/tech-policy/2011/02/mpaa-sues-hotfile-for-copyright-infringement-on-a-staggering-scale/> (Hotfile is accused of “direct infringement, facilitating copyright infringement “on a staggering scale,” and raking in the cash while doing it”).

⁷¹ Jon Brodtkin, *Emboldened by Megaupload shutdown, Hollywood targets Hotfile*, Ars Technica, Mar. 8, 2012, available at: <http://arstechnica.com/tech-policy/2012/03/emboldened-by-megaupload-shutdown-hollywood-targets-hotfile/>

⁷² Timothy B. Lee, *RapidShare Struggles to Placate Big Content with Anti-piracy Plan*, Ars Technica, Apr. 12, 2012, available at: <http://arstechnica.com/tech-policy/2012/04/rapidshare-struggles-to-placate-hollywood-with-anti-piracy-plan/>

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⁷⁴ https://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf

is a much different one for users of file sharing services and the companies that provide them.”⁷⁵

It remains to be seen whether more file storage sites will follow RapidShare’s approach, or will, like torrent search engine BTJunkie, shut down to prevent drawing the attention of the government and plaintiffs.⁷⁶

The post-Megaupload world also has the potential to impact the business models of some of the largest tech companies in the world. If the government is successful in prosecuting Megaupload, it may create a strong precedent that data or transactions on a server based in the United States brings corporations and their employees under U.S. jurisdiction. If this happens:

the Megaupload case could have significant consequences for international users of US-based cloud computing services such as Microsoft Azure, Amazon Web Services, Rackspace or Google AppEngine. It would equally concern users of online storage services, such as DropBox or Mozy, even users of Apple’s iCloud service. Users of the former could lose significant troves of company data should their sites ever be shut down as Megaupload has.⁷⁷

While the larger and more established of these tech companies, “like Google[,] have sophisticated filter algorithms that can help identify copyrighted content—though those are trivially defeated by file compression and encryption—and large, well paid legal teams to handle copyright compliance and fend off lawsuits, like the one Google’s own YouTube continues to fight with content behemoth Viacom,” the specter of U.S. jurisdiction may dramatically shape and channel the direction that information storage development takes:

File lockers still look like nothing but piracy tools to a lot of people, because most of us aren’t yet generating and sharing gigabytes worth of content on a daily basis. But it doesn’t take a whole lot of imagination to imagine a world where that’s not at all the case, a world where cheap, ubiquitous, powerful

⁷⁵ Brodtkin, *To Reduce Piracy, RapidShare Throttles Download Speed for Free Users*.

⁷⁶ Mark Brown, *Torrent Search Engine BTJunkie Voluntarily Shuts Down*, *Ars Technica*, Feb. 6, 2012, available at: <http://arstechnica.com/tech-policy/2012/02/torrent-search-engine-btjunkie-voluntarily-shuts-down/> (“Despite avoiding legal attention so far, the site’s founder told TorrentFreak that the legal action against file-sharing sites Megaupload and The Pirate Bay played an important role in its closure.”)

⁷⁷ Brett Winterford, *Four Key Questions from the 'Mega Conspiracy'*, *IT News*, Jan. 23, 2012, available at: <http://www.itnews.com.au/Tools/Print.aspx?CIID=287823>

computing and rising bandwidth and falling storage costs make collaborative creation of high definition sound, video, and—who knows—maybe entire 3D environments a nigh universal recreational activity. . . . It’s the next platform that we risk strangling in the cradle, because every new medium starts out recapitulating old media content before it becomes truly generative. Early radio is full of people reading newspapers and books out loud. Early TV and film looks like what you get when someone points a camera at a stage play.⁷⁸

The Megaupload case, and its implications for U.S. jurisdiction over the future of information storage and dissemination, may be a landmark in how American law molds the technologies of the future.

4. CONCLUSION

The indictment and arrest of Kim Dotcom and his fellow Megaupload executives raise a series of challenging questions about the future of copyright enforcement, the challenges of extradition, even between friendly nations, and, perhaps most notably, about the reach of national criminal laws in an increasingly interconnected and information based world. Is storage on a server in a country sufficient for jurisdiction? Is access by individuals in a country sufficient? Can a person be brought into a country’s court because an email he or she sent was routed (perhaps without his or her knowledge) through that country?

In the short-term, the United States and New Zealand will work to extradite Dotcom and his co-defendants to stand trial in Virginia, while the defendants seek to frustrate this purpose. In the mid-term, American courts may be forced to make critical decisions determining the global reach of American copyright infringement law and the suitability of U.S. criminal penalties for non-U.S. citizens, living in other countries, who allegedly use American information technology to commit crimes. These issues are already beginning to arise; on May 30, 2012, Megaupload sought permission of the District Court to file a motion to dismiss for lack of jurisdiction. In that proposed motion, Megaupload argues that the United States has failed to properly serve process on Megaupload.⁷⁹ Perhaps most

⁷⁸ Julian Sanchez, *Megaupload Chilling*, Cato Institute.

⁷⁹ Megaupload argues that Federal Rule of Criminal Procedure 4(c)(2), which states that “[a] warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute

importantly, in the long-term, we must all struggle with how to adapt existing national criminal laws and traditional norms with the ever-increasing rate of technological development and how to answer the questions posed above and others like them.

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