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Copyright, Intellectual Property and the Extradition Saga of Kim Dotcom

By Dr. Binoy Kampmark
Global Research, February 27, 2017
Region: Oceania, USA
Theme: Law and Justice

The hunger with which US officials pursue copyright or general intellectual property violations is insatiably manic. The degree of that hunger is expressed by the now suspended, and most likely defunct ***Trans-Pacific Partnership****, an attempt to further globalise the policing of IP laws in favour of corporate and copyright control.*

Then come the vigilantes and those singing different, discordant tunes suggesting another alternative. One such figure was Kim Dotcom, founder of Megaupload and on the US Department of Justice wanted list for some years, along with company co-founders Mathias Ortmann, Bram van der Kolk and Finn Batato.

His case is doing the torturous rounds in New Zealand, where the German-born defendant remains based, still seeing whether he can elude US authorities on the subject of inventive alleged violations. It has become one of the largest criminal copyright cases in history, beginning after Dotcom's dramatic arrest in 2012 at his New Zealand mansion at the hands of dozens of agents, both NZ and US, along with two helicopters.

The New Zealand court decided at the start of this week that the 2015 decision of the lower court favouring the extradition of Kim Dotcom and his co-defendants be upheld. Justice Murray Gilbert of the High Court seemed rather tricky with his reasoning. For one, he admitted "that online communication of copyright protected works to the public is not a criminal offence in New Zealand under s. 131 of the Copyright Act."

Dotcom and his legal team would have felt rather thrilled with that. The prosecution plank had collapsed. Case closed. Except, of course, that it hadn't. Justice Gilbert proceeded to assume a mighty pulpit and preach despite the absence of a NZ copyright offence in this case.

Much of this lay in the prosecutorial effort to expand the range of offences, a tactic the Dotcom team termed "massaging". In widening the net, acts amounting to internet piracy were suggested, including racketeering, money laundering, to name but a few charges additional to the issue of copyright infringement. Many coalesced around the issue of conspiracy, a favourite, catch-all provision US prosecutors have loved to employ.

The Crimes Act, in other words, had loomed into judicial consideration with its full force, its "general criminal law fraud provisions" doing their bit to undermine the case of the appellants, despite Dotcom's assertion that this was purely a copyright matter. Read along with s. 101B of the Extradition Act itself, the judge agreed "that the appellants are eligible for extradition on all counts for which their surrender is sought."

That wilful infringement supposedly committed by Dotcom did something devastating to the copyright holder: deprive it "of something to which it may be entitled." (The amount alleged is staggering: $500 million worth. Dotcom is alleged to have netted $175 million in criminal proceeds.) It followed that the alleged conduct on count 2 constituted "the offence of conspiracy to defraud in terms of art II.16."

Article II, paragraph 16 of the extradition treaty between the US and NZ outlines the grounds for extradition: "Obtaining property, money or valuable securities by false pretences or by conspiracy to defraud the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretense."[1]

Digital activists have a brat element to them, an impetuousness that follows the crooked over the straight. They are often necessary boons excavating to find deficiencies in existing systems, rather than spotty criminals to be potted.

In Dotcom's case, a cloud storage provider is being prosecuted, an aspect that has grave implications in the broader internet domain. For one, it suggests a self-policing dimension to the operations of such an enterprise. Dotcom's claims there, rather reasonably, are that policing the behaviour of 50 million daily users of a site is hardly credible, though efforts were made to detect copyright infringements. For all that, the US DOJ would still claim that there was a mere "veneer of legality" to such operations.[2]

As Dotcom's barrister, Ron Mansfield, said after Justice Gilbert had down his judgment, "The High Court has accepted that Parliament made a clear and deliberate decision not to criminalise this type of alleged conduct by internet service providers, making them not responsible for the acts of their users."[3]

Dotcom's legal counsel, Ira Rothken, put it such last year: "The second you put a cloud storage site on the Internet, whether it's Google or Megaupload, there's going to be good users and bad users. There's going to be folks who are going to infringe, there are going to be folks who are saving wedding photos and using that for fair use." [4]

But the legal assessment of Dotcom's case suggests that prosecuting authorities will be favoured, and that powerful corporate demands expressed through state intermediaries and lobbies, will continue to have their day. Any effort to battle this case out in a US setting is most likely, as Rothken asserts, going to take place on an "unfair playing ground".[5] Next stop: the NZ Court of Appeal.

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Notes

[1] https://www.documentcloud.org/documents/1501886-extraditionusnz.html

[2] https://www.justice.gov/usao-edva/release-victim-notification

[3] http://www.scoop.co.nz/stories/PO1702/S00226/dotcom-legal-team-on-high-court-judgment.htm

[4] http://www.cnbc.com/2016/08/29/megaupload-founder-kim-dotcom-wouldnt-get-a-fair-trial-in-us-lawyer-says-as-extradition-appeal-hearing-starts-in-new-zealand.html

[5] http://www.cnbc.com/2016/08/29/megaupload-founder-kim-dotcom-wouldnt-get-a-fair-trial-in-us-lawyer-says-as-extradition-appeal-hearing-starts-in-new-zealand.html

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