



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

February 1, 2012

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Counsel for Mathias Ortmann, Finn Barao and Bran van der Kolk

Re: *United States v. Kim Dotcom, et al.*; Case No. 1:12-cr-00003 (E.D. Va.)

Dear Counsel:

We write to notify both you and the Court of the concerns of the many individuals (at least one of whom we represent) who lost access to their legal, noninfringing materials stored with Megaupload.com on January 19, 2012, when the U.S. Government shut down the website at www.megaupload.com (and related sites) and executed search warrants at Carpathia Hosting, Inc. and Cogent Communications, Inc. We also write to formally request that you preserve that material both for purposes of contemplated future litigation and as a matter of obligation and courtesy to the innocent individuals whose materials have unfortunately been swept up into this case.

We write specifically in response to the letter filed by the Government with this Court on January 27, 2012, where it stated that it had “completed execution of its search warrants” and that it was returning possession of all servers covered by those warrants to Carpathia and Cogent. (Dkt. No. 32.) In its letter, the Government further stated an “understanding that the hosting

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companies may begin deleting the contents of the servers beginning as early as February 2, 2012.” *Id.*

As we expect you are well aware, many innocent third parties (in addition to our current client) used Megaupload for wholly legal purposes and have since lost access to their data. This may include both commercial and personal materials. We also note that, in many instances, this material included protected expression under the First Amendment, which raises additional concerns. Many of these materials are property of the individuals involved, and they are legally entitled, not only to access, but to preservation and privacy. We are hopeful that our client and other third parties can obtain access to their material without resorting to legal action, but if that is not the case, we intend to take the necessary steps to ensure the return of their materials.

Consequently, we write now to request that anyone with access to our client’s materials, or evidence potentially relevant to an action filed on behalf of our client or other similarly situated third parties, immediately (and in any event, before February 2) institute a litigation hold that covers all reasonably potentially relevant evidence, *e.g.*, the complete set of data on servers used by Megaupload.

We further request that all parties to this matter together devise a process as expeditiously as possible to ensure that Megaupload’s innocent clients may control and retrieve their own lawful data. These third parties were given no notice that their data were at risk, nor have they been given any information about how or whether they can retrieve it. We ask that all those concerned work together to make sure innocent users are returned their legal property, both as a matter of law, and a matter of simple fairness to the individuals who have been, and are being harmed, by the government’s actions.

More generally, we are prepared to work with the government on designing an appropriate procedure for the prosecution of criminal or civil cases related to websites used by innocent customers.



Sincerely,

ELECTRONIC FRONTIER FOUNDATION

CINDY A. COHN
Legal Director and General Counsel

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cc: The Honorable Liam O'Grady, United States District Judge
Chief Legal Officer, Cogent Communications
Outside Counsel, Carpathia Hosting