

# MIMESIS

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LAW

## COPYRIGHT INFRINGEMENT “FUGITIVE” KIM DOTCOM LOSES IN THE FOURTH CIRCUIT

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It is probably no surprise that here, at Fault Lines, there is not a lot of support for civil forfeiture. It might have something to do with the criminal defense bias.\* On the other hand, the Fault Lines in-house prosecutor has defended certain aspects of civil forfeiture [here](#), [here](#), and [here](#).

There are some noble policy ideas behind forfeiture, including restitution to victims, disgorgement of criminal proceeds by folks without clean hands, and punishment of the wrongdoer. Generally, criminal forfeiture, which would follow a conviction, sufficiently vindicates this interest. Indeed, truly criminal punishment cannot flow except from a conviction.

But there are instances where criminal forfeiture is insufficient. Proceeds from criminal activity can be transferred to family members; the wrongdoer might be dead or unavailable; and proceeds can be spent or hidden before a conviction is obtained. Similarly, when instrumentalities are seized, it can deplete the wrongdoers' ability to perpetuate crime, e.g. the forfeiture of boats and airplanes used in drug smuggling. This is especially true in the case of organized crime.

But there are situations where civil forfeiture can be misused. Kim Dotcom, the infamous creator of Megaupload.com, has been fighting extradition to the U.S. for years now. He was [indicted on several different charges](#), but they mostly relate back to Megaupload being a haven for pirated materials. The reason Kim Dotcom was of interest was because he was making tens of millions of dollars each year by facilitating copyright infringement. Of course, even college students who infringe on copyrights make for ripe federal targets.

The U.S. government seized whatever U.S. based assets it could grab, including the domain registrations. But you don't live the kind of lifestyle Kim Dotcom was leading without having cash stuffed in various mattresses. So the government was keen on [grabbing his assets](#) in Hong Kong and New Zealand too.

But Kim wasn't keen on coming to the U.S. to face what could be a [novel theory of prosecution](#). So, [he has fought against extradition to the U.S.](#) That proceeding has been, in turn, complicated

by the extradition treaty and the U.S.'s practice of using money laundering charges to extradite anyone that becomes a target. Not surprisingly, Kim has maintained his innocence.

So, the U.S. government has indicted an extremely wealthy foreign national on charges related to copyright infringement, thereby pulling two other countries into this matter. In addition to the indictment, the U.S. has frozen his assets, seized others, and filed a civil forfeiture action against property they do not physically possess. Meanwhile, the criminal case has stalled because they can't bring him to the U.S. It certainly seems like a giant hassle for copyright infringement, but what the Mouse wants, the Mouse gets.

Because this springs out of copyright infringement, there is the issue of what exactly are the ill-gotten assets Kim Dotcom obtained. In the U.S., copyright infringement is a crime. So, in theory all the proceeds of the sale of pirated material is subject to forfeiture. But copyright infringement is different than drug trafficking; there are no secondary effects such as overdoses, violence, and property crime associated with it. And, unlike drugs, the object being sold isn't per se illegal; it's just the particular form of the object that is illegal.

Unlike other offenses, the profit motive of copyright infringement is relatively insubstantial. Torrents, message boards, and dark sites are filled with people making copies and sharing them without the expectation of personal profit. Relatedly, there is the issue of the harm copyright holders are suffering. An argument can be made that the price of the authentic article is too high, which is why people seek out the cheaper pirated version. So, there is some cause to think that sales are not being diverted by infringement.

While there are reasons to treat drug contraband differently than copyright contraband, the fact remains for the moment proceeds from criminal copyright infringement are subject to forfeiture. But what about the fact Kim Dotcom is fighting extradition and the assets subject to forfeiture are outside the control of the U.S.? No problem says the Fourth Circuit.

The U.S. government argued successfully that by fighting extradition and remaining in New Zealand, Kim is the legal equivalent of a fugitive. Yes, invoking a legal process recognized by a treaty is the same thing as Dr. Kimble escaping to look for the one-armed man who killed his wife. While it may seem like a novel description of someone like Kim, this appellation has legal consequences.

Under the fugitive disentitlement doctrine, codified in 28 U.S.C. § 2466, Kim loses his right to due process:

A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person—

(1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution— \* \* \* (B) declines to enter or reenter the United States to submit to its jurisdiction.

Demanding the international equivalent of due process means you lose the right to domestic due process. That's a nifty statutory trick.

The Cato Institute unsuccessfully argued, as an amici, that this statute distorts the common law version of the rule. It makes sense that an escaped criminal should not be able to prosecute an appeal will on the lam because the escaped criminal attempts to benefit from the judicial system while flouting it. Also, the rule acts as a deterrent for those who have an appeal pending but might be inclined to flee. And it preserves judicial resources that would be spent on someone that may not be amenable to the process anyhow and whose absence could delay the process, in any event.

But the roots of this doctrine have little to do with civil forfeiture. Disallowing a fugitive criminal defendant to benefit in a criminal case is a different policy consideration of whether someone resisting extradition can contest the civil forfeiture of property.

In its opinion, the Fourth Circuit points out that the Supreme Court rejected the application of this doctrine as a matter of common law. But Congress, ever helpful, passed what became 28 USC § 2466 in response. So, Kim was left arguing that the statute was unconstitutional, largely based on the Supreme Court decision that pre-dated the statute.

The Fourth Circuit was having none of it:

While the claimants correctly respond that § 2466 is no mere procedural requirement, their argument actually underscores the justification for disentitlement pursuant to statute. Whereas entering default judgment against a party for failure to meet a nonsubstantive requirement might produce the same result as in Degen, the refusal to face criminal charges that would determine whether or not the claimants came by the property at issue illegally supports a presumption that the property was, indeed, so obtained.

The very logic of fugitive disentitlement is that refusal to face and defend against charges, particularly in criminal court where procedural rights and the presumption of innocence favor the defendant, is “but an admission of the want of merit in the asserted defense.” (Citations omitted.)

Presumption of innocence has no place in civil forfeiture. Defendants who avail themselves of extradition procedures are presumed guilty for civil forfeiture purposes. If nineteenth century case law says it’s so, then it is so. No need to fuss with the application of modern Due Process precedent.

Although the Fourth Circuit felt the need to bolster its review of case law:

We make two final notes in support of our decision. First, there can be no doubt that the claimants’ waiver was knowing. Section 2466 leaves the application of disentitlement to the court’s discretion, see § 2466(a) (using “may” instead of “shall”), and in this case, the claimants were given a full opportunity to resist its application. Given their lengthy, and apparently expensive, intransigence with regard to the underlying controversy, it cannot be argued that they were unaware of the statute’s consequences and therefore unable to waive.

So, again, availing yourself of lawful procedures means it is just deserts when the feds take your money and property. It’s impossible to know why civil forfeiture gets a bad name. The Fourth Circuit then discusses its second reason, i.e. the Supreme Court case wasn’t not absolute in the terms it used. In other words, because in a sentence the Supremes qualified their holding by the phrase “in this case,” then the case can be mostly ignored.

In case you were wondering why the Fourth Circuit thinks it ought to be ignored, they helpfully tell us:

In this case, the claimants readily concede that the property at issue is being spent rapidly, despite numerous orders attempting to restrain it. The government can therefore show a need, in this case, to use more extreme measures.

Talk about burying the lede. Of course the accused should not be allowed to spend their assets, especially if it is being done rapidly. The mere accusation by the government and lawful resistance to being hauled into court justifies “extreme measures.”

But taking all of a man’s wealth is not extreme enough. Perhaps the U.S. Marshals can travel to New Zealand, light a bag of dog poop on fire, ring the doorbell, and run away too. Can’t Kim Dotcom just admit he’s a bad dude like Pablo Escobar, come to the U.S., and then get rightfully hammered for running a piracy website? Apparently, he’s shameless.

\*Ed. Note: It’s not that Fault Lines favors defense over prosecution, but that few prosecutors are willing or allowed to express their views publicly, leaving us with a dearth of prosecutorial voices. Which is one of the many things that makes Andrew King’s Fault Lines posts quite remarkable.