UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

In re COMMISSIONER'S SUBPOENA TO RACKSPACE MANAGED HOSTING	)	No. _____

MOTION TO UNSEAL AND FOR EXPEDITED HEARING

Movants the Electronic Frontier Foundation ("EFF"), Urbana-Champaign Independent Media Center Foundation ("UCIMC"), and Jeffrey Moe hereby move for this Court to immediately lift all sealing orders regarding the Commissioner's Subpoena (the "Order") issued in this District to Rackspace Managed Hosting, and for an expedited hearing on the matter.

I. SUMMARY OF FACTS[1]

At the secret request of a foreign government, the U.S. government recently silenced our modern printing presses—over twenty independent news web sites and an Internet radio station. Yet the federal court order upon which this prior restraint of unprecedented scope was based is under seal and cannot be inspected by the public or those who were silenced, contrary to constitutional and common law rights of access to court records.

Movant Jeffrey Moe is a customer of Rackspace Managed Hosting, which provides him with the use of two dedicated Internet "servers."[2] Moe uses these servers to host over twenty news web sites published by "Independent Media Centers" (IMCs), local volunteer coalitions that publish independent online newspapers; this global network of local IMCs comprises the "Indymedia" news network. To the surprise of Moe, Indymedia journalists, and readers, these heavily-trafficked news web sites[3] and an Indymedia Internet radio station were unexpectedly

[1] *See* Movants' appended Statement of Facts and supporting affidavits for complete narrative.

[2] A "server" is a computer connected to the Internet that offers online media content such as Web sites and/or services such as email; the servers here were "dedicated" to Moe's use.

[3] *See, e.g.,* <http://wmass.indymedia.org/>, <http://www.indymedia.org.uk/>, <http://italy.indymedia.org/>.

pulled off the Internet on October 7th, 2004. On or around that date, according to Rackspace, an employee in its San Antonio office "received a federal order to provide your hardware," i.e., the two Indymedia servers, to an unidentified "requesting agency." According to Rackspace, the Order was a Commissioner's Subpoena issued by a federal court pursuant to 28 U.S.C. § 1782 and based on a request by a foreign government under a Mutual Legal Assistance Treaty (MLAT).[4]

Rackspace has since refused to provide any further information about the incident or provide a copy of the Order to Moe, contending that the case is "under seal." Movants' counsel has contacted the FBI, the Departments of State and Justice, the U.S. Attorney's Office in San Antonio and this Court in an effort to independently determine the origin of the Order, but no office has accepted responsibility, much less identified the case number or issuing court. However, as 28 U.S.C. § 1782 only authorizes "the district court of the district in which a person resides or is found" to order that person to produce documents or things, and considering that the Order was served on Rackspace in San Antonio, a court in the Western District of Texas must have issued the Order. Therefore Movants pray for this court to exercise its discretion and immediately unseal the entire record in this matter.[5]

II. STANDING

As a result of the Indymedia seizure, Movant Moe has suffered direct injury to his First and Fourth Amendment rights. His speech rights were squelched and his private information and communications seized, yet he was given no notice or justification for this action nor any avenue for redress. Multiple courts have given persons whose property has been seized standing to challenge the sealing of documents supporting the warrant resulting in the seizure, based on Fourth Amendment and Due Process rights. *See, e.g., In re Wag-Aero Inc.*, 796 F.Supp. 394

[4] The U.S. has MLATs in place with nineteen countries. *See* U.S. Dept. of State, *Mutual Legal Assistance in Criminal Matters Treaties (MLATs) and Other Agreements* (visited Oct. 21, 2004) <http://travel.state.gov/law/mlat.html>. Movants have so far been unable to conclusively identify the requesting government.

[5] Including but not limited to the foreign government's request, the application to the Court for a commission to obtain the evidence requested, the order granting that commission, and the Commissioner's Subpoena itself.

(E.D. Wis. 1992); *In re Search Warrants for 2934 Anderson Morris Road*, 48 F.Supp.2d 1082, 1083 (N.D. Ohio 1999). Moe has similar standing to demand that he be allowed to inspect and copy the Order used to seize his computer files.

Movants EFF and UCIMC also have standing as publishers and interested members of the public. EFF is a non-profit, member-supported civil liberties organization working to protect civil rights and free expression in the digital world. In that role EFF publishes educational and advocacy materials for its 13,000 members and the public, via both a weekly email newsletter and <http://www.eff.org>, one of the most visited web sites on the Internet. UCIMC is an independent news media outlet and an autonomous portion of Indymedia, a collective of Independent Media Centers (IMCs) and thousands of journalists offering grassroots, non-corporate coverage of news events. *See* <http:/www.ucimc.org>. As news publishers and free speech advocates, EFF and UCIMC both have a distinct interest in discovering and publicizing the facts behind the Indymedia seizure.

As the Supreme Court has held, all members of the public must be given a right to be heard on the question of their exclusion from judicial proceedings, *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982), and it is well-settled in this Circuit that non-party members of the media have standing to challenge closure orders. *See U.S. v. Chagra*, 701 F.2d 354, 359-60 (5th Cir. 1983) (holding that newspapers and reporter, although nonparties to criminal case, had standing to appeal an order closing pretrial bail reduction hearing).

Accordingly, the Movants have standing to bring this motion.

III. MOVANTS HAVE CONSTITUTIONAL AND COMMON LAW RIGHTS OF ACCESS TO THE SEALED ORDER AND RELATED RECORDS

A. Movants' Common Law Right of Access

It is well settled in this Circuit that the public has a common law right to inspect and copy judicial records.[6] Because common law establishes a presumption of access to judicial records,

[6] *See S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir.1981); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978).

see S.E.C., 990 F.2d at 848, "the district court's discretion to seal the record of judicial proceedings is to be exercised charily" or with great caution. *Federal Savings & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987), citing *Publicker Industries Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984). Although this common law right of the access has been extended uniformly by the circuit courts to cover both civil and criminal matters,[7] the current motion seeking to uncover the basis for the Indymedia servers' seizure is particularly analogous to motions to unseal search warrant affidavits, to which the common law right of access has been applied. *See In the Matter of Searches of Semtex Industrial Corp., et al.*, 876 F.Supp 426 (E.D. NY 1995) (holding that the indefinite sealing of a warrant affidavit was inappropriate, even in an ongoing multi-state investigation involving multiple unindicted targets).

Because of the common law presumption of access, sealing of the Order and related records "is an extraordinary action, and should be done only if the government shows a real possibility of harm." 3A Fed. Prac. & Proc. Crim.3d § 672. The seal must not be granted or continued merely at the government's request; rather, the court must exercise its independent discretion in the matter. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989). In exercising that discretion to seal—or unseal—judicial records, the court must weigh the public's right of access against any factors favoring secrecy. *See S.E.C.*, 990 F.2d at 848; *see also Nixon*, 435 U.S. at 599, 602, 98 S.Ct. at 1312, 1314 (court must consider "relevant facts and circumstances of the particular case"); *Belo*, 654 F.2d at 434; *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) ("The historic presumption of access to judicial records must be considered in the balance of competing interests." (citing *Belo*)). And although the arguments favoring secrecy in this case are unknown to Movants, they must have necessarily weakened now that the Order has been complied with. No evidence will be destroyed if the seal is lifted, as it has already been seized; nor will any malefactors be notified of any investigation that has not

[7] *See, e.g., Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 161 (3rd Cir. 1993); *Smith v. United States District Court*, 956 F.2d 647, 650 (7th Cir. 1992); *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999); *FTC v. Standard Financial Management*, 830 F.2d 404, 408 n.4 (1st Cir. 1987); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983); *EEOC v. Erection Co.*, 900 F.2d 168, 169 (9th Cir. 1990).

already been made obvious to the public by virtue of the servers' disappearance from the Internet, and the resulting extensive press coverage. *See, e.g.,* Appendix, Opsahl Aff., Ex. B. In fact, there is no reason to believe that any U.S. investigation would be jeopardized.

Moreover, the public and the press have a clear and compelling interest in discovering under what authority the government was able to unilaterally prevent Internet publishers from exercising their First Amendment rights, and in uncovering details that may indicate whether this action violated any constitutional or statutory rights of Movant Moe, members of the broader Indymedia network, or the public itself. Although "every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes," *Nixon*, 435 U.S. at 598, 98 S.Ct. at 1312, the current records are sought not for any improper purpose, but only out of a "desire to keep a watchful eye on the workings of public agencies." *Id.* Therefore, even if there are some continuing grounds to justify the seal, the Order and related records must at least be released to Movants in redacted form to the extent it is possible to do so without undue harm to the public interest. *Baltimore Sun Co.*, 886 F.2d at 66.

B. Movants' First Amendment Right of Access

Movants are further entitled to access to the Order and related records under the First Amendment, which "guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed." *Washington Post v. Robinson,* 935 F.2d 282, 287-88 (D.C. Cir. 1991).

The Supreme Court has consistently recognized that the public and the press have a First Amendment right of access to criminal proceedings and records. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trials); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (voir dire and transcripts); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") (preliminary hearings). The circuit courts have broadly extended this right of access to filed legal documents and other court records, even in pretrial

proceedings,[8] and have applied it in civil as well as criminal matters.[9] The Fifth Circuit has similarly recognized the First Amendment right of access to judicial proceedings and records,[10] and the Eighth Circuit has recognized a First Amendment right of access to search warrant affidavits, which must be unsealed unless nondisclosure "is necessitated by a compelling government interest." *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

In determining whether the First Amendment right of public access extends to a particular type of proceeding, the Supreme Court considers "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8. As the exact nature of the proceedings leading to the Order are unknown to the Movants, it is difficult to evaluate the first *Press-Enterprise* prong regarding a history of access to those proceedings. Even so, the Order and relevant documents are likely

[8] *See In re Globe Newspaper Co.*, 729 F.2d 47, 51, 59 (1st Cir. 1984) (the First Amendment right of access "has also been extended to documents filed in pretrial proceedings"); *U.S. v. Haller*, 837 F.2d 84, 87 (2nd Cir. 1988) ("right of access extends to plea hearings and thus to documents filed in connection with those hearings"); *United States v. Smith*, 123 F.3d 140, 146 (3rd Cir. 1997) (First Amendment right of access to criminal proceedings is extended "to the records and briefs that are associated with that proceeding"); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("the First Amendment right of access applies to documents filed in connection with plea hearings"); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("this court has held that the first amendment right of access extends to documents submitted in connection with a judicial proceeding"); *Oregonian Publ'g Co. v. U.S. District Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) ("Under the first amendment, the press and the public have a presumed right of access to court proceedings and documents."), *cert. denied*, 501 U.S. 1210 (1991); *U.S. v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1997) (assuming that First Amendment right of access applies to pretrial documents filed in a criminal case); *U.S. v. Ellis*, 90 F.3d 447 (11th Cir. 1996) (First Amendment right of access applies to transcripts of *in camera* hearings).

[9] *See Grove Fresh Distribs. Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (recognizing First Amendment right of access to civil proceedings and records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment standard applies to documents filed in connection with civil summary judgment motion); *Publicker*, 733 F.2d at 1066 (3rd Cir. 1984) (concluding that First Amendment analysis of *Richmond Newspapers* applies equally to civil cases); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1181 (6th Cir. 1983) (vacating district court's sealing of all documents in civil action based on First Amendment and common law right of access).

[10] *See U.S. v. Chagra*, 701 F.2d 354, 363-64 (5th Cir. 1983) (finding First Amendment right of access to pretrial bail proceedings); *Rovinsky v. McKaskle*, 722 F.2d 197, 201 (5th Cir. 1984) (relying on First Amendment right of access in *Chagra* and *Richmond Newspapers* for assertion that the right to a public trial "extends at least" to pretrial hearings such as jury selection and motions to suppress evidence); *U.S. v. Edwards*, 823 F.2d 111, 118 (5th Cir. 1987) (finding that First Amendment guarantees right of access to record of closed proceedings and raises presumption that transcript of such proceedings be released within a reasonable time).

analogous to other categories of documents for which the federal courts have acknowledged a First Amendment right of access, such as motions, briefs, orders and hearing transcripts.[11]

Furthermore, while both factors should be considered, the Supreme Court and this Circuit have held that a document need not meet both prongs for the First Amendment right of access to attach. *See Globe Newspaper Co.*, 457 U.S. at 605 n.13 (recognizing right of access to testimony of minor sex crimes victim despite lack of history of access); *Chagra*, 701 F.2d 354 at 363-64 (same regarding bail reduction hearings). Rather, "the first amendment must be interpreted in light of current values and conditions," *Chagra*, 701 F.2d at 363. As this Circuit has recognized, "[t]he first amendment right of access is, in part, founded on the societal interests in public awareness of, and its understanding and confidence in, the judicial system. … Moreover, public access is a check on judicial conduct and tends to improve the performance both of the parties and of the judiciary," and "[t]hese interests are as affected by [the current] proceedings…as they are by other judicial proceedings." *Id.* The public has an obvious interest in understanding—and if it is improper, curbing—a legal process that can be used by the government to quickly and quietly silence news reporting on the Internet, and such an interest can only play a significant positive role as a check on that process. To maintain confidence in the judicial system, the public must understand how such an egregious prior restraint could be allowed to occur.

C. Movant Moe's Fourth Amendment Right of Access

Numerous courts have held that the targets of a search and seizure have a Fourth Amendment right to inspect and copy the sealed affidavit on which the warrant issued. *See In re Search Warrants for 2934 Anderson Morris Road*, 48 F. Supp.2d 1082, 1083 (N.D. Ohio 1999); *In re Search of Up North Plastics, Inc.*, 940 F.Supp. 229, 232 (D. Minn. 1996); *In re Search Warrants Issued August 29, 1994*, 889 F.Supp. 296, 299-300 (S.D. Ohio 1995). And although Rackspace has characterized the Order as a subpoena, it has also made clear that it was ordered

[11] *See, e.g., In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (pretrial motions and briefs, including discovery-related motions); *U.S. v. Ellis*, 90 F.3d 447, 451 (11th Cir. 1996) (transcripts of *in camera* hearings once the case was concluded); *Associated Press*, 705 F.2d at 1145 (all pretrial documents); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1517 (9th Cir. 1988) (pretrial release proceedings and documents filed therein); *In re Washington Post*, 807 F.2d at 390 (plea and sentencing documents in espionage case).

to immediately provide the servers to the government. The physical servers that were seized are owned by Rackspace, but the information stored on them was not.[12] Rather, it is Movant Moe who has a direct possessory interest in the information stored on Rackspace's servers, which includes not only Indymedia's published materials but also private communications and information belonging to Moe. A seizure has clearly occurred, and the Order is tantamount to a search warrant, even if not presented in that form. "That which looks like a duck, walks like a duck, and quacks like a duck will be treated as a duck even though some would insist upon calling it a chicken." *Tidelands Marine Service v. Patterson*, 719 F.2d 126, n.3 (5th Cir. 1983). Therefore, Moe has a Fourth Amendment right to examine the records underlying this seizure in order to assess its reasonableness.

Due process also requires that the records be unsealed so that Moe may examine them. *See In re Wag-Aero Inc.*, 796 F.Supp. 394 (E.D. Wis. 1992) (granting motion to unseal brought by subject of search, and rejecting government's assertion that the continued sealing of a search warrant affidavit was justified because of an ongoing investigation). Like the movant in *Wag-Aero*, Moe has a right to consider whether he wishes to challenge the issuance of the Order or seek to obtain the return of his property (i.e., any copies made by the government), and "these rights are obviously seriously encumbered by the present seal." *Id*. at 395. Here, as in that case, any speculative "harm to the United States of disclosure at this time is significantly outweighed by the injury to [movant's] due process rights flowing from nondisclosure." *Id*.

Without access to the case file, Moe cannot effectively allege that his Fourth Amendment rights (or statutory privacy rights[13]) were violated by the seizure, even though such a violation is

[12] In the search and seizure context, "'property' includes documents, books, papers, any other tangible objects, *and information*." Fed. R. Crim.P. 41(a)(2)(A) (emphasis added).

[13] Pursuant to the Stored Communications Act (SCA), Rackspace is prohibited from providing the government with the content of stored electronic communications in response to a mere subpoena. 18 U.S.C. § 2702(a)(1). The servers contained, *inter alia*, the contents of unopened electronic emails. Because the servers contained journalists' work product and documentary materials as well, their seizure must also comply with the Privacy Protection Act (PPA), which restricts the search and seizure of such materials. 42 U.S.C. § 2000aa. *See also Steve Jackson Games, Inc. v. U.S. Secret Service*, 816 F. Supp. 432 (W.D.Tex. 1993) (holding that seizure of computer game publisher's Internet bulletin board system violated SCA and PPA), *aff'd by Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994).

especially likely here. As the Supreme Court has held, the particularity requirement of the Fourth Amendment "is to be accorded the most scrupulous exactitude" when expressive materials are seized. *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *see also U.S. v. Peden*, 891 F.2d 514, 518 (5th Cir. 1989). Thus,

> [W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved. It is the risk of prior restraint which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials that motivates this rule.

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63-64 (1989). It is because of these special protections that the Supreme Court, when considering a warrant to search the premises of a newspaper, found that the First Amendment did not independently bar such a search. The Court instead presumed that the Fourth Amendment's warrant requirement could provide adequate protection for free speech:

> There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorized nothing of this sort.

Zurcher v. Stanford Daily, 439 U.S. 885 (1978). The Supreme Court never considered it a realistic possibility that even a valid search warrant could be used as a blanket prior restraint against a news publisher, and would have balked at the same result from a mere subpoena.

The plain fact is that this was far from a typical seizure—it was a seizure that *silenced*. The Internet "is the most participatory form of mass speech yet developed, entitled to the highest protection from governmental intrusion." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 863 (1997) (internal citations omitted). Movants and the public must understand how this protection was cast aside in this case.

IV. CONCLUSION

For all the foregoing reasons, Movants respectfully request that the Court grant this

motion and lift all sealing orders regarding the Commissioner's Subpoena served on Rackspace Managed Hosting. In the absence of immediate unsealing, Movants request an expedited hearing, as well as an order to allow briefing by amici, if part of this Court's practice.

Respectfully submitted by,

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