

1827ROJC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

11 Civ. 4139

6 ROJADIRECTA.ORG
7 and ROJADIRECTA.COM,

8 Defendant-in-Rem.

9
10 August 2,, 2011
3:45 p.m.

11 Before:

12 HON. PAUL A. CROTTY

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 BY: CHRISTOPHER FREY

Assistant United States Attorney

18 RAGESH TANGRI

19 DAVID SPEARS

Attorneys for Defendant-in-Rem
Rojadirecta.org and Rojadirecta.com

1827ROJC

1 (Case called)

2 (In open court)

3 MR. FREY: Good afternoon, your Honor. Christopher
4 Frey on behalf of plaintiff United States of America.

5 THE COURT: Mr. Frey.

6 MR. TANGRI: Ragesh Tangri, your Honor, on behalf of
7 defendant.

8 MR. SPEARS: And David Spears of Spears & Imes LLP on
9 behalf of defendants.

10 THE COURT: OK, please be seated.

11 Mr. Frey, I have a petition here for release of the
12 materials, correct? It was filed back in -- petition to
13 release seized property -- back on 6/13. Then you filed your
14 verified complaint on June 17?

15 MR. FREY: That's correct, your Honor.

16 THE COURT: And I have a letter request of July 15
17 and -- two letter requests. One July 15, another one is
18 updated July 19, I guess from Johanna Colabria asking for
19 authorization to move to dismiss, right?

20 MR. TANGRI: That's correct, your Honor. Ms. Colabria
21 is one of my colleagues, and we submitted the letter request to
22 move to dismiss.

23 THE COURT: The question I have, Mr. Tangri, as long
24 as you are on your feet, is what does this do to the petition
25 for release of the seized property?

1827ROJC

1 MR. TANGRI: Well, your Honor, the petition for the
2 relief of seized property is a pendente lite temporary relief
3 procedure to allow a claimant to regain its property under
4 certain conditions pending adjudication of the civil forfeiture
5 complaint. We would respectfully request -- and that petition,
6 by the way, your Honor, is fully briefed.

7 THE COURT: Right.

8 MR. TANGRI: We would respectfully request that that
9 be ruled on. If the court rules on it favorably, then the
10 property would be returned, the domain names would be returned
11 pending disposition of the civil case. That could occur if the
12 motion to dismiss that we've asked leave to file is filed and
13 granted; it could occur later if the proceeding goes further.
14 But the motion to dismiss does not moot the petition for the
15 return of the property pendente lite.

16 THE COURT: Do you want to argue that motion then, or
17 do you want it considered on the papers?

18 MR. TANGRI: Your Honor, we would be happy to address
19 it today. As I say, it's been fully briefed, and I am happy to
20 address it.

21 THE COURT: Mr. Frey?

22 MR. FREY: That's fine, your Honor. It is fully
23 briefed, and I think it's ready for disposition.

24 THE COURT: OK. Well, Mr. Tangri, do you want to take
25 five or ten minutes and give me your points of view?

1827ROJC

1 MR. TANGRI: Certainly, your Honor.

2 Thank you for hearing us. I would like to start by
3 setting the framework for the 983(f) petition because it's a
4 somewhat unusual framework. As I said, it allows for the
5 return of seized property pending the disposition of a civil
6 forfeiture action.

7 There are in broad strokes two sort of issues I
8 believe for the court to consider on this motion. The first is
9 a balancing test, essentially balancing the hardships as one
10 might do in the more familiar context of a preliminary
11 injunction motion.

12 The hardships or the issues to be balanced under the
13 balancing test are, one, is there any risk on the one side that
14 if the property is returned to the claimant it will be
15 dissipated, transferred, taken away, flee the jurisdiction or
16 otherwise be rendered unavailable for recovery at the end of
17 the proceeding should the proceeding be resolved in favor of
18 the government.

19 On the other side of that balance is the hardship that
20 is suffered if the property remains seized while the civil
21 forfeiture action is adjudicated on the merits. That's one
22 large issue, and I will address it in a moment.

23 The second issue is whether if the balancing test was
24 resolved in favor of the complaint, in favor of return of the
25 property pendente lite, the government can show that the

1827ROJC

1 property will be used to commit a crime if it is returned.

2 That is the second issue. We, needless to say, think that both
3 issues fall in our favor.

4 On the balancing test I think it's important to begin
5 by observing that the government has not argued, has put in no
6 evidence and has not even briefed anything on its side of the
7 balance. They make no argument that the domain names will not
8 be available if they are returned to my client during the
9 pendency of the proceeding. They make no argument that they
10 will be destroyed, that they will be unavailable as evidence,
11 or that they will be dissipated or rendered beyond the
12 jurisdiction of this court in the event that they are returned
13 and then the proceeding is later concluded adversely to us.
14 They do not address those points.

15 So, there is nothing on their side of the balance.
16 Indeed, that is correct because the domain names are registered
17 through a U.S. domain name registry. That is how and why the
18 government was able to seize them in the first place. That
19 will not change; they will be there. So, on the government's
20 side of the balancing, on the balancing test, there is nothing.

21 On our side of the balancing test, on the hardship
22 that is suffered if the domain names remain seized, there are
23 two broad areas of hardship. The first is that a substantial
24 amount of speech, expressive speech, was taking place on the
25 website that these domain names point to prior to the seizure.

1827ROJC

1 THE COURT: What was the expressive speech?

2 MR. TANGRI: It was in the form of a user forum, sort
3 of user blogs, a chat room, if you will, in which sports fans
4 posted their impressions and commentary back and forth.

5 THE COURT: On?

6 MR. TANGRI: On various sporting events.

7 THE COURT: And the sporting events were -- how were
8 the sporting events portrayed? They are copyrighted materials,
9 aren't they?

10 MR. TANGRI: The sporting events, your Honor, some of
11 them were copyrighted material, I'm sure, and some of them were
12 materials that may -- well, in some cases they were authorized
13 to be streamed on the Internet.

14 The sporting events themselves were not on the
15 website. And I am perhaps jumping ahead to the second big
16 issue, which is the criminal issue.

17 But to address your Honor's question directly now, the
18 website neither hosts nor streams any infringing content or
19 copyrighted content without authorization of its own. And
20 there is no allegation that it does. It is what is referred to
21 as a linking website; it puts up links that one can click on.
22 That takes a user to a different website on which the material
23 may reside.

24 THE COURT: So, you have the ball games going on in
25 one area, and then you have this running commentary? Is that

1827ROJC

1 what you're saying? I'm not very good at this.

2 MR. TANGRI: Let me talk a step back.

3 THE COURT: So, you have the citizen commentary on
4 ball games, and that's carried over on a website that has
5 nothing to do with the live streaming of the sporting event?

6 MR. TANGRI: Correct, your Honor. The citizen
7 commentary -- and I don't mean to suggest -- I mean I don't
8 mean to suggest that it's all contemporaneous commentary. Some
9 of it may be wasn't that a great game last night, or didn't
10 that umpire the call at the home plate in the 19th inning of
11 the game last night, or yesterday morning. So, I don't mean to
12 suggest it's all real time, but it is a website -- I mean
13 ESPN.com runs websites where users can comment on things, and
14 so does this.

15 That content, the user commentary, is posted to a
16 website and a server controlled by Rojadirecta. The sporting
17 events are being streamed from or reside upon different servers
18 run by different websites in different companies that
19 Rojadirecta do not control, host or own. It's different.

20 What Rojadirecta has on it, in addition to the
21 fan-based, fan-generated commentary are links to those
22 websites. In the same way that if one were to go to Google or
23 any other search engine and type in a series of words that you
24 were interested in, Google puts up links in the search result
25 page, and when you click on one of those links you go to The

1827ROJC

1 New York Times, or ESPN, or the Washington Post, or the
2 Department of Justice website, but that material although
3 Google got you there isn't Google's material and it is not
4 hosted on Google's server.

5 So, returning for a moment to the hardship inquiry,
6 with the seizure of the domain names a substantial number of
7 people who previously visited the site ceased doing so, and
8 they have lost the ability to post comments on that site and to
9 read comments from other users. They have lost in short the
10 forum through which they were engaged in this First Amendment
11 activity. That's one form of hardship.

12 The government in its opposition said very little
13 about that. It devoted a paragraph to it. It made the
14 assertion that there were other places where users could engage
15 in this speech. That does not serve to justify a prior
16 restraint or vitiate a prior restraint under the First
17 Amendment. And in our briefs, without belaboring the point, we
18 put in cases both in the opening and the reply that address the
19 fact that this is a prior restraint and that a prior restraint
20 cannot be justified by --

21 THE COURT: -- alternative forums.

22 MR. TANGRI: Alternative forums, exactly.

23 THE COURT: And what about the second reason?

24 MR. TANGRI: The second reason -- the second hardship
25 for us is, as I mentioned a moment ago, the diminution in

1827ROJC

1 traffic. We put in evidence that traffic to our site is down
2 substantially since the seizure, and it has not returned to
3 pre-seizure levels; it dropped precipitously immediately after
4 the seizure. It has worked its way back up a little bit, but
5 it is still down substantially from pre-seizure level.

6 The government makes the point that there are other
7 domain names which they have not seized that point to the same
8 site. That is correct. It is also we submit not dispositive
9 because the reality is that most people who look for websites
10 look for them under their familiar names and under first dot
11 com and then dot org, and most U.S. users are not necessarily
12 going to find it under dot ES or dot ME or some other suffix
13 that might take them there from a technical standpoint if they
14 don't know how to put it in.

15 So, it is a hardship; it is a burden. The evidence is
16 that it has driven traffic down. There is no contrary evidence
17 submitted by the United States to show that traffic has not
18 gone down or to show that anything else caused traffic to go
19 down.

20 Again, at the end of the day, in the balance of
21 hardships, there is a debate it seems as to the degree or the
22 severity of the hardship being suffered because of the seizure,
23 but I submit that it really cannot fairly be concluded that
24 there is no hardship being suffered. And because there is
25 nothing on the other side of the balance, we suggest that the

1827ROJC

1 balance tips in our favor.

2 THE COURT: All right. And the second reason is if
3 one is present will the property be used to commit a crime.

4 MR. TANGRI: Correct, your Honor. The answer there is
5 that the property has not been used to commit a crime and will
6 not be used to commit a crime for several reasons, but let me
7 start from what I think is the clearest one.

8 The crime alleged is criminal copyright infringement.
9 Criminal copyright infringement requires a showing of willful
10 conduct. In the context of criminal copyright infringement
11 willfulness is given the same reading as it is given in banking
12 cases and criminal tax cases. It is a specific intent crime.
13 The government must show to establish criminal copyright
14 infringement that the actor knew the act was illegal, not
15 merely that they intended to commit an act.

16 The cases that address criminal copyright infringement
17 cite to cases such as Screws and Cheek and others in that line
18 of specific intent federal crimes, not general intent crimes.
19 And the cases specifically hold -- again these are in the
20 petition, you will have seen them -- that an intent to violate
21 the law must be shown, and knowledge of violating the law must
22 be shown. It's not enough to say you intended to act, you must
23 have been aware that the act was criminal.

24 THE COURT: So, your view is under this petition you
25 should get the property back pending the outcome of the

1827ROJC

1 determination on the complaint filed.

2 MR. TANGRI: That's correct. And if I may just say
3 one more thing on the merits of the copyright issue. The
4 business we were talking about a few moments ago in response to
5 your question about where the content was, when I said this
6 site just links to other conduct, we have cited several cases
7 holding that even in the context of civil copyright claims,
8 merely linking to conduct that might be infringing does not
9 constitute copyright infringement. The government did not cite
10 any cases holding to the contrary. And we submit that for that
11 reason alone, one, there is no showing of copyright
12 infringement at all, but there cannot be a showing of
13 willfulness where the uniform authority says the conduct is
14 legal even under a civil standard, to then hold that it can be
15 willfully criminal is beyond precedent.

16 THE COURT: Thank you very much. Mr. Frey.

17 MR. FREY: Thank you, your Honor.

18 Your Honor, under the law this remedy that Rojadirecta
19 seeks to use in order to obtain its website domain names back
20 is not like a preliminary injunction. It is not a balancing
21 test. The law is very clear that the claimant bears the burden
22 of demonstrating that the statutory prerequisites are
23 satisfied. And Rojadirecta has not done that because it cannot
24 do that. It cannot establish the substantial hardship that is
25 necessary under the statute.

1827ROJC

1 Both the statutory text and the legislative history
2 make very clear that what Congress was concerned with was
3 giving back property pending the final disposition of an action
4 in very limited situations, in situations where the functioning
5 of a business would be prevented, where an individual wouldn't
6 be able to go to work, where an individual would be left
7 homeless.

8 The hardship that Rojadirecta --

9 THE COURT: I think we can concede that nobody is
10 going to be made homeless. But you have seized something now
11 from Rojadirecta, and how are they to do business without this
12 domain name?

13 MR. FREY: Your Honor, the Rojadirecta website is
14 functional today. It is in business. It's located at other
15 domain names, not even name but under multiple domain names.
16 The only access that the government has deprived Rojadirecta of
17 has been through the .org and .com domain names that the United
18 States controls, that Rojadirecta registered through a
19 registrar located in Arizona. That's all that Rojadirecta has
20 been deprived of.

21 And Rojadirecta concedes that the loss in Internet
22 traffic that it has experienced is a mere 32 percent. It
23 speaks to the fact that the website is still very much
24 accessible, it's still being used. It can be found merely by
25 Googling Rojadirecta. It's available today. It's not

1827ROJC

1 prohibiting the financing of their business.

2 THE COURT: Well, what is the utility then of seizing
3 .com and .org with Rojadirecta? I mean if it's so easily
4 available on other sites, what's the utility of your seizure of
5 it? You are sending a message, I understand.

6 MR. FREY: Exactly. It's sending a message that the
7 use of such domain names that are controlled by the United
8 States are not going to facilitate criminal copyright
9 infringement, that the United States is not going to permit
10 that. It sends a message; it has a deterrent effect.

11 THE COURT: What is the criminal violation of the
12 copyright here? I mean what does that consist of?

13 MR. FREY: I'm sorry, your Honor, I guess I don't
14 understand your Honor's question.

15 THE COURT: I phrased it inartfully. What is the
16 violation? What's the precise violation of the copyright
17 statute that you believe Rojadirecta.com and Rojadirecta.org
18 have engaged in?

19 MR. FREY: That they have facilitated criminal
20 copyright infringement by linking to material that is protected
21 under the United States copyright laws.

22 THE COURT: Now, what's protected under the United
23 States copyright laws? It's the ball games?

24 MR. FREY: It's the performance of the sporting
25 events. The individual sporting leagues, the NFL, the NBA, the

1827ROJC

1 NHL, they hold the copyrights to the various sporting
2 performances, and then they enter into leasing arrangements
3 with broadcasters in which those broadcasters will televise
4 those events.

5 THE COURT: Right. At the Yankees they always say
6 unauthorized use is not permitted unless you talk to George
7 Steinbrenner.

8 But as I understand what Mr. Tangri told me, that's
9 handled on a separate server or separate waiver, and what he
10 does -- not what he does -- but what his company does is
11 provide a facility for sports fans like yourself, Mr. Frey, and
12 myself, to say, well, Chris, what did you think of that play?
13 Wasn't he really out at second base? So you and I are engaging
14 in a real-time dialog about a sports event. But the sports
15 event, it's the occasion for the speech, but it has nothing to
16 do with what the Rojadirecta.com and Rojadirecta.org are
17 providing.

18 MR. FREY: Well, your Honor, Rojadirecta and the
19 government disagree about the nature of the website. The
20 government did attach as one of its exhibits to the declaration
21 that was submitted in support of our opposition to that
22 petition a still photo of the website as it existed on January
23 31st of this year, setting forth the way that that home page is
24 visible to the user. But the government submits that it is
25 disingenuous to characterize the Rojadirecta website as a chat

1827ROJC

1 forum. To the extent there is any chatting going on in that
2 website, that's certainly secondary to what Rojadirecta aims to
3 do. Rojadirecta adds links to various copyrighted sporting
4 events as the day progresses, so as events near in time those
5 links are posted allowing Internet users access to those
6 videos.

7 Your Honor can see from that photograph of the website

8 --

9 THE COURT: I'm trying to find the photograph.

10 MR. FREY: I believe it's attached.

11 THE COURT: Exhibit A? Exhibit B?

12 MR. FREY: As Exhibit A, your Honor, to my declaration
13 supporting the opposition.

14 THE COURT: Declaration of Christopher Frey in support
15 of government's opposition.

16 MR. FREY: Yes, your Honor. Exhibit A to that is a
17 screen shot of the Rojadirecta home page as it appeared on
18 January 31st of this year.

19 THE COURT: Oh. But this just looks like a chart.

20 MR. FREY: Well, your Honor, exactly, it looks like a
21 chart because for all intents and purposes that's what it is,
22 it's a chart of links linking to the various sporting events
23 that were occurring that day. On the left-hand side of the
24 website there is a "today on Internet TV" page, and then on the
25 right is there are options to download the last whole matches

1827ROJC

1 and video highlights.

2 As your Honor will see, the chatting -- to the extent
3 it exists -- appears to be limited to the upper left-hand
4 corner under the Rojadirecta banner where it lists forums.

5 THE COURT: So, you focus in on the download matches?
6 Is that it?

7 MR. FREY: It's both the "today on Internet TV"
8 portion on the left as well as the material on the right. Once
9 one clicks on these individual links, a new window opens
10 bearing the Rojadirecta domain names and streams those
11 individual matches, those individual sporting events, which are
12 copyrighted.

13 They were seized after Judge Maas found probable cause
14 to believe that Rojadirecta was in fact engaged in criminal
15 copyright. It's not chatting that's going on on this site;
16 it's criminal copyright infringement.

17 Rojadirecta simply can't establish a substantial
18 hardship that they need to show in order to allow for the
19 immediate return of the property.

20 To characterize or attempt to characterize Rojadirecta
21 as a search engine, something like Google, is disingenuous.
22 The links are being constantly updated in a targeted and
23 purposeful way. It is simply not an avenue for one to go and
24 search for things that happen to be out on the Internet. It
25 brings them all together in a very purposeful manner.

1827ROJC

1 And as our opposition demonstrated, the government
2 believes that Rojadirecta was in fact engaged in willful
3 criminal copyright infringement.

4 THE COURT: Do you agree with Mr. Tangri's definition
5 of willful?

6 MR. FREY: I believe that we would have to establish
7 that they knew that the conduct was illegal. And here we have
8 shown -- as the declaration also offers an example of, Exhibit
9 B to my declaration -- that over and over again Rojadirecta
10 received so-called take-down notices, informing Rojadirecta
11 that it was in violation of the various copyrights and asking
12 it to cease its activity. It was put on notice; it ignored
13 those.

14 For all of those reasons, your Honor, the government
15 would request that you deny the petition and that we move
16 forward with the civil forfeiture complaint.

17 THE COURT: Mr. Tangri, do you want to have a brief
18 response?

19 MR. TANGRI: Yes, please, your Honor. Thank you.

20 On the balancing test, that comes straight from the
21 statute. It's 983(f)(1)(D). That's where the statute says one
22 should balance.

23 On the severity of the hardship that has to be shown,
24 the statute does not by its terms require severe hardship. It
25 gives one example of something that would be a severe hardship,

1827ROJC

1 but it simply says hardship, and it then directs the balancing,
2 as I said.

3 Mr. Frey acknowledges, he says, a mere 32 percent --

4 THE COURT: Well, I noticed that, but 32 percent is a
5 lot.

6 MR. TANGRI: Yeah, it's another way of saying one
7 third, and most businesses if they lost one third of their
8 business would be troubled and they would be suffering a
9 hardship.

10 And again your Honor pointed this out, but there is a
11 little bit of you can't have it both ways here. I mean if
12 there is a purpose to doing this, and if there is a reason for
13 the government to believe it is justified in keeping these
14 domain names, then it must be because they think that it is in
15 some way impeding the operation of the site. And, in fact, as
16 the numbers demonstrate, it is.

17 To respond briefly to a couple other points that Mr.
18 Frey made reference to another window opening and the streaming
19 content then appearing. Their papers acknowledge several
20 points: That streaming content is coming from another site.
21 Just as when you are -- I don't know if your Honor uses Google
22 News -- if you click on a link in Google News to a news story,
23 often a new window appears, that window, that content is coming
24 from The Washington Post, the Detroit Free Press or whatever
25 paper story you are clicking on; it's not coming from Google,

1827ROJC

1 although it arises from clicking on a link in Google News.

2 Back to the search engine analogy, Google News is a
3 good example. It is part of Google. It's is search engine.
4 It in real-time aggregates and selects content that it believes
5 is going to be of interest to its users; it puts them up on the
6 front page. But you can also search for any other content, and
7 whatever you find you go to contest hosted by somebody else.

8 THE COURT: Let's carry that forward, Mr. Tangri, into
9 what Rojadirecta does. Assuming it is like Google, can I click
10 on Google and get an unauthorized baseball game or basketball
11 game? What would my rights be as against -- I mean what would
12 the government do if Google were to give you access to
13 unauthorized rebroadcast of a football game or basketball game?

14 MR. TANGRI: Your Honor, Google -- I think they
15 might -- well, let me answer that. If you search on Google for
16 certain content, I believe you can find it unless Google has
17 for its own reasons taken it down. And I think there is an
18 ongoing sort of up and down and up and down, but it is not I
19 don't think in any way impossible to locate on Google or on any
20 other search engine on the Internet the same content that you
21 can locate via Rojadirecta. It is out there and search engines
22 will lead you to it if you look for it. There is no reason
23 that would not be the case. The government -- I will let the
24 government speak for what the government will do with it or
25 what it's doing vis-a-vis --

1827ROJC

1 THE COURT: That wouldn't be aiding and abetting
2 copyright violations?

3 MR. TANGRI: So, your Honor, a couple words on aiding
4 and abetting, so I'm glad you brought it up.

5 Aiding and abetting is not a crime for which
6 forfeiture -- one, it's not the crime pled in the complaint,
7 and, two, it's not a crime for which forfeiture lies under this
8 forfeiture statute. The crime for which forfeiture lies under
9 this statute is criminal copyright infringement.

10 Now, in the civil copyright infringement realm there
11 are civil claims for what is sometimes called indirect
12 infringement or secondary infringement. Contributory
13 infringement is a particular species. Vicarious infringement
14 is a particular species. Those are common law creations, and
15 the criminal copyright statute does not pick them up. Our
16 position is that there are not common law adumbrations on or
17 penumbras around crimes. The existence of the aiding and
18 abetting statute, it is there but it is expressly not included
19 among the crimes for which forfeiture lies under the forfeiture
20 statute that the government is proceeding under, and that's I
21 think why there is no claim in the civil forfeiture complaint
22 for aiding and abetting.

23 I also think on the merits it would not be shown to be
24 aiding and abetting. Because of the general purpose nature of
25 the site, the fact that it's used for many other things,

1827ROJC

1 wouldn't certainly constitute contributory copyright
2 infringement in a civil case because it is adapted for many
3 other purposes.

4 And to get back to the other purposes for a moment,
5 Mr. Frey showed you the screen shot. I am sure your Honor
6 appreciates this, but that's a screen shot of one page of a
7 website that has many, many pages to it. And as you did point
8 out, the very uppermost left-hand link is forums, and as you
9 click on that link it takes you to all of the discussion forums
10 and all of the various expressive speech that's happening.

11 THE COURT: What if I'm not interested in the
12 discussion forums, I'm really more interested in the sports?

13 MR. TANGRI: Well, then if you click on one of the
14 sporting links you may go to a broadcast that's hosted on some
15 other website by some other actor.

16 THE COURT: And your client bears no responsibility
17 for that?

18 MR. TANGRI: Our client does not originate
19 unauthorized content, and there is not an allegation that it
20 does. The allegation is that this is a linking site. The
21 government's papers and the special agent's affidavit contain a
22 discussion of what is a linking site, and they are express
23 about the fact that it links to conduct hosted by, created by,
24 put there by somebody else on some other website, maintained by
25 some other actor.

1827ROJC

1 THE COURT: Thank you very much.

2 MR. TANGRI: Thank you, your Honor.

3 THE COURT: Mr. Frey and Mr. Tangri, do you want this
4 matter resolved first before we take up the verified complaint
5 that Mr. Tangri and Ms. Calabria want dismissed? What's the
6 best approach here?

7 MR. TANGRI: Your Honor, if I may answer, I would
8 respectfully submit that the 983(f) petition has now been fully
9 briefed and argued, and we would respectfully request that the
10 court rule on it.

11 We would also request that we be allowed to go ahead
12 and file a motion to dismiss, because, as I said, even if you
13 rule in our favor on the 983(f) and we get the domain names
14 back, we still face a forfeiture proceeding and I believe one
15 that is defective on its face.

16 THE COURT: Without suggesting what my ruling is going
17 to be, I mean why am I doing that if I can give you leave to
18 file your motion to dismiss and I address that promptly?

19 MR. TANGRI: Well, your Honor --

20 THE COURT: Why am I doing the same work twice or
21 slightly different work twice?

22 MR. TANGRI: I guess what I would say is if the motion
23 to dismiss I suspect is going to take a little while -- we are
24 prepared to file our motion this week. I mean we're ready to
25 go. I expect the government, I don't know how long they are

1827ROJC

1 going to want to oppose it.

2 THE COURT: Well, ask Mr. Frey. He seems to be an
3 accommodating gentleman.

4 When would you file it, Mr. Tangri?

5 MR. TANGRI: We could file it on Thursday, your Honor.

6 THE COURT: OK. So, assuming we do that. We will do
7 it on Friday the 5th. It's easier to calculate.

8 Mr. Frey, how much time do you need to respond?

9 MR. FREY: Your Honor, the government would like three
10 weeks, which I believe would take us to August 26.

11 THE COURT: OK. So, I mean it will be fully briefed
12 then shortly after Labor Day.

13 MR. TANGRI: That's correct, your Honor. And I mean
14 the website has been seized now since January 31.

15 THE COURT: Yes. But you didn't make your motion
16 until when?

17 MR. TANGRI: We didn't make our motion until June,
18 your Honor, because -- this is an important point and I'm glad
19 you raised it -- we didn't make our motion because we were
20 making I think what everyone would agree were serious efforts
21 to reach a compromise.

22 THE COURT: There is reference to that in somebody's
23 papers that I read. I guess it would be yours, Mr. Frey. You
24 refer to it.

25 MR. FREY: I think both, your Honor. I mean that's

1827ROJC

1 absolutely correct. Those discussions ultimately broke down.
2 The defendants were unwilling to remove copyright-protected
3 material from their website.

4 THE COURT: I'm not interested in that.

5 MR. TANGRI: I would prefer not to get into the merits
6 of the discussions, because I --

7 THE COURT: I agree.

8 MR. TANGRI: -- But I will say, your Honor, we were
9 proceeding down a path, and we thought there was room for
10 compromise, and in the end it turned out there was not, and I
11 think it would be regrettable if we were sort of punished, if
12 you will, for trying to work this out without burdening the
13 court system and then be told we slept on our rights.

14 THE COURT: The point of my raising it is I have known
15 about this only for a couple weeks.

16 I understand the urgency of it, and I will try to
17 press ahead as quickly as possible. In the meantime, you want
18 to make the motion that you have sought permission to make on
19 July 19, you want to make that by this Friday?

20 MR. TANGRI: Yes, your Honor, we shall.

21 THE COURT: And then three weeks after that we will
22 get Mr. Frey's response.

23 MR. SPEARS: Your Honor, may I confer with Mr. Tangri
24 for one second?

25 THE COURT: Sure.

1827ROJC

1 MR. TANGRI: So, your Honor, if I understand
2 correctly, we will file the motion to dismiss on the schedule
3 given, and it will be opposed. Are we permitted a reply?

4 THE COURT: You are permitted a reply. You want a
5 reply on the Friday before Labor Day Weekend, or would you like
6 to have it a little bit later?

7 MR. TANGRI: No, we will reply the Friday before Labor
8 Day Weekend, that's fine.

9 THE COURT: OK. So, the schedule then is the 5th for
10 your motion, the 26th for the response, and the 2nd of
11 September for your reply.

12 MR. TANGRI: Very well. And we would, as I am sure
13 you know, because I am saying over and over, and I apologize,
14 but we respectfully request that to the extent there is room on
15 the court's docket to move forward with the petition while this
16 is being briefed by the parties, we submit they are on
17 different tracks.

18 THE COURT: All right, fine. I appreciate the
19 argument today; it helped to clarify the issues for me.

20 MR. TANGRI: Thank you very much, your Honor.

21 THE COURT: Anything else, Mr. Frey?

22 MR. FREY: No. Thank you, your Honor.

23 MR. TANGRI: No, your Honor. Thank you.

24 THE COURT: Thank you, Mr. Tangri. Thank you,
25 Mr. Spears.