11-3390

To Be Argued By:
CHRISTOPHER D. FREY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-3390

PUERTO 80 PROJECTS, S.L.U.,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
DEPARTMENT OF HOMELAND SECURITY,
IMMIGRATIONS AND CUSTOMS ENFORCEMENT,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Puerto 80 Projects, S.L.U. ("Puerto 80") appeals from a final order entered on August 4, 2011 in the United States District Court for the Southern District of New York, by the Honorable Paul A. Crotty, United States District Judge, denying its petition brought pursuant to Title 18, United States Code, Section 983(f) for the immediate return of certain property seized by the Government.

On January 31, 2011, the Honorable Frank A. Maas, United States Magistrate Judge, found probable cause to believe that two domain names controlled by Puerto 80 — rojadirecta.com and rojadirecta.org (collectively, the "Rojadirecta Domain Names") — had been used to commit and facilitate the commission of criminal copyright infringement, and that therefore the domain names were subject to seizure and civil forfeiture pursuant to Title 18, United States Code, Sections 2323(a)(1) and 981(b). Accordingly, Judge Maas issued two seizure warrants that same day, authorizing the Government to seize the Rojadirecta Domain Names. The Government seized the domain names on February 1, 2011, pursuant to the January 31, 2011 warrants.

On June 13, 2011, Puerto 80 filed a petition pursuant to Title 18, United States Code, Section 983(f), which sought the immediate return of the Rojadirecta Domain Names. On August 4, 2011, Judge Crotty denied that petition in its entirety.

Statement of Facts

A. The Rojadirecta Domain Names

Prior to their seizure by the Government on February 1, 2011, the Rojadirecta Domain Names,[*] which were both

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[*] A domain name is a simple way to identify computers on the Internet. (A. 91). Each domain name is composed of one or more parts, or "labels," that are delimited by periods, such as "www.example.com." (*Id.*). Each domain name is associated with an Internet Protocol ("IP") address, which is a unique machine-readable

registered with GoDaddy.com, Inc., a popular registrar located in Scottsdale, Arizona, directed Internet users to a website commonly known as "Rojadirecta." (A. 89, 124).* Rojadirecta was a "linking" website that collected and catalogued links to files on third-party websites, which, in turn, contained illegal copies of copyrighted content, namely, (1) broadcasts of daily live sporting event and Pay-Per-View event telecasts, and (2) downloadable event telecasts that had been previously aired. (A. 96-97, 124-25). Users of the Rojadirecta website would simply click on a particular link to begin the process of "streaming" (in the case of live telecasts) or downloading (in the case of prior telecasts) to their own computer an illegal broadcast of a sporting or Pay-Per-View event from the third-party website that hosted the program. (*Id.*). Linking websites are extremely popular because they allow users to quickly browse content and locate illegal streams that would otherwise be more difficult to find through individual manual searches of the Internet. (A. 96-97, 124).

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numeric address that computers use to identify each other on the Internet. (*Id.*). Every computer connection to the Internet must be assigned an IP address so that Internet traffic sent from or to that computer is directed properly from its source to its destination. (A. 92). If an individual or business wants to purchase a domain name, the individual or business must buy it through a company called a "registrar." (*Id.*).

* "Br." refers to Puerto 80's brief on appeal; "A." refers to the appendix to Puerto 80's brief on appeal; and "Add." refers to the addendum to the Government's brief on appeal.

The holder of the copyrights to all television broadcasts and other footage of any given athletic event is the associated individual sports league. (A. 94). The U.S. Copyright Act, Title 17, United States Code, Sections 101, *et seq*., gives the holder of such copyrights various exclusive rights, including the right to control public performances and distribution of the works. *See* 17 U.S.C. § 106. In turn, the copyright holding sports leagues enter into contractual arrangements with television networks, which pay the leagues fees for the rights to broadcast telecasts of their copyrighted sporting events. At no time did the relevant copyright holding sports leagues in this case authorize Rojadirecta to broadcast telecasts of their sporting events over the Internet. (A. 94, 128, 130).

Prior to the February 1, 2011 seizure, Rojadirecta's homepage displayed three general categories of links to content available for viewing: (1) "Today on Internet TV"; (2) "Download last full matches"; and (3) "Last video highlights." (A. 124-25). Links for daily sporting events were displayed under the "Today on Internet TV" category header. (*Id.*). The links under the "Today on Internet TV" category header changed on a daily basis; links were added as the day progressed and an event's start time drew closer. (A. 125). The sporting events and their starting times corresponded to individual sporting leagues' official events and starting times. (A. 125).

When a user selected a link for a particular sporting event under the "Today on Internet TV" category header, the type of link, the name of the broadcasting station (*e.g.*, ESPN), the language option, and the type of Internet media player were subsequently displayed. (A. 126). Once a user

selected a specific link option, that user was then taken to a new window, which displayed the selected program and bore a Uniform Resource Locator, or "URL,"* containing the words "rojadirecta." (A. 125-26). Because the content ran on a live stream from another website, the selected show did not start at the beginning of the program; instead, the program ran from whatever particular point the show was presently at in the stream. (A. 127-30). The event broadcasts on the Rojadirecta website were also identical to the authorized broadcast of that same event, despite the fact that these broadcasts were not authorized by the relevant copyright holders. (A. 128, 130). In addition, advertisements that were separate and distinct from any commercials airing during the stream of the sporting event broadcast were periodically displayed at the bottom of the video during the live stream. (A. 126-30).

B. The Government's Seizure of the Rojadirecta Domain Names

On January 31, 2011, the Honorable Frank Maas, United States Magistrate Judge for the Southern District of New York, considered the Government's *ex parte* application for warrants to seize the Rojadirecta Domain Names. (A. 88-154). In reviewing that application, Magistrate Judge Maas found that probable cause existed to believe that the domain names had been used to commit and facilitate the commission of criminal copyright infringe-

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* A URL is code that specifies a particular webpage or file on the Internet. If clicked on by a user, a URL can, for example, bring up the relevant webpage in an Internet browser or run a program. (A. 97 n.3).

ment and that they contained evidence of that crime. (A. 69-82, 134). Accordingly, Magistrate Judge Maas issued two warrants authorizing the seizure of the Rojadirecta Domain Names (collectively, the "Seizure Warrants"). (A. 69-82). The following day, on or about February 1, 2011, ICE agents executed the Seizure Warrants.

C. Puerto 80's Seized Asset Claim Forms and the Government's Complaint

More than a month and a half later, on March 22, 2011, Puerto 80 filed Seized Asset Claim Forms with the U.S. Department of Homeland Security, seeking the return of the Rojadirecta Domain Names. (A. 156-59, 207-25). In response to Puerto 80's filing of the Claim Forms, the Government was required to file any civil complaint within 90 days of the filing of the Claim Forms and filed such a complaint (the "Complaint") on June 17, 2011, pursuant to the procedures set forth in Title 18, United States Code, Section 983(a)(3)(A), alleging that there was probable cause that the Rojadirecta Domain Names consisted of "property used or intended to be used to willfully infringe a copyright in violation of 18 U.S.C. § 2319 and/or unlawfully transmit copyrighted sporting event telecasts in violation of 18 U.S.C. § 2319B." (A. 221). On August 5, 2011, Puerto 80 filed a motion to dismiss the Complaint, which is presently pending before the District Court. (Add. 5).

D. Puerto 80's Section 983(f) Petition

Separately, on June 13, 2011, and more than four months after ICE's execution of the Seizure Warrants, Puerto 80 filed a petition pursuant to Title 18, United

States Code, Section 983(f) (the "Petition") in the United States District Court for the Southern District of New York, seeking the immediate release of property seized by the Government on the basis that the seizure had caused "substantial hardship" under Section 983(f)(1)(C). (A. 5-11). The case was assigned to the Honorable Paul A. Crotty, United States District Judge. (A. 1-4). In its Petition, Puerto 80 argued principally that the Government's continued possession of the Rojadirecta Domain Names would substantially and irreparably harm the goodwill of the Rojadirecta website and drive customers away. (A. 8-9, 193-94). Puerto 80 also asserted that the seizure constituted an invalid prior restraint of Puerto 80's users' and readers' speech in violation of the First Amendment. (A. 8-9, 194-97).

On July 11, 2011, the Government argued in response that Puerto 80 had failed to demonstrate the kind of substantial hardship required by statute to require the Government to immediately release the seized property. (A. 264-69). In addition, the Government argued that returning the Rojadirecta Domain Names to Puerto 80 would afford Puerto 80 the ability to commit additional criminal acts, because Puerto 80's prior use of the Rojadirecta Domain Names to operate the Rojadirecta website had facilitated criminal copyright infringement. (A. 269-78).

On August 2, 2011, the District Court heard oral argument, during which counsel largely reiterated the arguments from their written submissions. (A. 387-411). On August 4, 2011, the District Court entered an Order, denying Puerto 80's Petition. (Add. 1-5). Judge Crotty

found that Puerto 80 had not satisfied the substantial hardship requirement of Section 983(f). (Add. 3-5). Specifically, the District Court held that because the Rojadirecta website was available on the Internet at other domain names, and because Puerto 80 had not explained how it generates profit or argued a loss of a significant amount of revenue as a result of the seizure, the purported reduction in visitor traffic to its website did not constitute "substantial hardship" under Section 983(f). (Add. 3-4). The District Court further held that the First Amendment considerations raised by Puerto 80 did not establish the kind of substantial hardship required to prevail under Section 983(f). (Add. 4-5). The District Court did not reach the question of whether Puerto 80's prior use of the Rojadirecta Domain Names had facilitated criminal copyright infringement. (Add. 5).

On August 18, 2011, Puerto 80 filed a timely notice of appeal. (A. 412).

ARGUMENT

The District Court's Denial of Puerto 80's 18 U.S.C. § 983(f) Petition Was Proper

The sole issue for this Court to decide is whether the District Court abused its discretion in denying Puerto 80's Section 983(f) Petition. As discussed below, the District Court was well within its discretion in denying Puerto 80's Petition in its entirety. Further, the Government's seizure of the Rojadirecta Domain Names did not violate the First Amendment.

A. The District Court Properly Found That Puerto 80 Did Not Satisfy the Substantial Hardship Requirement of Section 983(f)(1)(C).

1. Applicable Law

Congress enacted Section 983(f) as part of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 202, 208-09 (2000), in order to provide a mechanism for the release of property during the pendency of a civil forfeiture proceeding in certain circumstances in which the Government's continued possession of the property would pose a substantial hardship to a claimant. *United States* v. *Undetermined Amount of U.S. Currency*, 376 F.3d 260, 263-64 (4th Cir. 2004). The statute places a hefty burden on the claimant, and provides that a claimant is "entitled to immediate release of seized property" if the claimant can demonstrate the following, including a showing of "substantial hardship to the claimant":

> (A) the claimant has a possessory interest in the property;
>
> (B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial;
>
> (C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an

> individual from working, or leaving an individual homeless;
>
> (D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and
>
> (E) none of the conditions set forth in paragraph (8) applies.

18 U.S.C. §983(f)(1). Paragraph (8), in turn, provides that Section (f):

> shall not apply if the seized property —
>
> (A) is contraband, currency or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;
>
> (B) is to be used as evidence of a violation of the law;
>
> (C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or
>
> (D) is likely to be used to commit additional criminal acts if returned to the claimant.

Id. § 983(f)(8).

As reflected by the examples of "substantial hardship" explicitly articulated in subsection 983(1)(C), the nature of the difficulty encountered by a claimant must "go beyond mere inconvenience." *In re Petition of Moran*, No. 99-cv-248-MMA (CAB), 2009 WL 650281, at *3 (S.D. Cal. Mar. 10, 2009); *see* 18 U.S.C. § 983(f)(1)(C) ("substantial hardship" includes examples "such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless"). Indeed, the statutory text makes clear that Congress intended this hardship provision to apply only in "the most urgent situations." *Kaloti Wholesale, Inc.*, v. *United States*, 525 F. Supp. 2d 1067, 1070 (E.D. Wis. 2007) (citing *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989)). Thus, while Section 983(f) offers a claimant a "detailed and comprehensive mechanism" for obtaining the release of property subject to civil forfeiture, it "strictly limits the situation in which such relief is available." *United States* v. *Contents of Accounts*, Nos. 10-5799 & 10-5800, 2011 WL 9167, at *5 (6th Cir. Jan. 4, 2011).

In order to obtain the release of property under Section 983(f), a claimant bears the burden of demonstrating that the statutory prerequisites are satisfied. *Contents of Accounts*, 2011 WL 9167, at *5; *Undetermined Amount of U.S. Currency*, 376 F.3d at 264 (citing Section 983(f)(6)); *United States* v. *Huntington National Bank*, No. 2:07-cv-0080, 2007 WL 2713832, at *1 (S.D. Ohio Sept. 14, 2007) (same).

This Court reviews the denial of preliminary injunctive relief for an abuse of discretion. *See, e.g.*, *United States* v.

Contents of Accounts, 629 F.3d 601, 606 (6th Cir. 2001). Moreover, the district court's interpretation of statutory provisions are reviewed *de novo*, whereas its findings of fact are to be reversed only if this Court finds them to be clearly erroneous. *United States* v. *Undetermined Amount of U.S. Currency*, 376 F.3d 260, 264-65 (4th Cir. 2004).

2. Discussion

Before the District Court, Puerto 80 articulated two purported hardships in support of its Petition: (1) an alleged decrease in the total number of visits to the Rojadirecta website combined with an associated loss of goodwill from Internet users accessing that site; and (2) a violation of the First Amendment rights of its website users as a result of the seizure, which purportedly constituted an invalid prior restraint by the Government. (A. 8-9, 193-97). For the reasons discussed below, the District Court did not abuse its discretion in deciding that these alleged harms did not rise to the level of "substantial hardship" as contemplated by Congress in authorizing a district court to order the immediate release of seized property under Section 983(f). (Add. 1-5).

First, the District Court found, as Puerto 80 itself acknowledged, that shortly after the Government's seizure of the Rojadirecta Domain Names, Puerto 80 transferred its website to alternative domain names on the Internet which are beyond the jurisdiction of the United States. (Add. 3-4). Thus, the Rojadirecta website itself remains available on the Internet to its users this very day. (*Id.*). In rejecting Puerto 80's contention that the Rojadirecta website's experience of a 32% reduction in visitor traffic constituted substantial hardship, the District Court noted

that nowhere in its Petition had Puerto 80 explained how its generates any profit in operating the Rojadirecta website or argued that it had incurred a financial loss as a result of the Government's seizure. (*Id.*). On this record, the District Court properly concluded that the claimed reduction in visits to the Rojadirecta website did not give rise to a substantial hardship for the purposes of Section 983(f)(1)(C).

Similarly, the District Court did not abuse its discretion in finding that Puerto 80 likewise failed to satisfy the substantial hardship requirement of Section 983(f) in alleging its First Amendment claim. Before the District Court, Puerto 80 argued that, in seizing the Rojadirecta Domain Names, the Government suppressed content in the "forums" located on the Rojadirecta websites. (Add. 4 (citing A. 194)). However, the District Court found that "[t]he main purpose of the Rojadirecta websites . . . is to catalog links to the copyrighted athletic events — any argument to the contrary is clearly disingenuous." (*Id.*). "Although some discussion [chats] may take place in the forums," the District Court further reasoned, "the fact that visitors must now go to other websites to partake in the same discussions is clearly not the kind of substantial hardship that Congress intended to ameliorate in enacting § 983." (*Id.* (citing 145 Cong. Rec. H4854-02 (daily ed. June 24, 1999)). Accordingly, the District Court concluded that "the First Amendment considerations dis-

cussed here certainly do not establish the kind of substantial hardship required to prevail on this petition." (*Id.*).[*]

Indeed, in crafting the text of Section 983(f), Congress explicitly mandated that a claimant is entitled to the immediate release of seized property *only* in the most urgent of situations, including, among others, those that make it impossible to run the impacted business. 18 U.S.C. § 983(f)(1)(C) (requiring petitioner to demonstrate that ". . . the continued possession by the Government will cause substantial hardship to the claimant, *such as preventing the functioning of a business* . . . .") (emphasis added); *United States* v. *$6,787 in U.S. Currency*, No. 1:06-cv-1209 WSD, 2007 WL 496767, at *2 (N.D. Ga. Feb. 13, 2007) (holding that while absence of a vehicle may decrease petitioner's profit margin, such loss does not amount to substantial hardship because it does not prevent functioning of business).

Moreover, the legislative history of the Civil Asset Forfeiture Reform Act underscores Congress's intent to severely limit the situations in which such immediate relief would be available. In recommending its passage, the

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[*] Puerto 80 does not claim that the District Court's factual finding regarding the nature of the Rojadirecta websites was in error, but in any event, the District Court's finding that the main purpose of the website was to list copyrighted links is not clearly erroneous, as there is no evidence to give this Court any "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

House Judiciary Committee laid out several examples of situations, not unlike the ones contained in the actual text of Section 983(f)(1)(C), in which irreparable damage may be done to a property owner's interests even if the owner ultimately prevails in a civil forfeiture proceeding and, as such, constitute a showing of hardship that may justify a return of property before final judicial disposition of forfeiture proceedings. First, a claim of substantial hardship may be shown if the property seized is "used in a business," wherein "its lack of availability for the time necessary to win a victory in court could have forced its owner into bankruptcy." H.R. Rep. No. 106-192, at 17 (1999). Second, "if the property is a car, the owner might not have been able to commute to work until it was won back." *Id*. Finally, "if the property is a house, the owner may have been left temporarily homeless (unless the government let the owner rent the house back)." *Id*. The Judiciary Committee's fear in such instances was that, despite a weak government case, the property owner would "settle with the government and lose a certain amount of money in order to get the property back as quickly as possible." Furthermore, Congress did not want "individuals' lives and livelihoods . . . [to] be in peril during the course of a legal challenge to a seizure." 145 Cong. Rec. H4854-02 (daily ed. June 24, 1999) (statement of Rep. Hyde).

Viewed in light of the statutory text and this legislative history, the District Court did not abuse its discretion in concluding that Puerto 80's claims of purported hardship did not rise to the sufficiently substantial degree that motivated Congress to enact Section 983(f).

B. The Government's Seizure Does Not Violate the First Amendment

Puerto argues on appeal, as it did before the District Court, that the Government's seizure of the Rojadirecta Domain Names constituted a substantial hardship because the seizure violated the First Amendment, as it "constituted a prior restraint on speech." (Br. 13). Puerto 80's argument should be rejected.

1. Applicable Law

The Supreme Court has consistently upheld "the time-honored distinction between barring speech in the future and penalizing past speech" — a distinction "critical to our First Amendment jurisprudence." *Alexander* v. *United States*, 509 U.S. 544, 553–54 (1993); *accord Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 714–20 (1931) (distinguishing "previous restraint" from "subsequent punishment"; the latter is "appropriate remedy, consistent with constitutional privilege"). The danger of a prior restraint — and the reason it receives "special emphasis" in First Amendment jurisprudence, *Near*, 283 U.S. at 714 — is that the speaker can be punished solely for violating an administrative or judicial order barring that speech, even if the content of the speech itself is protected: a prior restraint "permits sanctions to be imposed for failure to obtain the censor's approval, regardless of the nature of the expression. Expression may be punished in a censorship scheme upon proof of one fact — the failure to obtain prior approval." *In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979), *abrogated on other grounds by Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 31 (1984); *accord Near*, 283 U.S. at 712–13 ("[F]urther

publication is made punishable as a contempt. This is of the essence of censorship."); *Lawson* v. *Murray*, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in denial of certiorari) ("The very episode before us illustrates the reasons for this distinction between remedial injunctions and unconstitutional prior restraints. . . . [T]he only defense available to the enjoined party is factual compliance with the injunction, not unconstitutionality."); *see Lusk* v. *Village of Cold Spring*, 475 F.3d 480, 485-87 & n.6 (2d Cir. 2007) (defining prior restraint as "law requiring prior administrative approval of speech").

Where expression is conditioned on governmental permission, the First Amendment generally requires heightened procedural protections to guard against impermissible censorship. *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965); *see id.* at 54 (question is whether "danger of unduly suppressing protected expression" warrants procedural protections). However, prior-restraint regulations that operate less like "a censorship system" — such as regulations that do not engage in "direct censorship of *particular* expressive material," or where the government "does not exercise discretion by passing judgment on the content of any protected speech" — do not require "the full procedural protections set forth in *Freedman*." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 228-29 (1990) (plurality opinion) (emphasis added; internal quotation marks omitted). In any event, where there is no prior restraint at all, *Freedman*'s heightened procedural requirements to a regulation do not apply. *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975) ("We held in *Freedman* . . . that a system of prior restraint runs afoul of the First Amendment if it lacks certain

safeguards" (emphasis added)); *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 280-81 (2001) (describing *Freedman*'s procedural requirements as "guard[ing] against unconstitutional *prior restraint* of expression"; in *Freedman*, "expression [could not] begin prepermission" (emphasis added)); *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (characterizing *Freedman* as averting dangers of licensing scheme); *Waters* v. *Churchill*, 511 U.S. 661, 687 (1994) (Scalia, J., concurring in judgment) ("*Freedman* . . . was . . . a prior restraint case; review and requirement of procedures were to be expected.").

2. Discussion

a. The Government's Seizure Is Not a Prior Restraint

The Government's seizure of the Rojadirecta Domain Names, motivated not by a desire to limit expression, but rather as an effort to combat the theft of intellectual property, is not a prior restraint in violation of the First Amendment. In *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986), the Supreme Court sustained a court order, issued under a general nuisance statute, that closed down an adult bookstore that was being used as a place of prostitution and lewdness. Specifically, in rejecting a claim that the closure order amounted to an improper prior restraint on speech, the Supreme Court reasoned:

> The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of par-

> ticular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited — indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

478 U.S. at 705-06 & n.2. Here too, the seizure in no way imposes a restraint on particular materials, as Rojadirecta's users remain free to carry on the chat aspect of the website via alternative domain names. Moreover, the Government's seizure was not imposed based on an advance determination about any expressive aspect of the Rojadirecta website.

Similarly, in *Alexander*, a case involving a First Amendment challenge to a forfeiture statute related to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the petitioner argued that the application of RICO's forfeiture provisions following his conviction on certain racketeering offenses constituted a prior restraint on speech and hence violated the First Amendment. In rejecting petitioner's prior restraint claim, the Supreme Court noted that the "forfeiture order . . . does not *forbid* petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities." 509 U.S. at 550-51. Rather, unlike those traditional prior restraint cases, the forfeiture order in *Alexander* "impose[d] no legal impediment to —

no prior restraint on — petitioner's ability to engage in any expressive activity he chooses." 509 U.S. at 551. The Supreme Court noted that the petitioner was perfectly free to resume his adult entertainment business; but he could not finance that enterprise with assets derived from his racketeering activity. *Id.* ("He is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses"); *cf. Arcara*, 478 U.S. at 705 ("The severity of this [First Amendment] burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location."). Here, Rojadirecta's users remain free to express themselves in the chat forums found on the fully operational Rojadirecta website, which remains accessible on the Internet to this very day through alternative domain names. (A. 194 n.5). Further, although Rojadirecta's users will be unable to access the links that present copyright issues via the Rojadirecta Domain Names, such a limitation does not present First Amendment issues. *See Harper & Row Publishers Inc.* v. *Nation Enterprises*, 471 U.S. 539, 555-60 (1985) (copyright infringement is not protected by the First Amendment). As such, the Government's seizure cannot be fairly characterized as a prior restraint.

b. Extraordinary Procedural Protections Are Required Only for Prior Restraints

Because the Government's seizure of the Rojadirecta Domain Names is not a prior restraint, it is not subject to the heighted procedural protections articulated in *Freed-*

man (nor is it even subject to the lesser procedures mandated by, *e.g.*, *City of Littleton* v. *Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781–84 (2004)). Relying on *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989), Puerto 80 argues that a greater showing than probable cause is required to justify seizing the Rojodirecta Domain Names. (Br. 24-25). Puerto 80's reliance on this case is misplaced. The Supreme Court's imposition of procedural safeguards in *Fort Wayne Books* turned on the nature of the seizure, which was targeted at the books themselves because they were allegedly obscene. 489 U.S. at 51. In other words, to establish the criminal violation that led to the seizure, the state was required to delve into an inquiry related to the content of the books, *i.e.*, expression.[*] Here, however, the Government's seizure was occasioned by a violation of law unrelated to speech, namely, intellectual property theft, and thus did not implicate the same risks of content regulation that the presumptions of protection were designed to protect.

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[*] To be sure, the Supreme Court's ruling in *Alexander* turned, in part, on there being more process than was afforded in the Government's obtaining of an *ex parte* warrant here. However, *Alexander* involved a prohibition on obscenity, and thus raised concerns about Government infringement of presumptively protected materials. The instant seizure involves no similarly presumptively protected material.

c. The Government's Seizure Survives Traditional First Amendment Scrutiny

To the extent that the Government's seizure of the Rojadirecta Domain Names had an unintended and secondary impact on speech rights — and nothing in the record reflects that there was such an impact — First Amendment scrutiny would apply "only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . , or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." *Arcara*, 478 U.S. at 706-77.* Contrary to Puerto 80's assertions, however, nothing in the record suggests that the Government's seizure here was motivated by a desire to

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* This Court itself has rejected incidental-burden-on-expression arguments similar to those advanced here by Puerto 80 based on the Supreme Court's holding in *Arcara*. *See, e.g.*, *Church of American Knights of the Ku Klux Klan* v. *Kerik*, 356 F.3d 197, 209 (2d Cir. 2004) (concluding that New York's anti-mask statute was a conduct-regulating statute of general application that imposed an incidental burden on the exercise of free speech rights and did not implicate the First Amendment) (citing *Arcara*, 478 U.S. at 706). Additionally, the Supreme Court has recently reiterated the more general point that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health, Inc.*, 131 S. Ct. 2653, 2664-65 (2001).

stop the dissemination of expression. To the contrary, the instant seizure was motivated solely by a desire to curtail theft of valuable intellectual property on the Internet. (A. 93-97). Moreover, like in *Alexander*, the seizure that Puerto 80 challenges involves the Government's application of a forfeiture statute that is wholly neutral as to expression. *Alexander*, 509 U.S. at 551 ("The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or nonexpressive nature of the assets forfeited; books, sports cars, narcotics and cash are all forfeitable alike under RICO."). The Government seized the Rojadirecta Domain Names pursuant to Sections 2323(a)(1)(A)-(B) and 981(b) of Title 18 — two provisions that are entirely neutral as to the nature of the assets that may permissibly be civilly forfeited. *See* 18 U.S.C. § 981(b) ("*[A]ny property* subject to forfeiture to the United States . . . may be seized by the Attorney General . . . ."); 18 U.S.C. § 2323(a)(1)(A)-(B) ("The following property is subject to forfeiture to the United States Government: (A) *Any article*, the making or trafficking of which is prohibited under section 506 of title 17, or section . . . 2319 . . . of this title. (B) *Any property* used, or intended to be used, in *any manner or part* to commit or facilitate the commission of an offense referred to in subparagraph (A).") (emphasis added).

However, even assuming this to be a case where an intermediate level of scrutiny is appropriate, the Government's actions here clearly satisfy the test articulated by the Supreme Court in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government

regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

First, the Government's seizure was within its constitutional power and in furtherance of an important or substantial government interest, *i.e.*, protecting the rights of copyright holders. The Constitution explicitly grants Congress authority to foster the progress of science and creativity. U.S. Const. art. I, § 8, cl. 8 ("Congress shall have Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings."); *see also 321 Studios* v. *Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1101-02 (N.D. Cal. 2004) (recognizing the Government's substantial interest in copyright protection).

Second, the Government's interest in preventing copyright infringement is unrelated to the suppression of expression. Courts have repeatedly upheld copyright restrictions against challenges that such limitations restrict speech. *See, e.g.*, *Harper & Row Publishers Inc.* v. *Nation Enterprises*, 471 U.S. at 555-60 (1985) (holding that the First Amendment does not shield against liability for copyright infringement); *Universal City Studios, Inc.* v. *Corley*, 273 F.3d 429, 454-59 (2d Cir. 2001) (upholding the district court's granting of a preliminary injunction to copyright holder over First Amendment challenge); *Universal City Studios, Inc.* v. *Reimerdes*, 82 F. Supp. 2d

211, 221 (S.D.N.Y. 2000) (noting that to the extent there is any tension between free speech and protection of copyright, the Supreme Court has found it to be accommodated fully by doctrines such as fair use).

Finally, the incidental restriction on the alleged First Amendment freedoms of Rojadirecta's users and readers is no greater than is essential to the furtherance of the Government's compelling interests in preventing copyright infringement and the theft of valuable intellectual property. Particularly in light of the fact that its users are still free to exercise their speech rights in Rojadirecta's chat forums by accessing the website via alternative domain names on the Internet, any incidental First Amendment restrictions are no greater than necessary here. *See Arcara*, 478 U.S. at 706 ("It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction."). For these reasons, the Government's seizure survives traditional First Amendment scrutiny.

Nevertheless, as a part of its attempt to argue that the Government's seizure does not pass muster under the First Amendment, Puerto 80 asserts on appeal that the Complaint filed against Puerto 80 was insufficient to allege copyright infringement. (Br. 26-32). However, that very issue is still pending before the District Court, which has yet to determine whether to grant the motion to dismiss filed by Puerto 80 on August 5, 2011. (Add. 4-5; Puerto

80's Request for Judicial Notice, Ex. C). Indeed, claims of the kind raised by Puerto 80 here are more traditionally brought in connection with the filing of an answer to the Government's civil forfeiture complaint or as part of a motion to dismiss, *see, e.g.*, *United States* v. *All Right, Title and Interest in Real Property and a Building Known as 16 Clinton Street, New York, New York*, 730 F. Supp. 1265 (S.D.N.Y. 1990), or by filing its own civil complaint, *see, e.g.*, *U-Series Intern. Services, Ltd.* v. *United States*, 1995 WL 671567, at *3-*5 (S.D.N.Y. Nov. 7 1995). To date, Puerto 80 has elected not to pursue either of these avenues with respect to its First Amendment claim. Although the District Court, in denying Puerto 80's Petition, specifically noted that Puerto 80 could raise its First Amendment argument in a motion to dismiss the Government's civil forfeiture complaint, Puerto 80 chose not to do so. (Add. at 4; Puerto 80's Request for Judicial Notice, Ex. C).

d. The Statute That Authorized the Government's Seizure Is Not Overbroad

Finally, Puerto 80 argues that the statute under which the Government seized the Rojadirecta Domain Names is overbroad. (Br. at 32-34). This argument likewise fails. The "overbreadth" doctrine permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if the individual has engaged in speech that could be regulated under a more narrowly drawn statute. *See, e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973) ("Such claims of facial overbreadth have been entertained in cases involving statutes which, by their

terms, seek to regulate 'only spoken words.' . . . Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.") (omitting internal citations); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 798-801 (1984) ("[T]he Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it."). A law is "substantially overbroad" when there is more than a mere possibility that the law might be applied in a way that violates the First Amendment; the standard is not met "in cases where, despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." *Secretary of State of Md.* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 964-65 (1984) (internal quotation marks and alterations omitted); *accord Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800-01 & n.19 (1984); *see Virginia* v. *Hicks*,

539 U.S. 113, 119 (2003) (substantiality requirement avoids "substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech"). Substantially overbroad laws are those with an "embracing sweep . . . over protected expression," that lack a "central core of constitutionally regulable conduct." *New York* v. *Ferber*, 458 U.S. 747, 771 & n.26 (1982); *accord Munson*, 467 U.S. at 965-66. In the context of obscenity laws, the Supreme Court has recognized that some degree of overbreadth is both inevitable and acceptable: "deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Fort Wayne Books*, 489 U.S. at 60 (internal quotation marks and citations omitted). The mere threat of arrest or prosecution does not render a criminal statute substantially overbroad: "overbreadth jurisprudence has consistently focused on whether the prohibitory terms of a particular statute extend to protected conduct; that is, [the Supreme Court has] inquired whether individuals who engage in protected conduct can be convicted under a statute." *Virginia* v. *Black*, 538 U.S. 343, 371 (2003) (Scalia, J., concurring in part and dissenting in part); *see, e.g.*, *id.*, 538 U.S. at 365 (plurality opinion) ("The provision permits the Commonwealth to arrest, prosecute, *and convict* a person . . . ." (emphasis added)); *Houston* v. *Hill*, 482 U.S. 451, 459 (1987) (a statute "that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held

facially invalid" (emphasis added)); *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct" (emphasis added)); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 397 (1992) (White, J., concurring in judgment) (deeming the ordinance at issue "fatally overbroad because it *criminalizes* . . . expression protected by the First Amendment." (emphasis added)).

Puerto 80's argument regarding the purported overbreadth of the Government's seizure is nothing more than an attempt to recast its argument that the Government's seizure suppresses speech or expression. Like the RICO statute at issue in *Alexander*, however, the forfeiture statute implicated here (Title 18, United States Code, Section 2323(a)(1)) "does not criminalize constitutionally protected speech and therefore is materially different from the statutes at issue in [the Supreme Court's] overbreadth cases." *Alexander*, 509 U.S. at 555 (comparing the RICO forfeiture statute to the statutes at issue in *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987)). As such, the forfeiture statute under which the Government's seizure was authorized does not present constitutional infirmities due to its purported overbreadth.

CONCLUSION

The order in the case should be affirmed.

Dated: New York, New York
November 15, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 6,990 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: IRIS LAN,
Assistant United States Attorney

ADDENDUM

Add. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PUERTO 80 PROJECTS, S.L.U.,

Petitioner,

- against -

UNITED STATES OF AMERICA AND, DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents.

11 Civ. 3983 (PAC)

This Order also pertains to:
11 Civ. 4139 (PAC)

ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

On or about February 1, 2011, Immigration and Customs Enforcement ("ICE") agents enforced a warrant signed by Magistrate Judge Frank Maas authorizing the seizure of two domain names: Rojadirecta.com and Rojadirecta.org (the "domain names"). In signing the warrant, Magistrate Judge Maas found probable cause to believe that the domain names were subject to forfeiture because they had been used to commit criminal violations of copyright law. On June 13, 2011, Plaintiff Puerto 80 Projects, S.L.U. ("Puerto 80") filed the instant petition for the release of the domain names pursuant to 18 U.S.C. § 983(f). On June 17, 2011, the Government filed its Verified Complaint. On August 2, 2011, the Court conducted a conference and heard oral argument on the instant petition. The Court also set a briefing schedule for Puerto 80's motion to dismiss the Verified Complaint.

For the following reasons, Puerto 80's petition for release of the domain names under § 983 is DENIED.

Add. 2

LEGAL STANDARD

Under 18 U.S.C. § 983(f)(1), an individual whose property has been seized is entitled to "immediate release" of the seized property where:

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of the business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

Under § 983(f)(8):

This subsection shall not apply if the seized property —

(A) is contraband, currency or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

DISCUSSION

Rojadirecta.com and Rojadirecta.org were websites that collected and organized links to third-party websites which directed visitors to live athletic events and other pay-per-view

presentations which were subject to copyright law. (Gov't Mem. 4.) The websites displayed three categories of links including "Today on Internet TV," "Download last full matches," and "Last video highlights." (Id.) The website also contained several other links, including one labeled "Forums." (Id.)

The Government argues that the domain names should not be released because (i) Puerto 80 has failed to demonstrate a substantial hardship under §983(f)(1)(C); and (ii) because, under § 983(f)(8)(D), the domain names would afford Puerto 80 the ability to commit additional criminal acts. The Government does not discuss the other elements of § 983(f)(1), and so the Court assumes that the Government agrees that Puerto 80 meets these criteria.

I. Substantial Hardship Under § 938(f)(1)(C)

Puerto 80 argues that if the Government does not immediately release the domain names, Puerto 80 will be caused substantial hardship, "including but not limited to, depriving it of lawful business in the United States and throughout a substantial part of the world." (Pl. Mem. 9.) In addition, "continued seizure of the domain names infringes on Puerto 80's users' and readers' First Amendment rights, thus imposing further hardship." (Id.) In support of their substantial hardship assertion, Puerto 80 notes that Rojadirecta has experienced a 32% reduction in traffic since the seizure and that continued seizure will cause further erosion of goodwill and reduction in visitors. (Id.)

As the Government points out (and as Puerto 80 admits), however, Puerto 80 has, since the seizure, transferred its website to alternative domains which are beyond the jurisdiction of the Government, including www.rojadirecta.me, www.rojadirecta.es, and www.rojadirecta.in. (Gov't Mem. 11, Pl. Mem. 10 n.5.) The United States Government cannot seize these foreign domain names, but United States residents can access them without restriction. Rojadirecta

argues that, because "there is no way to communicate the availability of these alternative sites on the .org or .com domains . . . the vast majority of users will simply stop visiting the sites altogether." (Pl. Mem. 10 n.5.) This argument is unfounded — Rojadirecta has a large internet presence and can simply distribute information about the seizure and its new domain names to its customers. In addition, Puerto 80 does not explain how it generates profit or argue that it is losing a significant amount of revenue as a result of the seizure. Specifically, Puerto 80 states that it does not generate revenue from the content to which it links, and it does not claim to generate revenue from advertising displayed while such content is playing. (Seoane Decl. ¶ 5, 10.) Accordingly, the claimed reduction in visitor traffic does not establish a substantial hardship for the purposes of § 983(f)(1)(C).

Puerto 80's First Amendment argument fails at this juncture as well. Puerto 80 alleges that, in seizing the domain names, the Government has suppressed the content in the "forums" on its websites, which may be accessed by clicking a link in the upper left of the home page. (Pl. Mem. 10.) The main purpose of the Rojadirecta websites, however, is to catalog links to the copyrighted athletic events — any argument to the contrary is clearly disingenuous. Although some discussion may take place in the forums, the fact that visitors must now go to other websites to partake in the same discussions is clearly not the kind of substantial hardship that Congress intended to ameliorate in enacting § 983. See 145 Cong. Rec. H4854-02 (daily ed. June 24, 1999) (statement of Rep. Hyde) ("Individuals lives and livelihoods should not be in peril during the course of a legal challenge to a seizure."). Puerto 80 may certainly argue this First Amendment issue in its upcoming motion to dismiss, but the First Amendment considerations discussed here certainly do not establish the kind of substantial hardship required to prevail on this petition.

Accordingly, it is clear that Puerto 80 does not satisfy the substantial hardship requirement of § 983(f)(1)(C). Indeed, the seizure certainly does not "prevent[] the functioning of the business, prevent[] an individual from working, [] leav[e] an individual homeless," or create any other similar substantial hardship. 18 U.S.C. §983(f)(1)(C); see United States v. $6,786 in U.S. Currency, No. 06-cv-1209, 2007 WL 496747, at *2 (N.D. Ga. Feb. 13, 2007). As Puerto 80 has failed to demonstrate hardship, the balancing test discussed in § 983(f)(1)(D) does not apply.

II. Additional Criminal Acts Under § 983(f)(8)(D)

A discussion regarding whether Puerto 80 would use the domain names to commit additional criminal acts if the Court granted Puerto 80's petition would necessitate the Court's consideration of whether Puerto 80 has committed criminal acts in the first instance. Given the Court's resolution of the substantial hardship issue above, the Court will defer consideration of this question until it considers Puerto 80's motion to dismiss, which is scheduled to be fully briefed on September 2, 2011. Puerto 80 will have another chance to test the validity of the seizure at that time.

CONCLUSION

For the foregoing reasons, Puerto 80's petition is DENIED. The Clerk of Court is directed to close and enter judgment in case number 11 Civ. 3983.

Dated: New York, New York
August 4, 2011

SO ORDERED

PAUL A. CROTTY
United States District Judge