

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-3390-cv Caption [use short title]

Motion for: Expedited Review Puerto 80 Projects, S.L.U. v. United States of America

Set forth below precise, complete statement of relief sought:

Petitioner-Appellant Puerto 80 Projects, S.L.U. respectfully submits this emergency motion to expedite its appeal of the District Court's Order denying Puerto 80's petition filed pursuant to 18 U.S.C. § 983(f).

MOVING PARTY: Puerto 80 Projects, S.L.U. OPPOSING PARTY: United States of America, et al.

- Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Mark A. Lemley OPPOSING ATTORNEY: Christopher Douglas Frey

Durie Tangri LLP U.S. Attorney's Office, Southern District of New York
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Court-Judge/Agency appealed from: U.S.D.C. Southern District of New York, Judge Paul A. Crotty, USDJ

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Mark A. Lemley Date: 08/26/2011 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

**UNITED STATES DISTRICT COURT  
FOR THE SECOND CIRCUIT**

PUERTO 80 PROJECTS, S.L.U.,

Petitioner-  
Appellant,

v.

United States of America and  
Department of Homeland Security,  
Immigration and Customs Enforcement,

Respondents.

Docket No. 11-3390-cv

**APPELLANT’S UNOPPOSED EMERGENCY  
MOTION FOR EXPEDITED REVIEW**

Petitioner-Appellant Puerto 80 Projects, S.L.U. (“Puerto 80” or “Appellant”) respectfully submits this emergency motion to expedite its appeal of the District Court’s Order denying Puerto 80’s petition filed pursuant to 18 U.S.C. § 983(f) (the “Order”).<sup>1</sup>

Appellant has satisfied the procedural requirements set forth in Local Rule 27.1(d). At the earliest possible opportunity, on August 25, 2011, Appellant advised the Clerk of this Court and opposing counsel of its intent to file the instant emergency motion to expedite its appeal. The government has consented to expediting this appeal and to the following briefing schedule:

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<sup>1</sup> A copy of the August 4, 2011 Order is attached to the Affidavit of Mark Lemley, sworn to August 25, 2011 (“Lemley Affidavit”), as Exhibit A.

Appellee's opposition brief to be filed sixty (60) days from the filing date of Appellant's opening papers;

Appellant's reply brief to be filed twenty-one (21) days from the filing date of Appellee's opposition brief.

Appellant requests that oral argument be held on the appeal within forty-five (45) days once briefing is completed.

In this motion, Appellant makes the required showing as to the nature of the emergency and the harm that Appellant will suffer if the motion to expedite is not granted. Specifically, as set forth in more detail below, the government's seizure of Appellant's domain names is an unlawful prior restraint on speech which causes irreparable harm to Appellants' users and readers' First Amendment rights and the public interest. The damage increases each day that passes while the seizure of the domain names remains in effect. And delay in resolution of this appeal could render it moot, denying Appellant any relief on a meritorious claim. Consequently, expedited review of the Order denying Appellant relief is necessary to minimize the extent of such harm.

### **BACKGROUND**

Appellant Puerto 80 is a Sole Shareholder Limited Liability Company incorporated under the laws of Spain with its principal place of business in Arteixo, Spain. Puerto 80 owns the rojadirecta.org and rojadirecta.com domain

names (the “subject domain names”),<sup>2</sup> which are registered with GoDaddy.com, Inc., in Scottsdale, Arizona. Puerto 80 operates the “Rojadirecta” website under the subject domain names. *See* Declaration of Igor Seoane Miñán in Support of Petition for Release of Seized Property (“Seoane Decl.”) ¶¶2-3.<sup>3</sup> The Rojadirecta site is essentially an online discussion group that hosts “forums” in which users can post messages concerning sports, politics, and other topics. It also provides a forum in which users can discuss and post information about highlights from various sporting events, and indexes links to streams of sporting events that can already be found on the Internet. It does not host copyrighted videos or streams of sporting events. *Id.* ¶¶4, 6. Following a multi-year legal battle, two Spanish courts specifically held that the website was operating legally and did not infringe copyrights. *Id.* ¶7.

The Rojadirecta site has been listed among the 100 most popular sites in Spain in terms of traffic. *Id.* ¶8. Prior to the seizure, the site had approximately 865,000 registered users from around the world, including the United States, many of whom use their accounts to engage in discussions of sports, politics, and a variety of other subjects on Rojadirecta discussion boards. *Id.* ¶12.

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<sup>2</sup> “A domain name is a unique string of characters or numbers that typically is used to designate and permit access to an Internet website.” *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 295 (2d Cir. 2002).

<sup>3</sup> The Declaration of Igor Seoane Miñán, which was submitted to the District Court, is attached to the Lemley Affidavit as Exhibit B.

On January 31, 2011, Immigration and Customs Enforcement of the U.S. Department of Homeland Security (“ICE”) seized the subject domain names which pointed to the “Rojadirecta” website. The domain names were seized pursuant to warrants issued in the District Court for the Southern District of New York, and were based on an ICE agent’s assertion that probable cause existed to believe that the domain names were being used to commit criminal violations of copyright law. The government did not at that time file either a civil forfeiture complaint or a criminal complaint alleging the violation of any law.

Counsel for Puerto 80 repeatedly tried to discuss the seizure with ICE agents and the Department of Justice, but was unable to engage with the government until it notified the U.S. Attorney’s Office of its intent to seek a temporary restraining order and file a petition for immediate return of the seized domain names.<sup>4</sup> It was not until then that Puerto 80 was able to have a substantive conversation with the appropriate officials. Hoping to avoid burdening the court, Puerto 80 held off filing the petition now being appealed, pending the outcome of those negotiations. On May 26, 2011, the government informed counsel for Puerto 80 that the only

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<sup>4</sup> Puerto 80’s experience appears typical of other website operators whose domain names have been seized by the government, *see* Mike Masnick, *Why We Haven’t Seen Any Lawsuits Filed Against The Government Over Domain Seizures: Justice Department*, TECHDIRT, May 24, 2011, available at <http://www.techdirt.com/articles/20110521/15125114374/why-we-havent-seen-any-lawsuits-filed-against-government-over-domain-seizures-justice-department-stalling.shtml>.

acceptable “compromise” would entail Puerto 80 prohibiting its users from linking to any U.S. content anywhere on its sites. Because this “solution” would prohibit Puerto 80 from engaging in lawful acts not prohibited by copyright law, Puerto 80 chose instead to challenge the seizure in court.

On June 13, 2011, Puerto 80 filed a petition in the District Court pursuant to 18 U.S.C. § 983(f) seeking the immediate return of the seized domain names. Among the grounds for its petition were that the Rojadirecta site is not violating copyright law, let alone *criminal* copyright law, and that Puerto 80 will continue to suffer substantial hardship—a reduction in traffic to the Rojadirecta site and inability of many of its users to access their accounts, and a deprivation of First Amendment rights—if the domain names are not immediately returned to Puerto 80. Only after Puerto 80 filed its petition did the government finally bring a civil forfeiture claim directed at the domain names.

After briefing (including an amicus brief filed by the Electronic Frontier Foundation as to the First Amendment issues) and oral argument, the Court denied Puerto 80’s petition on the sole ground that Puerto 80 was unable to make a sufficient showing of substantial hardship. Notably, the Court did not conclude that the domain names were being used to violate any law.

In denying Puerto 80’s petition, the District Court rejected Puerto 80’s First Amendment concerns on the following grounds:

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.

Lemley Affidavit, Ex. A, August 4, 2011 Order at 4.

### **APPELLANT'S NEED FOR EXPEDITED REVIEW**

Puerto 80's appeal should be expedited because the government's seizure of the subject domain names violates the Constitutional rights to Puerto 80's users and readers. 28 U.S.C. § 1657(a) provides that the fact that a Constitutional right is at stake shall constitute "good cause" to expedite an appeal if the factual context shows that the claim has merit. That is true here.

The basis of Puerto 80's brief on appeal will be that government's seizure of the subject domain names constitutes an unlawful prior restraint on speech and suppresses Puerto 80's users' and readers' protected First Amendment activities. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) ("[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 . . . ., it is otherwise when materials presumptively protected by the First Amendment are involved.”). *See also Maryland v. Macon*, 472 U.S. 463, 468 (1985) (“The First Amendment imposes special constraints on searches for and seizures of presumptively protected material, and requires that the Fourth Amendment be applied with ‘scrupulous exactitude’ in such circumstances.”) (internal citation omitted); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979) (noting that the First Amendment imposes special constraints on searches for, and seizures of, presumptively protected materials).

Registered users of Rojadirecta cannot access their accounts or participate in forum discussions as a result of the seizure. Nor can they post or follow links to other web sites. This speech restriction extends not just to registered users of Rojadirecta, but also to anyone wishing to visit the website. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[T]he protection afforded is to the communication, to its source and to its recipients both.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . . That right may not constitutionally be abridged . . . .”).



In *Fort Wayne*, state and local officials (respondents) filed a civil action pursuant to Indiana’s RICO laws, alleging that the defendant bookstores had engaged in a pattern of racketeering activity by repeatedly violating Indiana’s obscenity laws. 489 U.S. at 50-51. Prior to trial, respondents petitioned for, and the trial court granted, immediate seizure of the bookstores pursuant to a state law that permitted courts to issue seizure orders “upon a showing of probable cause to believe that a violation of [the State’s RICO law] involving the property in question has occurred.” *Id.* at 51. On appeal, the Supreme Court held that the pretrial seizure order was unconstitutional, stating that “mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.” *Id.* at 66. As in *Fort Wayne*, the government here has seized an entire business and effectively suppressed all of the expressive content hosted on it, including political discussions, commentary, and criticism by the site’s users—without it being determined whether the seizure was “actually warranted” under the relevant statutes. *Id.* at 67.

The prior restraint on Puerto 80 users’ and readers’ First Amendment rights constitutes irreparable harm of the highest order. The Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996)

(“Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.”). In *CBS, Inc. v. Davis*, the Supreme Court stayed the lower court injunction that prohibited CBS from broadcasting video footage documenting unsanitary practices in the meat industry, finding that such prior restraint caused “irreparable harm to the news media that is *intolerable* under the First Amendment.” 510 U.S. 1315, 1315-16, 1318 (1994) (emphasis added). The deprivation of Constitutional rights is, therefore, *ipso facto* irreparable injury and subject to expedited review.

In the instant case, the government effectively shut down an entire website, suppressing all of the speech hosted on it, based on an assertion that there was probable cause to believe that *some* of the material *linked to* by the website (though not found on the website itself) might be infringing. Puerto 80 was not provided any advance notice, nor was it provided the opportunity to contest the seizure before (or, for that matter, shortly after) the government shut down the site. Nor were the site’s users afforded any notice or opportunity to contest the seizure. That procedural failing itself indicates that the government’s action was an unlawful prior restraint. “[T]he lack of notice or opportunity to be heard normally renders a prior restraint invalid.” *United States v. Quattrone*, 402 F.3d 304, 312 (2d Cir. 2005) (citing *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968)).

The special vice of a prior restraint is that it stifles speech in advance of any finding as to whether or not that speech is legal. In this case, expedited review is necessary because without it the appeal may well be overtaken by events. Puerto 80 is vigorously contesting the seizure of its domain names on the merits, and is confident that it will eventually prevail. But for this Court to wait so long in deciding this appeal that the underlying merits are already determined would defeat the purpose of the rule against prior restraints. The restraint pre-trial is itself the evil against which the First Amendment guards; the only way to prevent that evil in this case is to order the return of the Rojadirecta domain names pending the ultimate resolution of the forfeiture proceeding.<sup>5</sup>

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<sup>5</sup> Because the government seized the domain name without any sort of notice or opportunity to be heard by Puerto 80, the normal process by which Puerto 80 could obtain immediate relief—a stay of the court order authorizing the seizure—is not available. Simply put, there was never any court order authorizing this seizure; the government simply seized the web sites without normal judicial process.

**CONCLUSION**

For the reasons set forth above, it is respectfully requested that Appellant's emergency motion for expedited review be granted.

Respectfully submitted,

DURIE TANGRI LLP

Dated: August 26, 2011

By: /s/ Mark A. Lemley  
Mark A. Lemley

Mark A. Lemley  
Ragesh K. Tangri (*Admission  
pending*)  
Johanna Calabria (*Admission  
pending*)  
Genevieve P. Rosloff (*Admission  
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Appellant*  
PUERTO 80 PROJECTS. S.L.U.

**UNITED STATES DISTRICT COURT  
FOR THE SECOND CIRCUIT**

PUERTO 80 PROJECTS, S.L.U.,

Petitioner-  
Appellant,

v.

United States of America and  
Department of Homeland Security,  
Immigration and Customs Enforcement,

Respondents.

Docket No. 11-3390-cv

**AFFIDAVIT OF MARK A. LEMLEY**  
**IN SUPPORT OF APPELLANT'S UNOPPOSED**  
**EMERGENCY MOTION FOR EXPEDITED REVIEW**

I, Mark A. Lemley, declare as follows:

1. I am a partner with the law firm of Durie Tangri LLP, counsel for Plaintiff-Appellant Puerto 80 Projects, S.L.U.

2. Attached as **Exhibit A** is a true and accurate copy of the August 4, 2011 District Court's Order denying Puerto 80's petition filed pursuant to 18 U.S.C. § 983(f), filed as ECF No. 23 in the lower court docket.

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3. Attached as **Exhibit B** is a true and accurate copy of the Declaration of Igor Seoane Miñán in Support of Petition for Release of Seized Property, which was filed with the District Court on June 13, 2011 as ECF No. 2.

SIGNED UNDER PENALTY OF PERJURY THIS 26TH DAY OF AUGUST,  
2011.

/s/ Mark A. Lemley

Mark A. Lemley  
DURIE TANGRI LLP  
217 Leidesdorff Street  
San Francisco, CA 94111  
Tel. (415) 362-6666

*Attorneys for Petitioner-  
Appellant*  
PUERTO 80 PROJECTS, S.L.U.

# EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
PUERTO 80 PROJECTS, S.L.U.,

Petitioner,

- against -

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

Respondents.  
-----X

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: August 4, 2011

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.



### **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](http://www.rojadirecta.me), [www.rojadirecta.es](http://www.rojadirecta.es), and [www.rojadirecta.in](http://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

# EXHIBIT B

**JUDGE GROTTY**

**11 CIV 3983**

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**PUERTO 80 PROJECTS, S.L.U.,**

**Plaintiff,**

**v.**

**United States of America and  
Department of Homeland Security,  
Immigration and Customs Enforcement,**

**Defendants.**

Civil Action No.



**DECLARATION OF IGOR SEOANE MIÑÁN IN SUPPORT OF PUERTO  
80'S PETITION FOR RELEASE OF SEIZED PROPERTY**

I, Igor Seoane Miñán, declare as follows:

1. I am the CEO of Puerto 80 Projects, S.L.U. ("Puerto 80"), a limited liability corporation organized under the laws of Spain. I submit this declaration in support of Puerto 80's Petition for Release of Seized Property and other relief. The following are matters of my personal knowledge, except where otherwise noted, and I could and would testify competently thereto if called upon to do so.

2. Puerto 80 has a possessory interest in rojadirecta.org and rojadirecta.com (the "subject domain names"), as it is the lawful owner of the subject domain names and operates the "Rojadirecta" site under these domain names.

3. The subject domain names were registered with GoDaddy.com, Inc., which is a United States company located in Scottsdale, Arizona. As Daniel Brazier notes in his Affidavit in Support of the Application of a Seizure Warrant ("Brazier Affidavit"), the registry for all ".com" top-level domains is Verisign, Inc., 487 East Middlefield Road, Mountain View, California 94043. The registry for all ".org" top-level domains is The Public Interest Registry, 1775 Wiehle Avenue, Suite 200, Reston, Virginia 20190. The ".org" domain is administered by Afilias USA, Inc., Building 3, Suite 105, 300 Welsh Road Horsham, Pennsylvania 19044. The subject domain names will remain under the control of the registries and registrars at all times.

4. As set forth in the Brazier Affidavit, the Rojadirecta sites do not themselves host unauthorized copies of the sporting events that Mr. Brazier describes. *See* Paras. 13, 40(a), 40(c). Rather, that content is hosted and/or streamed by third parties and it is never hosted or streamed at/by Rojadirecta. The Rojadirecta sites merely contain links to those sites.

5. The advertisements described at para. 40(c) of the Brazier Affidavit are not run by Rojadirecta and Rojadirecta does not receive revenue from those advertisements.



6. In addition to providing an index of links to material already existing on the Internet, the Rojadirecta sites provide forums in which users can discuss sports, politics, and any other topic. Among these is a “highlights” forum in which users discuss sports highlights and link to clips of highlights from various sporting events.

7. The activity on the Rojadirecta site has been expressly held to be lawful by the Spanish judiciary. Following allegations of copyright infringement, the Criminal Court of First Instance ruled in 2009 that the Rojadirecta sites did not violate any copyright laws. One year later, in an appeal of that decision, the Madrid Provincial Court, First District, affirmed the lower court’s ruling and held that “the reported actions do not constitute a crime, and the [lower court’s] decision to dismiss the action is in accordance with law.” A true and correct copy of those decisions, along with English translations, are attached hereto as Exhibits 1-2.

8. The continued possession by the government pending the final disposition of forfeiture proceedings will prevent the functioning of the Rojadirecta site under the subject domain names in the United States and throughout a substantial part of the world, thus causing Puerto 80 substantial hardship. The site which operates under the subject domain names was (prior to the government’s seizure) listed among the 100 most popular sites in Spain in terms of traffic according to Alexa Internet, a subsidiary of Amazon that provides, among other things, traffic metrics.

9. Rojadirecta has users and visitors worldwide, including from the United States.

10. Puerto 80 does not receive any revenue that is derived from specific content hosted on, or streamed by, the sites to which it links. In other words, Puerto 80 does not receive any revenue whatsoever from any site to which a user can link from the subject domain names based upon the content of the web links to that site. To the extent there is any site that a user can



link to from Rojadirecta which contains any infringing material, Puerto 80 receives no benefit from a user viewing such content on that site.

11. The seizure of the subject domain names is depriving Puerto 80 of lawful business. Further, this is a matter of considerable urgency, because Internet users who cannot access the Rojadirecta site for a sustained period of time will eventually stop trying. As a result, the possibility of getting the subject domain names back months or even days from now will not solve the problem. With each day that passes, we continue to face the risk that we will lose our ability to conduct our business altogether because users will stop attempting to visit our site, or will use the websites of our competitors. Since the date of the seizure, we have experienced approximately a 32% reduction in traffic in terms of visits to the Rojadirecta site.

12. The continued possession by the government of the subject domain names causes immediate hardship in another respect. Rojadirecta has almost 865,000 registered users, many of whom use their accounts to engage in discussions of sports, politics, and a variety of other subjects on Rojadirecta discussion boards. Because of the government's seizure of the subject domain names, those registered users are now unable to access their accounts from the subject domain names, and many or most are substantially impeded from accessing their existing accounts and the information they have stored on those accounts.

13. As explained above, the subject domain names will remain under the control of the U.S.-based registries and registrars at all times. Thus, there is no risk that the domain names will be destroyed, damaged, lost, concealed, or transferred if they are returned to Puerto 80 during the pendency of this proceeding.

14. I do not have any intent to use the subject domain names to commit criminal acts.

15. The first time I learned that the subject domain names had been seized by the U.S.

government was when I visited rojdirecta.org and rojdirecta.com on February 1, 2011, and discovered that the U.S. government had made the site's content inaccessible via those domain names and pointed the domain names to another web page stating that the domain had been seized by ICE.

16. I have not received any notice from the U.S. government that forfeiture proceedings have been instituted against the subject domain names.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 11 day of June 2011 in A CORUÑA, Spain.



---

Igor Seoane Miñán

# EXHIBIT 1

## TRANSLATION STATEMENT

February 10, 2011

To whom it may concern:

I, Lisa Grayson, do hereby swear and certify the following:

1. That I am certified by the American Translators Association (ATA) for translation from Spanish into English, and that my ATA membership is in good standing;
2. That the following page is a valid copy of my ATA credential certificate, altered only to prevent duplication;
3. That the attached English-language document is my translation of the fax cover sheet and court verdict that I received from Durie Tangri LLP, a copy of which is attached after the English translation;
4. That, to the best of my knowledge, the English document is an accurate and faithful translation of the document I received from Durie Tangri LLP.



Lisa Grayson  
ATA Member No. 224476

**Publica**



*ata*

THE AMERICAN TRANSLATORS ASSOCIATION

Founded in 1959

Having successfully completed the examination required by the Committee on Accreditation.

Copy invalid unless accompanied by original letter  
signed by **Lisa A. Grayson**

a Member in good standing of the Association, subscribing to its Code of Professional Conduct and Business Practices, is granted this

Copy invalid unless accompanied by original letter  
signed by **Lisa A. Grayson**

**CERTIFICATE OF ACCREDITATION**  
**For translation from Spanish into English**

Issued under the seal of the Association this June 27, 2001



Copy invalid unless accompanied by original letter  
signed by **Lisa A. Grayson**

*Shuckran Kamal*  
Shuckran Kamal  
Chair, ATA Accreditation Committee

*Ann G. Macfarlane*  
Ann G. Macfarlane  
President, ATA

*C. Searls-Ridge*  
Courtney Searls-Ridge  
Secretary, ATA

This certificate is valid only in combination with membership in good standing in the American Translators Association.

**RAMON BLANCO BLANCO**  
**Court Attorney**  
**Madrid Capital Judicial District**

Tax I.D. No.: 51.667.890-T

(address:) C/Mequinenza No. 9 = 1<sup>st</sup> Floor  
Madrid 28022, Spain  
Telephone and fax: 91.320.93.56  
Mobile: 610.54.44.34  
ramonblancoblanco@hotmail.com

### **FAX TRANSMISSION**

**ADDRESSEE:** Mr. JAVIER MAESTRE RODRIGUEZ (Attorney at Law)  
**FAX NUMBER:** 91.222.67.95  
**DATE:** May 7, 2010

**SUBJECT:** Summary proceedings  
**COURT:** No. 37  
**COURT RECORD NO.** 2517/07 roll 51/2010  
**CLIENT:** Mr. Igor Seoane Miñán

### **MESSAGE**

Dear colleague:

I am sending you the attached decree, issued today.

Please accept my best wishes.

(signature)

No. of pages including attachment: 8



Roll number 51/2010

Previous Proceedings number 2517/2008

Madrid Pre-trial Investigation Court number 37

**MADRID PROVINCIAL COURT**

**FIRST DIVISION**

The Honorable

President:

Mr. Alejandro María Benito López

Magistrates:

Ms. Araceli Perdices López

Mr. Eduardo de Porres Ortiz de Urbina

(rubber stamp)

Honorable Assembly of Court Attorneys of Madrid

Received Notification

MAY 6, 2010 MAY 7, 2010

Article 151.2 L.E.C. 1/2000

**DECREE No. 364/10**

In Madrid, on April twenty-seventh, two thousand ten

**BACKGROUND**

**FIRST** — On July 15, 2009, the Honorable Magistrate Judge of Madrid Pre-trial Investigation Court number 37 issued a decree in which the provisional dismissal of action and the file of these proceedings was agreed to. The parties having been notified, the legal representative of AUDIOVISUAL SPORT S.L. filed an appeal, which has been transferred to the Public Prosecutor's Office and other parties who have requested rejection of the appeal.

**SECOND** — Timely reports of the legal proceedings having been filed in this Court for the resolution of the appeal,

the date of April 8, 2010, has been indicated for the deliberation, voting, and verdict, appointing Mr. Eduardo de Porres Ortiz de Urbina to express the Court's opinion.

#### FUNDAMENTALS OF LAW

**FIRST-** The present proceedings investigate the Web page [www.rojadirecta.com](http://www.rojadirecta.com), a page that is based on "links" that allow for the download, through "door-to-door" exchange programs, of archives or files of diverse content between different users or guests, specifically, football<sup>1</sup> games from other countries and whose rights for usage in Spain belong to the complainant, Audiovisual (sic) Sport S.L.

The particular charge is made with the understanding that there is an act of public communication of works protected by the Intellectual Property Law without authorization from the respective owners.

It is currently a generally accepted criterion that the act of downloading files from the Internet does not constitute a crime. It suffices to cite the criterion from Circular 1/2006 from the State General Prosecutor's Office to show the relevance of this factor. The above-mentioned Circular confirms the following:

*In regard to determining the type of conduct of someone who gathers protected works through a server on a Web site, without the authorization of the owner of the rights of use, it can be included ??? in the assumptions of unauthorized communication, but in this case, if no consideration is given for it, the typical element of profit does not coexist, this conduct can be legally pursued only as an illicit civil action. In*

---

<sup>1</sup> This presumably means European football, i.e., soccer.



*regard to the user who "downloads or receives" a work "from the Internet" without [financial] consideration as a result of an act of unauthorized communication made by another person, making a private copy of the work that cannot be considered conduct of a criminal nature. In regard to [typo; letters or word missing] the responsibility of the company's information service providers, they will not be responsible when the service they offer is one of simple intermediation, within the terms established in Articles 14 to 18 of Law 34.2002, dated July 11 [2002], of services of the information or electronic commerce company.*

Notwithstanding the foregoing, in this proceeding what has been investigated and questioned is not the activity of the persons who are part of the file exchange network, but rather the activity of those responsible for the Web page that provides this service, and who also gain an economic advantage from their activity no matter how indirect it may be, since the charge is not paid, only the publicity of the insert on the page itself, which is seen independent of what is produced or not downloaded.

Those responsible for the Web page do not directly commit acts of public communication of works protected by the LPI [Intellectual Property Law], since the downloaded items are not located in their files. They only encourage this behavior by the means in which they select, make available, and inform about how to access the pages that offer the games' retransmission.

Far from contemptible is the position of those who maintain that if the investigative activity is advantageous together with and as a function of the final result, the Web pages such as the one under investigation could be publicly offering protected works and performing those necessary acts of support so that Internet

users can communicate and use this public offering of the work. Their labor, from this perspective, would not be that of mere intermediation but the heart of activity that advertises and makes possible the massive exchange of files for the users who, without this publicity and organization, could not do it or could do it in a significantly more limited way. The work of making available and offering public works constitutes an unauthorized act of public communication more because technically it is the user and not the provider who in fact puts the file at public disposal. The provider advertises and offers the protected work to the users in a public way, and in some cases facilitates the technical means so that the users can connect among themselves and make the download. Such a position could have support in Article 20 of the LPI, in which the concept of "public communication" in open form is defined, inasmuch as that precept defines that legal concept broadly as follows: *"Any act through which a plurality of persons can have access to the work without prior distribution of samples of each one of them. Communication is not considered public when it takes place within a strictly domestic environment that is integrated or connected to a broadcast network of any type."*

Nevertheless, the following considerations should be made:

- a) Addressing the actions reported in this process, one cannot get around the fact that the Web page in question does not keep the files, nor does it directly make the download. The files are transferred through download programs broadly available among Internet users.
- b) The actions of making available and advertising the games that are transferred facilitate download, but they do not provide the means of doing so; therefore, in principle, they can be qualified as acts of mere intermediation.
- c) On the other hand, the fees that the Web page administrators receive do not pay for the download of the public titles; rather, it is the publicity that comes from generic



access to the page, which is independent of the publicity and which can be produced even if there is no download.

d) The operators of the web page, such as they are listed in the accusing legal record, do not facilitate the removal of protection from the key codes for viewing the sporting events, nor do they make connections with programs that do so; rather, they only facilitate the viewing of television programs that are broadcast openly.

For all of the above reasons, the reported actions do not constitute a crime, and the decision to dismiss the action is in accordance with law. Furthermore, in regard to a similar claim made by the plaintiff against a different Web page with similar content ([www.tvmix.net](http://www.tvmix.net)), this Provincial Court already ruled on November 3, 2008 (Section 5) in which the Court was asked if the party responsible for a Web page that facilitated links to view football games from abroad committed a crime or induced the commission of a crime, and responded as follows:

*"No in both cases, because except for what is clarified in the following and final conclusion, the programs that invite or encourage utilization are freely available, their use is open and universal, because they do not require any use license, and as a result, for the reported actions, the subject of this report, no legal infraction was committed, although indeed in some cases a third-party economic complaint results. It is for this reason that Article 270 of the CP (Criminal Code) does not apply either; it requires economic damage and profit motive. In regard to the economic damage imputed to the owners of the broadcast rights of National League games, said damage has not been determined, given the ever-changing world of*

*the Internet, in which proof of either case becomes practically impossible, therefore it is lacking a determinant element of this [proof] (STS 1578/02), nor of the existence of a profit motive on the part of the defendant who, according to the experts appearing in the proceedings, did not receive any type of benefit for serving as a "link," but from indirect remuneration from the Web portal publicity. In this same context, we emphasize the Supreme Court sentence 529/2001 of April 2, 2001, which indicates that that which is punishable are the importing of stolen works, but not those legally acquired abroad, even though their commercialization in Spain has not been authorized here, so that the title owner can defend against such conduct through preventive injunctions and the system of responsibility outlined in Article 138 ff. of the Intellectual Property [Law]. It can be assumed that this can be applied to the typical conduct of Article 286, which has not been violated in this case either."*

These same criteria are applicable to the present case, in which the denounced actions completely lack criminal relevance.

For all of the above reasons, the appeal is denied.

**SECOND** – Not having found the parties acting in bad faith and in given the denial of the appeal, the costs for this appellate hearing should be declared the court's own, as authorized by Articles 239 of the Law of Criminal Judgment.

#### **ORDER OF THE COURT**

**THE COURT AGREES:** WE DENY the appeal petition filed by the legal representative of AUDIOVISUAL SPORT S.L. against the court order of July 15, 2009, issued by Instructing Court number 37 of Madrid

(Previous Proceedings 2517/2007), which we confirm in its entirety, declaring the costs of this appellate hearing "de officio" [the court's own expenses].

Notice of this verdict shall be posted, against which there is no further appeal, and the Instructing Court shall be informed, including certification of this verdict.

The Magistrates listed in the margin agree, confirm, and sign this decision, which I certify.



07-05-10 13:26 913209356

BLANCO PROCURADOR->934882792 ECM

PAG. 01

**RAMON BLANCO BLANCO**  
Procurador de los Tribunales  
Partido Judicial de Madrid Capital  
N.I.F.: 51.667.890-T

C/ Mequinenza nº 9 - 1º C.  
28022 Madrid  
Teléfono y fax : 91.370.93.56  
Móvil: 610.54.44.34  
ramonblancoblancob@hotmail.com

## TRANSMISION DE FAX

**DESTINATARIO:** D. JAVIER MAESTRE RODRIGUEZ (Letrado)  
**Nº DE FAX:** 91.222.67.95  
**FECHA:** 7 de mayo de 2010

**ASUNTO:** Procedimiento abreviado  
**JUZGADO/TRIBUNAL:** Instrucción nº 37 A.P sección 1  
**Nº DE AUTOS:** 2517/07 rollo 51/2010  
**CLIENTE:** D. Igor Seoane Miñán

## MENSAJE

Estimado compañero:

Adjunto te envío auto notificado en el día de la fecha.

Sin otro particular, recibe un fuerte abrazo.



Nº de páginas incluida carátula: 8

07-05-10 13:26 913209356

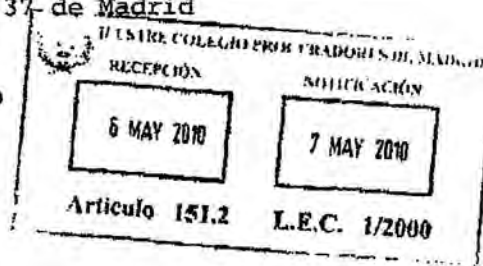
BLANCO PROCURADOR->934882792 ECM

PAG. 02

Artículo 151.2  
de la L.E.C.

Rollo número 51/2010  
Diligencias Previas número 2517/2009  
Juzgado de Instrucción número 37 de Madrid

**AUDIENCIA PROVINCIAL DE MADRID  
SECCION PRIMERA**



Ilmos. Sres.

Presidente:

Don Alejandro María Benito López

Magistrados:

Doña Araceli Perdices López

Don Eduardo de Porres Ortiz de Urbina

**AUTO N° 364/10**

En Madrid, a veintisiete de abril de dos mil diez

**ANTECEDENTES**

**PRIMERO.-** El día 15 de Julio de 2009 el/la Ilmo/a Sr/a Magistrado/a Juez del Juzgado de Instrucción número 37 de Madrid dictó auto por el que acordó el sobreseimiento provisional y archivo de las presentes diligencias. Notificado a las partes, la representación procesal de AUDIOVISUAL SPORT S.L. interpuso de apelación del que se ha dado traslado al Ministerio Fiscal y demás partes quienes han solicitado la desestimación del recurso.

**SEGUNDO.-** Remitido el oportuno testimonio de las actuaciones a este Tribunal para la resolución del recurso se ha señalado



07-05-10 13:26 913209356

BLANCOPROCURADOR-&gt;934882792 ECM

PAG. 03

g. III  
de f. III

el día 8 de Abril de 2010 para la deliberación, votación y fallo, designándose Ponente a Don Eduardo de Porres Ortiz de Urbina, que expresa el parecer de la Sala.

#### FUNDAMENTOS DE DERECHO

**PRIMERO.-** En las presentes diligencias se investiga la página Web [www.rojadirecta.com](http://www.rojadirecta.com), página que se basa en "elinks" que permiten bajar, a través de programas de intercambio "puerto a puerto" archivos o ficheros de contenido diverso entre los distintos usuarios o invitados, en concreto, partidos de fútbol emitidos en otros países y cuyos derechos de explotación en España corresponden a la querellante, Audiovisual Sport S.L.

La acusación particular entiende que existe un acto de comunicación pública de obras protegidas por la Ley de Propiedad Intelectual sin autorización de los respectivos titulares.

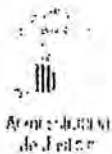
Es un criterio generalizado actualmente que la actividad de descarga de archivos a través de Internet no es constitutiva de delito. Baste citar el criterio de la Circular 1/2006 de la Fiscalía General del Estado para poner de relevancia esa circunstancia. En la referida Circular se afirma lo siguiente:

*En cuanto a la tipificación de la conducta de quien coloca a través de un servidor en un sitio de la Red obras protegidas sin autorización del titular de los derechos de explotación, puede incardinarse dentro de los supuestos de comunicación no autorizada, pero en este supuesto si no está acreditada ninguna contraprestación para él, no concurrirá el elemento típico del ánimo de lucro, pudiendo perseguirse esa conducta sólo como ilícito civil. Respecto del usuario*



Madrid





que "baja o se descarga de la Red" una obra, y obtiene ésta sin contraprestación, como consecuencia de un acto de comunicación no autorizado realizado por otro, realiza una copia privada de la obra que no puede ser considerado como conducta penalmente típica. En lo que respecta a la responsabilidad de los proveedores de servicios en la sociedad de la información, los mismos no serán responsables cuando el servicio que prestan sea el de simple intermediación, dentro de los términos que establecen los artículos 14 a 18 de la Ley 34/2002, de 11 da julio, de servicios de la sociedad de la información y de comercio electrónico.

No obstante lo anterior, en este proceso lo que se ha investigado y cuestiona no es la actividad de las personas que se integran en la red de intercambio de archivos sino la de los responsables de la página que provee este servicio, y que obtienen además una ventaja económica por su actividad por más que sea indirecta, ya que no se retribuye la descarga sino la publicidad de la inserta en la propia página y que se visualiza con independencia de que se produzca o no descarga.

Los responsables de la página no realizan de forma directa actos de comunicación pública de obras protegidas por la LPI ya que no alojan en sus archivos los títulos descargados. Únicamente favorecen esa conducta en la medida en que seleccionan, ordenan e informan sobre la forma de acceder a las páginas que ofrecen la retransmisión de partidos.

No es desdiable la postura de quienes sostienen que si se valora la actividad investigada de conjunto y en función del resultado final, las páginas web como la investigada pudieran estar ofertando públicamente obras protegidas y realizando los actos de apoyo necesarios para que los usuarios de la red se comuniquen y utilicen esa oferta pública de las obras. Su labor, desde esta perspectiva, no sería de mera intermediación





sino el núcleo de actividad que anuncia y posibilita el intercambio masivo de archivos a los usuarios que, sin esa publicidad y organización, no podrían hacerlo o lo podrían hacer de forma significativamente más limitada. Las labores de ordenación y oferta de las obras podrían constituir un acto de comunicación pública no autorizada por más que técnicamente sea el usuario y no el proveedor quien de facto ponga a disposición del público el archivo. El proveedor anuncia y oferta a los usuarios de forma pública la obra protegida y facilita en algunos casos los medios técnicos para que los usuarios enlacen entre sí y realicen la descarga. Tal posición podría tener apoyo en el artículo 20 de la LPI en el que se define el concepto de "comunicación pública" de forma abierta en cuanto dicho precepto define ese concepto jurídica de forma amplia de la siguiente forma: *"todo acto por el cual una pluralidad de personas pueda tener acceso a la obra sin previa distribución de ejemplares de cada una de ellas. No se considerará pública la comunicación cuando se celebre dentro de un ámbito estrictamente doméstico que esté integrado o conectada a una red de difusión de cualquier tipo"*.

Sin embargo, deben hacerse las siguientes consideraciones:

- a) En atención a los hechos acreditados en este proceso no puede soslayarse la circunstancia de que la página web investigada no aloja los archivos, ni realiza directamente la descarga. Los archivos se transfieren a través de programas de descarga de amplia difusión entre los usuarios de Internet.
- b) Los actos de ordenación y anuncio de los partidos que se transfieren facilitan la descarga pero no pueden equipararse a ésta, por lo que, en principio podrían calificarse de actos de mera intermediación.
- c) Por otra parte, la retribución que obtienen los administradores de la página no compensa la descarga de los







títulos sino la publicidad derivada del acceso genérico a la página, que es independiente de ésta y que se puede producir aunque no haya descarga.

d) Los gestores de la página, tal y como se indica en el auto impugnado, no facilitan la desprotección de los códigos claves para el visionado de los eventos deportivos, ni realizan conexiones con programas de desprotección, sino que facilitan únicamente el visionado de programas de televisión emitidos en abierto.

Por todo ello, los hechos denunciados no son constitutivos de delito y la decisión de sobreseer las actuaciones es conforme a derecho. A mayor abundamiento, sobre una reclamación similar efectuada por la denunciante contra otra página de contenido similar ([www.tvmix.net](http://www.tvmix.net)) ya se ha pronunciado esta Audiencia Provincial en sentencia de 3 de Noviembre de 2008 (Sección 5ª) en la que el Tribunal se preguntaba si el responsable de una página WEB que facilitaba enlaces para ver partidos de fútbol desde el extranjero cometía delito o inducía a la comisión de un delito y respondía en los siguientes términos:

*"No en ambos casos, porque a reserva de lo que se dilucide con la siguiente y última conclusión, los programas que invita o incluso incita a utilizar, son de libre uso, y su utilización es abierta y universal, por lo que no necesitan ninguna licencia de uso, y en consecuencia, para los hechos denunciados, objeto de este informe, no se comete ninguna infracción, aunque sí se produce en algunos casos quebranto económico a terceros. Es por ello que tampoco quedaría acreditado el artículo 270 del CP que precisa de un perjuicio económico y de un ánimo de lucro. En relación al perjuicio económico inferido a los titulares de los derechos de emisión de los partidos de Liga Nacional no se ha podido determinar el mismo dado el movedizo mundo*



de Internet en el que la prueba de tal extremo resulta prácticamente imposible, por lo que faltaría un elemento determinante de éste (STS 1578/02) ni tampoco la existencia de un ánimo de lucro por parte del imputado que según las periciales obrantes en las actuaciones no obtenía ningún tipo de beneficio por servir de "link" sino por la remuneración indirecta de la publicidad del portal. En este mismo contexto destaca la sentencia del Tribunal Supremo 529/2001 de 2 de abril en la que indica que lo sancionable son la importación de las obras usurpadas pero no las adquiridas lícitamente en el extranjero aunque su comercialización en España no haya sido aquí autorizada, por lo que de esa conducta puede defenderse el titular mediante las medidas cautelares y sistema de responsabilidad previsto en el artículo 138 y s.s. de la Propiedad Intelectual. Supuesto este extrapolable a la conducta típica del artículo 286 que tampoco se vería conculcado en el presente supuesto".

Estos mismos criterios son aplicables al presente caso lo que abunda en la falta de relevancia penal de los hechos denunciados.

Por todo lo expuesto, procede la desestimación del recurso.

**SEGUNDO.-** No apreciándose mala fe y pese a la desestimación del recurso deben declararse de oficio las costas procesales de esta alzada, según autorizan los artículos 239 y concordantes de la Ley de Enjuiciamiento Criminal.

#### PARTE DISPOSITIVA

**LA SALA ACUERDA:** DESESTIMAMOS el recurso de apelación interpuesto por la representación procesal de AJUDIOVISUAL SPORT S.L. contra el auto de fecha 15 de Julio de 2009 dictado por el Juzgado de Instrucción número 37 de Madrid



07-05-10

13:30 913209356

BLANCO PROCURADOR->934882792 ECM

PAG. 02

III  
6. med. v. 001  
de la. 113

(Diligencias Previas 2517/2007), que confirmamos íntegramente, declarando de oficio las costas de esta alzada.

Notifíquese esta resolución, contra la que no cabe recurso alguno, y póngase en conocimiento del Juzgado de Instrucción, remitiendo certificación de la presente resolución.

Lo acuerdan, mandan y firman los Sres. Magistrados que figuran al margen, lo que certifico.





## **EXHIBIT 2**

## TRANSLATION STATEMENT

February 10, 2011

To whom it may concern:

I, Lisa Grayson, do hereby swear and certify the following:

1. That I am certified by the American Translators Association (ATA) for translation from Spanish into English, and that my ATA membership is in good standing;
2. That the following page is a valid copy of my ATA credential certificate, altered only to prevent duplication;
3. That the attached English-language document is my translation of the fax cover sheet and court verdict that I received from Durie Tangri LLP, a copy of which is attached after the English translation;
4. That, to the best of my knowledge, the English document is an accurate and faithful translation of the document I received from Durie Tangri LLP.



Lisa Grayson  
ATA Member No. 224476

**Publica**



*ata*

THE AMERICAN TRANSLATORS ASSOCIATION  
Founded in 1959

Having successfully completed the examination required by the Committee on Accreditation.

Copy invalid unless accompanied by original letter  
signed by Lisa Grayson  
**Lisa A. Grayson**

a Member in good standing of the Association, subscribing to its Code of Professional Conduct and Business Practices, is granted this

Copy invalid unless accompanied by original letter  
signed by Lisa Grayson  
**CERTIFICATE OF ACCREDITATION**  
**For translation from Spanish into English**

Issued under the seal of the Association this June 27, 2001



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*Shuckran Kamal*  
Shuckran Kamal  
Chair, ATA Accreditation Committee

*Ann G. Macfarlane*  
Ann G. Macfarlane  
President, ATA

*C. Searls-Ridge*  
Courtney Searls-Ridge  
Secretary, ATA

This certificate is valid only in combination with membership in good standing in the American Translators Association.



**RAMON BLANCO BLANCO**  
**Court Attorney**  
**Madrid Capital Judicial District**

Tax I.D. No.: 51.667.890-T

(address:) C/Mequinenza No. 9 = 1<sup>st</sup> Floor  
Madrid 28022, Spain  
Telephone and fax: 91.320.93.56  
Mobile: 610.54.44.34  
ramonblancoblanco@hotmail.com

### FAX TRANSMISSION

ADDRESSEE: Mr. JAVIER MAESTRE RODRIGUEZ (Attorney at Law)  
FAX NUMBER: 91.222.67.95  
DATE: July 20, 2009

SUBJECT: Summary proceedings  
COURT: No. 37  
COURT RECORD NO. 2517/07  
CLIENT: Mr. Igor Seoane Miñán

### MESSAGE

Dear colleague:

I am sending you the attached dismissal of action, issued today.

Please accept my best wishes.

(signature)

No. of pages including attachment: 3

PRE-TRIAL INVESTIGATION COURT NO. 37

MADRID

(address) PLAZA DE CASTILLA 1, 6<sup>th</sup> Floor  
Telephone: (illegible) Fax: (illegible)

Identification Number: (illegible)

**DECREE**

In Madrid, on July fifteenth, two thousand nine

**FACTS**

**SOLE FACT** – The current proceeding was started by the actions that resulted from the previous legal proceedings, due investigative diligence having been practiced as indicated in court records.

**LEGAL REASONING**

**SOLE ISSUE** – From the diligence carried out, that is, declarations of the accused and an expert report on file in court records, it is clear that the Internet pages administered by the accused did not facilitate the removal of protection from the key codes for viewing the sporting events, nor did they create a connection with protection-removal programs; rather, what they facilitated were links to download programs that allowed the viewing of such events that, although (the events) were with access through a coded system in Spain, are openly broadcast on International TV channels; it does not follow that the harmful conduct of the accused, nor the programs they made available were not freely used, their use being open and universal, not obtaining from another party the denounced direct benefits by facilitating such links, but rather indirect remuneration of the web portal publicity.

For the above reasons, it not appearing that the commission of a criminal infraction has been duly proved, the provisional dismissal of action hereby proceeds, and closing the file of the actions taken in application<sup>1</sup> of the provisions of Article 779.1, section 1, of the Criminal Judgment Law as related to section no. 1 of Article 641 of the same legal text.

**ORDER OF THE COURT**

THE PROVISIONAL DISMISSAL OF ACTION AND CLOSING THE FILE OF THE PRESENT CLAIM IS HEREBY APPROVED.

<sup>1</sup> Typo in original. I am assuming that *apalicación* should have been *aplicación* (application).

The Prosecutor's Office and other interested parties shall be notified of this resolution, alerting them that they may file a petition for review and/or appeal against the decision before this Court within a period of THREE DAYS.

Thus agrees, orders, and signs Ms. PURIFICACION ELISA ROMERO PAREDES, MAGISTRATE-JUDGE of the Madrid Pre-trial Investigation Court No. 37 and the Judicial District. I hereby swear.

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BLANCOPROCURADOR->934882792 ECM

PAG. 01

**RAMON BLANCO BLANCO**  
Procurador de los Tribunales  
Partido Judicial de Madrid Capital  
N.I.F. 51 667.890-1

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## TRANSMISION DE FAX

**DESTINATARIO:** D. JAVIER MAESTRE RODRIGUEZ (Letrado)  
**Nº DE FAX:** 91.222.67.95  
**FECHA:** 20 de julio de 2009

**ASUNTO:** Procedimiento abreviado  
**JUZGADO/TRIBUNAL:** Instrucción nº 37  
**Nº DE AUTOS:** 2517/07  
**CLIENTE:** D. Igor Seoane Miñán

### MENSAJE

Estimado compañero:

Adjunto te envío auto de sobreseimiento notificado en el día de la fecha.

Sin otro particular, recibe un fuerte abrazo.



Nº de páginas incluida carátula: 3



42500

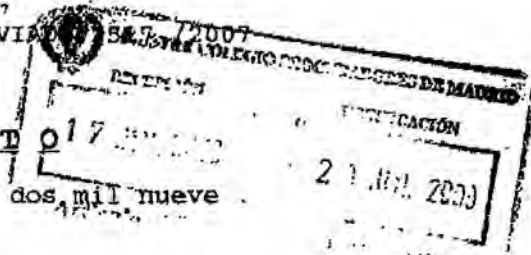
**JUZGADO DE INSTRUCCION n° 37  
MADRID**

PLAZA DE CASTILLA, 1, 6ª PLANTA

Teléfono: 91-4532215 76-77 Fax: 91-4932278

Número de Identificación Único: 20079 2 0220192 /2007

DILIGENCIAS PREVIAS PROC. ABREVIADO



**A U T O** 017

En MADRID a quince de julio de dos mil nueve

Dada cuenta; y

**HECHOS**

UNICO.- El presente procedimiento se incoó por los hechos que resultan de las anteriores actuaciones, habiéndose practicado las diligencias de investigación que constan en autos.

**RAZONAMIENTOS JURÍDICOS**

UNICO.- De las diligencias practicadas, a saber, declaraciones de los imputados e informe pericial obrante en autos, se desprende que las paginas de internet administradas por los imputados no facilitan la desproteccion de los codigos claves para el visionado de los eventos deportivos, ni realizan conexiones con programas de desproteccion, sino que lo que facilitaban son enlaces para descargar programas que permitian el visionado de tales eventos que, aunque con acceso de sistema codificado en España, son emitidos en abierto por canales de TV Internacional; no se desprende ni el comportamiento doloso de los imputados, ni que los programas que se facilitaban no fuesen de libre uso, siendo su utilizacion abierta y universal, no obteniendo por otra parte los denunciados beneficios directos por facilitar tales enlaces, sino remuneracion indirecta de la publicidad del portal.

Por lo expuesto, no apareciendo debidamente justificada la perpetracion de infraccion penal, procede el sobreseimiento provisional y archivo de las actuaciones en aplicacion de lo dispuesto en el articulo 779.1, 1º de la Ley de Enjuiciamiento Criminal en relacion con el num. 1º del articulo 641 del mismo Texto Legal.

**PARTE DISPOSITIVA**

**SE ACUERDA EL SOBRESEIMIENTO PROVISIONAL Y EL ARCHIVO DE LA PRESENTE CAUSA.**



54.09.09

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PAG. 03

Póngase esta resolución en conocimiento del Ministerio Fiscal y demás partes personadas, previniéndoles que contra la misma podrán interponer, ante este Juzgado, recurso de reforma y/o apelación, en el plazo de TRES DIAS.

Así lo acuerda, manda y firma D. PURIFICACION ELISA ROMERO PAREDES , MAGISTRADO-JUEZ del Juzgado de Instrucción n° 37 de MADRID y su partido.- Doy fe.



20 07 09