

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

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UNITED STATES OF AMERICA	:	
	:	
-vs-	:	Case No. 1:12cr3
	:	
KIM DOTCOM, et al.,	:	
	:	
Defendants.	:	
	:	
- - - - -	x	

Courtroom 700
U.S. District Courthouse
Alexandria, Virginia

Friday, July 27, 2012

The above-entitled matter came on to be heard before the HONORABLE LIAM O'GRADY, Judge, in and for the United States District Court for the Eastern District of Virginia, 401 Courthouse Square, Alexandria, Virginia, beginning at 11:12 o'clock a.m.

APPEARANCES:

On Behalf of the United States:

RYAN DICKEY, ESQUIRE
JAY PRABHU, ESQUIRE
Assistant U.S. Attorneys

APPEARANCES (cont.):

On Behalf of the Defendants:

HEATHER MARTIN, ESQUIRE
WILLIAM BURCK, ESQUIRE
IRA ROTHKEN, ESQUIRE
CRAIG REILLY, ESQUIRE

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P R O C E E D I N G S

THE CLERK: Criminal Case Number 1:12cr3,
United States of America versus Kim Dotcom, et al.

MR. PRABHU: Good morning, Your Honor. Jay
Prabhu and Ryan Dickey for the Government.

THE COURT: Good morning.

MS. MARTIN: Good morning, Your Honor.
Heather Martin on behalf specially appearing Defendant
Megaupload. With me at counsel table are Bill Burck and
Ira Rothken.

THE COURT: All right.

MR. BURCK: Good morning, Your Honor.

MR. ROTHKEN: Good morning, Your Honor.

THE COURT: Good morning to each of you. Good
to see you.

Mr. Reilly.

MR. REILLY: Good morning, Your Honor. Craig
Reilly here on behalf of several of the individual
defendants.

THE COURT: All right. Good morning to you.

All right, this comes on Megaupload's motion
to dismiss for failure to comply with Criminal Rule 4, and
it's an interesting argument.

1 And I'm just certain that the judicial body
2 that formed Criminal Rule Number 4 intended to allow a
3 company which didn't register with any state corporation
4 commission or have a place of residence in the United
5 States should be able to violate our laws indiscriminately
6 from an island in the Pacific.

7 But maybe they did mean that. They certainly
8 are an able-bodied group.

9 And I'm not trying to make light of this. It
10 certainly is a very interesting argument, and I'll hear
11 anything that counsel from Megaupload would like to say
12 at this time.

13 MR. BURCK: Thank you, Your Honor.

14 Your Honor, our position is a simple one. The
15 Federal Rules of Criminal Proceedings, Rule 4(c)(3)(C),
16 has two requirements for service.

17 One is the delivery requirement, deliver the
18 summons to an agent, an officer of the company. Second
19 and this is where we have a dispute with the Government
20 is the mailing requirement, mailing the summons to the
21 last known address or principal place of business of the
22 corporation.

23 That's our argument, very simple. Now, the

1 yes, sir?

2 THE COURT: Now, so the service (inaudible)
3 issue, the Defendants are -- if and when they're -- why
4 was the extradition hearing continued until March of next
5 year, March or April or whatever?

6 MR. BURCK: Your Honor, as I understand it,
7 the reason, the principal reason -- and the Government
8 can correct me if I'm somewhat inaccurate on this -- but
9 there were a number of claims raised by the individual
10 defendants as to the proceedings down there, including as
11 to the search warrants, as to various evidentiary issues,
12 discovery issues.

13 The Courts down there felt that it would be
14 appropriate to continue the proceedings for some period to
15 hear those arguments and have additional briefing. I
16 believe that's accurate.

17 MR. DICKEY: Yes, that's accurate, Your Honor.
18 They're waiting for resolution of those appeals.

19 THE COURT: Oh, the appeals, all right.
20 Because the lower Court has already ruled on the search
21 warrant.

22 And that's been appealed? Is that --

23 MR. DICKEY: Your Honor, the Court has made

1 the first ruling on the search warrant. There's another
2 hearing on what the proper remedy should be. That's not
3 scheduled until August.

4 And then that's likely either way -- however
5 that comes out, it's likely to be appealed up to the Court
6 of Appeals.

7 THE COURT: All right. Thank you, Mr. Dickey.
8 Mr. Burck?

9 MR. BURCK: Thank you, Your Honor.

10 Your Honor, the Government has said in its
11 brief that our position is incredible and, as the Court
12 has mentioned, it also references that a foreign company
13 that has no address and no business here in the United
14 States, no place of business, why should it be allowed to
15 allegedly violate the criminal laws of the United States.

16 Our view is that the real critique there may
17 be of the rule itself, or Congress, and that the argument
18 is not with us but with Congress.

19 The other aspect of this I think the Court
20 should take into consideration is that the Government is
21 hardly without recourse to foreign companies like
22 Megaupload.

23 First of all, we have the extradition

1 proceedings that the Government has, in fact, instituted
2 down in New Zealand. The people are the ones who are
3 alleged to commit these types of crimes.

4 The company is obviously potentially liable,
5 under respondeat superior, for the principals and other
6 corporate principals, but the people themselves are
7 certainly potentially liable. We don't argue with the
8 extradition proceedings as proceedings.

9 They also have civil proceedings they could
10 have brought against the company. In fact, there's a
11 whole set, as the Court is well aware, of civil rules
12 that are designed to bring corporations that have minimum
13 contacts with the United States and to serve those
14 corporations by MLAT process, through other processes,
15 and you can bring civil proceedings against a company
16 that way.

17 The other method that they could have used is
18 they could have gone to the Hong Kong authorities and
19 asked the Hong Kong authorities to go after, in a criminal
20 process or a civil process, a corporation that is an
21 entity creation of Hong Kong.

22 They chose not to do the latter two. They did
23 choose to do the first, and those remedies are designed --

1 and that's what we believe Congress has allowed the
2 Government to do -- to go after companies that allegedly
3 commit crimes in the United States. That's how it's
4 supposed to be done. That's what the rule permits.

5 We think it's very important to understand
6 that the Government has never tried to serve us, and we
7 think this is important because it indicates, with all due
8 respect to the Government, that they might have had a
9 vision here that this was a problem a long time ago.

10 They've never tried to -- they had no summons
11 issued by the court and never asked the court to issue
12 until the briefing. They've never -- they list a whole
13 bunch of ways they say they could effect service, and they
14 have not done any of that.

15 We believe that in the case they understood
16 they had a problem from the beginning, but they decided to
17 charge the company anyway.

18 And the results to the company, obviously,
19 have been devastating. The company has had its website
20 shut down, its business has been shut down, and all of its
21 funds have been frozen.

22 The interesting thing about that, from our
23 perspective, Your Honor, is that the Government was able

1 to effect that overnight because it brought a criminal
2 case.

3 THE COURT: Could they not have done the same
4 thing just charging the individual defendants?

5 MR. BURCK: Your Honor, I'll answer that --
6 it's three different ways.

7 First, with respect to funds, there's a
8 substantial amount of money that's in the name of the
9 corporation; it belongs to the corporation.

10 If they had charged the individuals, they
11 might have been able to go through a civil forfeiture
12 proceeding or some similar proceeding to try to seize the
13 funds of the corporation, but there would have been an
14 adversarial proceeding as part of that and the company
15 would have had the ability to have counsel argue against
16 that proceeding.

17 THE COURT: Well, couldn't they do it
18 criminally -- like you said, (inaudible) now and the alter
19 ego theory --

20 MR. BURCK: Your Honor, I believe that even
21 under a criminal forfeiture proceeding as a third party,
22 as an unindicted third party, the corporation still has a
23 requirement to have notice of this proceeding and would

1 have an opportunity to be heard.

2 Here they accomplished everything by simply
3 charging the company with a crime. And, again, we think
4 that they sort of knew that they probably couldn't serve
5 the company and that's why they did what they've done, and
6 it's had very devastating effects.

7 For example, if they'd gone through a civil
8 proceeding to shut down the entire business, some kind of
9 injunctive relief, we would have -- the standard
10 (inaudible) for probable cause versus injunctive relief
11 are very different.

12 There's also, of course, the importance of
13 having counsel present to advocate on behalf of the
14 company. We think that was another reason that they
15 decided not to proceed in a civil process.

16 We don't think it was a mistake that they did
17 this. We think they did it deliberately. And I'm not
18 questioning the motives of the Government, but it's
19 something I think to take into account when we think about
20 the remedies that they have available that they chose not
21 to pursue.

22 The Government now is trying to justify post
23 hoc the actions that it has taken and its ability

1 allegedly to serve the company by offering a whole range
2 of options that they've put in their briefs, that the
3 Court, of course, has read.

4 The first thing we want to note is that
5 there's not a single citation to any case in which any of
6 the alternatives that they have offered has ever been
7 deemed sufficient for a corporate defendant in a criminal
8 case.

9 The cases they really rely on are two, Chitron
10 -- and I'm not sure if that's how you pronounce it -- but
11 Chitron and Public Warehousing. Both of those cases had
12 the two requirements, the mailing requirement and the
13 delivery requirement of knowing the requirement was
14 satisfied. The mailing requirement was deemed satisfied
15 because the Government had served a subsidiary of the
16 parent, and that was deemed to be -- the subsidiary was
17 deemed an alter ego.

18 There's no case that holds -- that we're aware
19 of or the Government has cited -- that takes the position
20 that the Government has advocated expressly in its brief,
21 that the mailing requirement should be read out of the
22 statute -- or the rule, excuse me -- when it is convenient
23 to do so.

1 THE COURT: Should they have the opportunity
2 to argue that one of these U.S. entities which they've
3 identified is in fact an entity which they should have the
4 opportunity to demonstrate is controlled by Megaupload and
5 that the corporate veil should be pierced and that
6 therefore mailing would be appropriate under the alter ego
7 theory that's discussed in the most recent cases from the
8 Northern District of California and Georgia cases?

9 MR. BURCK: Your Honor, if the Government had
10 identified entities that were somehow corporate affiliates
11 of Megaupload that were located in the United States,
12 there would be an argument that --

13 THE COURT: Corporate officials, I guess.

14 MR. BURCK: And as the corporate official --
15 the corporate officials are two gentlemen that they named
16 as potential CEOs, and they also named, of course, the
17 individual defendants when they -- if they are extradited
18 to the United States.

19 In our view, that would simply collapse the
20 delivery requirement -- or the mailing requirement into
21 the delivery requirement.

22 And if you look at the Pangang case, Your
23 Honor, that Court looked at precisely the issue of whether

1 or not you could simply deem serving an agent, an officer,
2 as sufficient to satisfy the mailing requirement.

3 And that Court, we would respectfully submit
4 to the Court, decided correctly and said you couldn't do
5 that because it would essentially read out the mailing
6 requirement.

7 If there was a corporate entity that was in
8 the United States that was a subsidiary or some kind of
9 affiliate of Megaupload, which the Government has not
10 alleged and we certainly are not aware of that, that would
11 then be an argument potentially for an alter ego analysis.

12 Here they offer Carpathia, a third-party
13 vendor, as a potential recipient of service on behalf of
14 Megaupload.

15 Now, there's no precedent, no citation of
16 any sort for the prospect of a third-party vendor, no
17 corporate affiliation whatsoever, complete third-party
18 relationship with Megaupload, that that kind of entity
19 could satisfy the mailing requirement.

20 THE COURT: Well, if the officer is the alter
21 ego, why doesn't that not collapse the requirement?

22 MR. BURCK: Your Honor, I think again I'll
23 refer back to the Pangang case. In that case the Chinese

1 company, the Chinese parent that's been indicted, had a
2 corporate subsidiary located in New Jersey.

3 And the Court now analyzed the relationship
4 between these two entities, and actually one of the -- it
5 was a complicated structure, but one of the entities the
6 Court actually held in essence would be an agent for
7 purposes of the delivery requirement.

8 But as to the mailing requirement, the Court
9 said you can't simply take the agent aspect and assume
10 then the alter ego aspect of the mailing requirement.

11 THE COURT: What about if they found that the
12 Megaupload corporate veil should be pierced, and then one
13 of the officers who are also the defendants have now been
14 extradited, wouldn't that allow them to satisfy Rule 4
15 through the mailing to the officer as the alter ego?

16 MR. BURCK: Your Honor, we still think that
17 would not satisfy the mailing requirement because the
18 rule says that you have to mail the summons to the
19 organization's last known address or its principal place
20 of business.

21 An alter ego analysis -- all the alter ego
22 analyses that we're aware of in the case law that's dealt
23 with this issue has dealt with subsidiaries and corporate

1 parents. They've never, as far as we're aware, ever dealt
2 with a human being being deemed an alter ego and then
3 therefore mailing it to the place in which the person is
4 residing currently -- or the jail, which if the person is
5 in jail would be sufficient.

6 It's always been in the classic alter ego
7 subsidiary corporation, and I think the reason for that,
8 Your Honor -- it may sound somewhat strange, but, in fact,
9 if we look at it from the perspective of the goals of the
10 criminal prosecution, the people -- only human beings are
11 ultimately subject to incarceration.

12 Corporations are only subject to potentially
13 being -- reputation being destroyed, it's shut down in
14 some way, appliance penalties. But here it's -- the
15 people are still under the threat of prosecution
16 regardless of what happens with this motion.

17 The issue is the corporation, can the
18 corporation be held to account under this method, and our
19 view is that it can't be. And the rule is clear on that.

20 And in all the cases that we have found and
21 all the cases that we've cited and all the cases the
22 Government has cited, there's never been a case in which
23 any of the alternatives that the Government offered has

1 been deemed sufficient in an analogous case.

2 And we don't think that's because Megaupload
3 is a weird company or some kind of oddball; we think it's
4 by virtue of the fact that the Government decided to
5 charge a company that had no presence in the United States
6 that would be sufficient for purposes of service.

7 The reason why we believe there are so few
8 cases that actually argue or actually decide these issues
9 or address these issues is because it doesn't happen that
10 often. The Government usually doesn't charge companies
11 that are of this sort.

12 So, Your Honor --

13 THE COURT: Well, there are a lot of the
14 worldwide Internet companies that are doing business
15 versus providing information.

16 Like, Google doesn't register with the state
17 corporation commissions in the various states, but there
18 are a lot of international entities which do register and
19 subject themselves, at least (inaudible) service by
20 mailing to a state corporation commission or a registered
21 agent.

22 And, of course, Megaupload didn't do that, and
23 they didn't acquire their domain name themselves; they did

1 it through another entity. You might look at whether the
2 -- in the United States address was actually even verified
3 in some way, the domain name which permitted them to do
4 business.

5 But I agree with you. We don't have facts
6 that give rise to either of those.

7 Let me change the topic a little bit. Let's
8 assume that Rule 4 was very carefully drafted, that the
9 Criminal Rule 4 applies to mailing to entities which only
10 have a residence in the United States.

11 Why isn't it completely consistent, then, to
12 move over to the international context, the Mutual Legal
13 Assistance Treaty, and say that there's nothing
14 inconsistent with Rule 4 in providing that mailing through
15 the MLAT, which specifically provides for notice of
16 criminal prosecution?

17 MR. BURCK: Your Honor, our answer to that
18 again is the statutory construction argument, which I
19 think we say in our brief, the civil process very
20 explicitly allows for MLAT -- service to an MLAT of a
21 subpoena of a similar type of summons, but the criminal
22 process itself, the criminal rules, do not provide for any
23 such MLAT procedure for service of a criminal summons.

1 THE COURT: Well, MLAT considers cases of
2 notice about criminal proceedings being brought up in the
3 United States against a foreign entity, does it not?

4 MR. BURCK: It does, Your Honor, but the
5 service, the actual concept of the service is still
6 governed solely by Rule 4.

7 THE COURT: Why?

8 MR. BURCK: Because Rule 4 -- unlike the civil
9 rule, Your Honor, which has a very explicit, very long set
10 of provisions for how we go about using the MLAT process
11 for mutual understanding treaties to serve civil process,
12 the criminal process says we can do one thing -- you can
13 do one thing to serve a company; you can use Rule 4.

14 The MLAT process is used often by the
15 Government for all kinds of criminal-related search
16 warrants, subpoenas, et cetera. But we haven't seen,
17 again, a single citation from the Government, nor are we
18 aware of a single example in which a summons was served,
19 deemed served, in a criminal case against a corporation
20 with the MLAT process.

21 THE COURT: My question is a little different.
22 I understand there's not a body of case law on it, but why
23 are they mutually exclusive? Why doesn't Rule 4 capture

1 any ability to serve under the MLAT?

2 MR. BURCK: Your Honor, I have two responses.
3 First, it is --

4 THE COURT: For mailing. Mailing.

5 MR. BURCK: For mailing.

6 Your Honor, two responses. Congress could
7 very easily have said -- replicated the rules of the civil
8 proceedings, codes of civil procedure in the Federal Rules
9 of Criminal Procedure. They very easily could have done
10 that. There were many differences between the rules, and
11 they chose not to do it for the federal criminal rules.

12 We think that the reason -- or a very good
13 reason for that is that a corporation is of a different
14 nature than a person.

15 And the corporation is a creation of the
16 foreign sovereign, and the deference to comity interests
17 to other -- to similar international law issues, interests
18 and principles could dictate that Congress, which in our
19 view is clear from the rules, decided that for a foreign
20 corporate defendant in a criminal case it would be
21 inappropriate for the Government to serve or prosecute
22 such an entity when it belongs to -- is a creature of the
23 sworn sovereign.

1 It's not here in the U.S., it may have
2 contacts in the U.S., but also Congress again gave a whole
3 set of other alternative ways for the Government to do
4 this.

5 THE COURT: So, why is this any different than
6 having to go through the Hague in a similar context?

7 And, for the very same reasons, the
8 appreciation of the sovereignty of foreign nations
9 requires a treaty, because the Hague convention where
10 countries either sign on to or they don't sign on to the
11 Hague and (inaudible) for discovery.

12 And here you've got the MLAT, which, again,
13 out of deference to the sovereignty of foreign nations,
14 has identified the way to proceed when you're dealing with
15 criminal matters for a company in the United States.

16 MR. BURCK: Your Honor, our view is that the
17 nature of using criminal proceedings versus civil
18 proceedings raises a whole different comity issue with
19 respect to the interest of nations.

20 The individuals in this case and in any case
21 when they're located overseas, when there is a criminal
22 proceeding brought against them, there is a very --
23 there's a substantial deference to the extradition

1 proceedings. Obviously, there's a connection with the
2 extradition proceedings and the laws of that local
3 country.

4 Here, Congress made a judgment that the
5 criminal proceeding itself against a foreign corporation
6 that is not physically present, that would raise --
7 bringing a criminal case against that company would raise
8 comity issues of such a serious degree that they have
9 prohibited it.

10 Now, the Hague convention, the MLAT process,
11 we would submit that really goes to civil proceedings as
12 it relates to foreign corporate defendants, and civil
13 proceedings are the lower -- although serious, they are
14 the lower magnitude in terms of the threat to a
15 corporation.

16 Again, if you look at this case, had the
17 Government proceeded in a civil manner as opposed to a
18 criminal manner, there potentially would have been a very
19 different outcome to what happened seven months ago. The
20 company might still be alive, their websites might still
21 be alive, their funds may not be frozen.

22 But the process that was chosen here just
23 illustrates, I think, the threat that the rule was

1 designed to prevent.

2 They wiped out a foreign company that does not
3 reside in the United States by bringing a criminal case
4 against it, and there's no way -- unless the company would
5 have waived its service rights, there's no way for the
6 Government to actually prosecute them.

7 And, Your Honor, with respect to the MLAT and
8 comity issues, one issue that's particularly, I think,
9 specific to this case -- but again, the Pangang case --
10 and I hope I'm saying that correctly -- is illustrative.

11 In that case we're actually dealing with the
12 same government that we have in this case, the Chinese
13 government. The Hong Kong government is obviously
14 somewhat different, but it's part of the People's Republic
15 of China.

16 In the Pangang case the MLAT issue was left
17 open by the District Court, but the Government in that
18 case told the District Court, according to the opinion,
19 that serving going through the MLAT process would be
20 futile because they understood the Chinese would never
21 actually perform the service and were not required to do
22 so under the MLAT.

23 In this case we had no idea if the Chinese

1 government would entertain an MLAT process. We know, at
2 least as far as we are aware -- and perhaps the government
3 has done it now or they have not disclosed it to us or the
4 Court -- they have not tried to do this to the government,
5 with the Chinese, and given what the government in
6 California -- the U.S. Attorney's Office in California
7 says, it would be interesting to find out here whether or
8 not the government believes that the Chinese would even
9 entertain such an MLAT in this case.

10 So, the principles of comity, we think, are
11 very, very, very -- the highest with a criminal case. We
12 think that Congress took that into account in designing
13 the rules.

14 The civil rules are very different from the
15 criminal rules, and the Pangang case in particular raises
16 an issue about the Chinese willingness to actually go
17 ahead and even entertain such an MLAT process.

18 THE COURT: Well, even if you disregard Rule 4
19 entirely and focus on the MLAT for both the mailing and
20 the service, the statute just says the requested party may
21 effect service of any document by mail. And it then goes
22 on further about requesting (inaudible) of the parties.

23 But we've got, you know, a treaty here which

1 is obviously a separate body of law, and I understand your
2 comity argument and the fact that criminal proceedings are
3 different.

4 There's a case out of the 4th Circuit from
5 March of 2011, In re: Grand Jury Subpoena, where they
6 discuss a criminal service under Rule 17 of the Criminal
7 -- the Rules of Criminal Procedure.

8 In that case they --found that application of
9 the MLAT was appropriate, but the rule did not allow for
10 foreign service under the Criminal Rules themselves but
11 did allow it under the MLAT.

12 Did you have a chance to review that case or
13 not?

14 MR. BURCK: No, Your Honor, we have not had a
15 chance to review that case, but we are aware of the
16 arguments.

17 Your Honor, I think that -- you've heard our
18 arguments on the merits. I think that here we still have
19 no effort by the Government whatsoever to take any of the
20 steps that could have been available to them, possibly
21 available to them.

22 The MLAT -- obviously they are quite aware of
23 the MLAT. They could have done this a long time ago, they

1 could have done it before they indicted the company, but
2 they chose not to. And to this day we have no idea if
3 they have tried or if they have not tried.

4 So, from -- we believe the MLAT would not be
5 appropriate. We still maintain that there hasn't been a
6 case in this type of context in which the MLAT has been
7 used to effectuate service against a corporate defendant
8 that's located overseas that would be contrary to Federal
9 Rule of Criminal Procedure 4.

10 But even granting all that, putting everything
11 else aside, the Government hasn't done this, and we think
12 that there's an injustice built into that. Because the
13 company, again, suffered all the consequences of a
14 criminal prosecution but has not even been offered the
15 ability to respond until the Court graciously allowed us
16 to appear on a limited basis.

17 If this was a person that was in similar
18 circumstances and the Government had indicted the person
19 and then decided, "We're not going to serve you yet, we're
20 not going to arrest you yet, we're just going to let the
21 indictments hang out there, we're going to freeze your
22 assets, we're going to wipe out your reputation, kill your
23 business," I think that there would be very little

1 argument that there was a very serious due process
2 problem.

3 Here we have -- although it's not a person,
4 it has the same effect on the corporation. And there is
5 a right that these corporations have to due process and to
6 constitutional protections, and that is not being
7 vindicated here.

8 In our view, it's futile for the Government
9 to even attempt to do any of these measures that they have
10 now come up with, that they have now suggested, and for
11 those reasons we believe that the appropriate remedy here
12 is to dismiss the indictment, the superceding indictment,
13 with prejudice.

14 THE COURT: Which has never been done by any
15 court previously.

16 MR. BURCK: Your Honor, with respect, the
17 cases that we cited, they've been quashed. We can't even
18 quash because we haven't been served.

19 So, the only option would be -- could be a
20 remedy -- we have no remedy in that case because they can
21 just simply not serve us and say, "Well, we'll serve you
22 one day." And the only remedy we have is dismissal.

23 And we believe, as we've set forth in our

1 brief, that the devastation to the company and the clear
2 due process violations that have occurred would justify
3 dismissal.

4 We think the only reason why there isn't a
5 precedent for doing this is not because Megaupload is a
6 strange company that's operating in the United States
7 without an office; it's because the Government has not
8 really gone after companies like this, certainly not based
9 on the case law that we've reviewed.

10 So, we think it's a result of the nature of
11 the prosecution they've brought, not the nature of the
12 corporation that's at issue.

13 And just on the question that the Government
14 has suggested -- and I think it's important to discuss
15 this briefly -- that Megaupload has somehow designed
16 itself to evade process in the United States, nothing
17 could be further from the truth.

18 The company had servers -- half its servers
19 in the country, and it certainly had a lot of customers in
20 the United States, customers in Virginia, it had brought
21 cases in the United States.

22 The idea that the company thought five years
23 ago or six years ago that, "We're going to not put an

1 office in the U.S. so that we might one day -- just so we
2 don't get criminally prosecuted one day," is implausible
3 at best, in our view.

4 So, we think the company has not done anything
5 to evade anything. They simply don't -- aren't here for
6 purposes of a criminal prosecution.

7 THE COURT: All right. Thank you, Mr. Burck.

8 MR. BURCK: Thank you, Your Honor.

9 THE COURT: Does the Government want to
10 respond?

11 MR. DICKEY: Thank you, Your Honor.

12 And actually, Your Honor, with the help of
13 the Court Security Officer, we'd like to pass up a case.

14 (Mr. Dickey handed a document to the Court
15 Security Officer, who handed it up to the Court for his
16 examination.)

17 MR. DICKEY: And, Your Honor, I apologize that
18 we didn't get this in to our opposition. This is a case
19 that we just found yesterday. It's --

20 THE COURT: Have you given a copy to counsel?

21 MR. DICKEY: We have, Your Honor.

22 And it's a case from the District of Columbia,
23 and it's one where the defendant in that case is FARC, out

1 of South America, and it's a case where the Court allowed
2 service by, I think, email, publication, but not by the
3 methods that the Defendant is asking for.

4 But we're not going to focus on that, Your
5 Honor, but we did want to pass it up because we think it
6 would be helpful to the Court's decision.

7 THE COURT: All right. Thank you.

8 MR. DICKEY: First, Your Honor, just to
9 respond to a couple of points raised by Defense counsel,
10 starting with Congress. I think Defense counsel opened by
11 saying that this was -- this is more of an issue of
12 Congress than it is with the case or the rule.

13 We think that Congress has spoken very clearly
14 in the legislative history of the copyright laws, in
15 criminal copyright laws, in terms of this is a global
16 problem, this is a worldwide problem.

17 We think it's clear that Congress intended
18 that when foreign companies or foreign actors commit
19 copyright crimes in the United States, that courts would
20 have jurisdiction over those crimes.

21 But also, Your Honor, Defense counsel
22 mentioned possible repercussions to the restrained funds,
23 even funds that were in the name of the company.

1 Those funds are the proceeds of criminal acts,
2 whether they were put into accounts under the name of the
3 company or the individuals, so it's the Government's
4 position, Your Honor, that even if the corporation were to
5 be dismissed it's going to have no impact, it's going to
6 have no effect on whether those funds should be restrained
7 or not.

8 But it seems that that's a battle that we'll
9 have for a future day, Your Honor, but we believe that
10 there would be no impact there.

11 On the Pangang case, the one that counsel
12 brought to the Court's attention earlier this week, that's
13 a case where the MLAT was with China.

14 But in this case there is a separate and
15 distinct MLAT that the United States has with Hong Kong,
16 and so the concerns of the government, the overseas
17 government not effecting service aren't present with Hong
18 Kong, Your Honor.

19 And so, if the Court were to direct the
20 Government to go down that path, then we should be able to
21 effect service that way. Alternatively, New Zealand might
22 be another country that we could effect service with, Your
23 Honor.

1 And while we're on the topic of MLAT, Your
2 Honor, we didn't brief this issue as well, but it's our
3 understanding that MLAT being a treaty between the United
4 States and a foreign government would override a rule just
5 in terms of the structure of laws, Your Honor.

6 So, very quickly, Your Honor, I just want to
7 comment briefly and summarize the case law that the Court
8 has and then talk about some of the practical implications
9 of where we're at here.

10 As far as the case law is concerned, Your
11 Honor, if you look at all of the cases, not just the two
12 that Defense counsel is saying are the Government's main
13 cases -- but if you look at all of the cases that the
14 parties have cited, none of them adopt the Defendant's
15 interpretation of the rule.

16 If they did, then those cases would begin and
17 end with whether there's an office in the United States.
18 They don't do that; they go beyond that.

19 None of the cases impose a time limit on
20 service, none of the cases even acknowledge that dismissal
21 would be a possible remedy, let alone actually grant it,
22 and all of the cases interpret Rule 4 as the Government
23 is suggesting here, Your Honor; namely, that the mailing

1 provision can be satisfied in a variety of ways. There's
2 not just one way to satisfy that requirement.

3 And all of the cases have an underlying
4 principle which is basically that there are sufficient
5 contacts in a district. If a crime is being committed in
6 a district, then there is personal jurisdiction.

7 And, Your Honor, we don't need to belabor the
8 contacts that the company had. We've outlined those in
9 our brief. They were many, they were continuous; it's not
10 just a few isolated events but it was over a course of
11 years, millions of dollars being poured into this
12 district.

13 And most recently, we should add that the
14 Defendant did make an appearance in a civil matter in this
15 very court, so we don't think that it's even a question of
16 whether or not there were contacts with this district,
17 Your Honor.

18 And just to finish up, Your Honor, even if
19 this Court were to adopt the Defendant's interpretation of
20 Rule 4, the Government is and would be in a position to
21 accomplish service as we've outlined in our opposition.

22 At this time, right now, it's premature to
23 grant the relief sought by the Defendant because the rule

1 doesn't impose a deadline, the rule doesn't permit that
2 relief and because the U.S. should be given an opportunity
3 to effect service according to the methods we've outlined,
4 Your Honor. And if the Defendant feels at that time that
5 it's inappropriate, they can move to quash.

6 Your Honor, the Government has been accused of
7 rewriting the rule in this case, but it's the Defendant's
8 construction that tries to read in a number of the
9 requirements, the timing requirement, the dismissal
10 requirement, none of which are found in the rule.

11 The Government's interpretation, on the other
12 hand, is consistent with the plain language. It's
13 consistent with the drafter's intent --

14 THE COURT: Well, you know, it's a two-prong
15 rule under Rule 4, right? It's serve it and mail it to a
16 location in the United States, and you don't have a
17 location in the United States to mail it to.

18 MR. DICKEY: Your Honor, we believe --

19 THE COURT: At least that's the plain reading
20 of the words of the statute, right?

21 MR. DICKEY: That's right, Your Honor. We've
22 given a couple of options that would involve a mailing in
23 the United States, one of which would be to the individual

1 defendants when they're here. We would also mail copies
2 to wherever they're located.

3 Another would be the data center that was in
4 this district. The rule says the organization's last
5 known address within the district. It doesn't have to be
6 the principal place of business in the district; it just
7 has to be the last known address.

8 THE COURT: It's never had an address in the
9 district, right?

10 MR. DICKEY: Your Honor, they certainly had
11 hundreds of servers that were the very heart of the
12 business in that location, and that could be considered to
13 be their address in the district.

14 They were also given a couple of other
15 alternatives that would satisfy this plain language.
16 We've offered to serve the CEOs at their offices, those to
17 be considered the principal place of business elsewhere in
18 the United States, or to perhaps counsel's office in
19 California, which by their very own terms of service they
20 were demanding that users would have to bring suits in
21 southern California.

22 So, Your Honor, we believe that under these
23 circumstances we can satisfy the rule. We also think that

1 we don't have to guess at what the intent was of the
2 drafters. We've got this (indicating), this proceedings
3 of the drafters which we've cited to some of what they've
4 had to say.

5 And namely, Your Honor, they have a lot to say
6 about jurisdiction and how to apply the rules. They said
7 that the rules would never apply to a foreign company
8 unless that company committed a crime in the district and
9 that gives the Court jurisdiction.

10 They said you just can't get jurisdiction
11 unless the law creates it, and here Congress has made it
12 crystal clear that they intended to address the worldwide
13 problem.

14 How do we apply the rule? The drafters said
15 the provision for a summons was principally for the
16 convenience of both the Government and the Defendants.
17 The drafters said that it was to make things easier than
18 it would be to get in touch with the corporation
19 otherwise.

20 And so, we don't have to guess, Your Honor.
21 We don't have to compare to the civil rules to figure out
22 what the drafters intended here. Congress and the
23 committee that passed these rules have made it crystal

1 clear.

2 And just to conclude, Your Honor, the heart
3 of the issue here is whether a foreign company like the
4 Defendant, like Megaupload Limited, can commit crimes in
5 the United States, can commit crimes in this district and
6 never be brought to justice -- and all because the company
7 chose not to have an office, which under these
8 circumstances is also a violation of the Virginia law
9 that we've cited.

10 That just can't be the case, Your Honor.

11 Thank you.

12 THE COURT: All right. Thank you, Mr. Dickey.

13 MR. BURCK: Your Honor, may I just briefly
14 respond?

15 THE COURT: Yes, sir.

16 MR. BURCK: Just a few points, Your Honor, and
17 I'll start from back to forward.

18 On the copyright point, I don't think the
19 Government is suggesting that anything in the copyright
20 laws or the legislative history would suggest that the
21 Federal Rules of Criminal Procedure are tossed out when
22 you have a copyright case.

23 The copyright laws are obviously -- the

1 jurisdiction that we're talking about here, I think
2 they're conflating subject matter into personal
3 jurisdiction. But I will -- we can brief that further
4 on the legislative history if that will be necessary.

5 A lot of the arguments that the Government
6 is relying on are terrific civil case arguments, the
7 (inaudible) contacts and all the usual that you hear in a
8 civil case.

9 But we're not in a civil case. They've chosen
10 to criminally prosecute this company. Had they brought a
11 civil proceeding where there was an opportunity for an
12 adversarial appearance and there's an opportunity to be
13 heard in front of a Court before they took certain
14 actions, drastic actions that can't be unrun, that would
15 be -- the arguments they are making -- I mean, I don't
16 want to concede them, but I would certainly say that they
17 would be more convincing than they are in a criminal
18 prosecution.

19 The case that the Government has handed up,
20 which is United States of America versus Fuerzas Armadas
21 and FARC, which is a -- the Revolutionary Armed Forces of
22 Columbia, a well-known terrorist organization, we received
23 it in court this morning so we haven't had a chance to

1 review it other than to read the order. But I would note
2 a few things about it that I think make it inapplicable
3 and of little value here.

4 Obviously, FARC is not a corporation; it is
5 an organization; it actually is a terrorist organization.
6 This is a corporation that is created under the rules of a
7 foreign sovereign that we owe comity to. I don't think
8 anyone, certainly on this side of the court, is suggesting
9 that FARC would be owed any comity; nor, I think, would
10 Columbia be a party given comity.

11 There was no adversarial proceeding, as far as
12 we can tell from this order; it was simply an order issued
13 by a district court judge in D.C., ordering service upon
14 FARC through these various methods. Again, we have no
15 evidence that there was any kind of challenge to any of
16 this. Probably there wasn't, given it's a terrorist
17 organization.

18 So, we don't think, again, that this is really
19 something to rely upon in contrast to the various
20 citations, the case citations that we've given to the
21 Court.

22 And just on that last point, the case
23 citations, the Government again says that there are many

1 cases from which they cite that support their principle.
2 Your Honor, with respect to the Government, not a single
3 one of those cases is a criminal case. Every one of those
4 cases is a civil case.

5 This is a criminal proceeding. If the
6 Government had chosen to take this in a different path,
7 we'd have a different argument. Right now, Your Honor,
8 we are resting on the rule and the plain language of the
9 rule.

10 Thank you, Your Honor.

11 THE COURT: Let me ask you this. Say, you
12 know -- say I rule that -- and perhaps there's a couple
13 other different ways. One is that Rule 4 is one means of
14 serving a foreign defendant in a criminal action and that
15 the MLAT is a separate, independent way of fulfilling both
16 the mailing and the service requirement under due process
17 considerations.

18 If I rule that way and/or in the alternative
19 that mailing service would be available to the Government
20 when the Defendants appear in the United States after
21 extradition and that they should then have an opportunity
22 to argue that officers of the company are the alter ego
23 and that as a result the service could be under Rule 4 and

1 complied with by serving those defendants/officers.

2 Is this a matter which is never ripe for
3 interlocutory appeal, in your mind, so that you never can
4 get some resolution as to what's required and what isn't
5 required before, you know, the extradition proceeding is
6 finished? Or, do you think the 4th Circuit is just going
7 to send it back and say it's not a case in controversy and
8 check with us later?

9 MR. BURCK: Your Honor, I submit our view
10 would certainly be that it should be ripe for
11 interlocutory appeal. The harm has occurred to the
12 company.

13 If the MLAT was -- if the Court ruled that
14 the MLAT was an alternative to Rule 4 and presumably the
15 Government went through the MLAT process and served the
16 company consistent with whatever the Court had ruled --

17 THE COURT: Well, that -- can I require them
18 to serve the company on any particular date? There's no
19 date in the rule -- there appears to be no statutory
20 limitation, and I understand your due process argument.

21 So I -- what if I, you know, would start with
22 a premise that I don't control when the Government decides
23 to serve the company. Where do we go from there?

1 MR. BURCK: Well, Your Honor, we would submit
2 that if the Court were ruling -- going in that direction
3 as a reasoning matter, that the appropriate result would
4 be to dismiss the indictment without prejudice.

5 Because the company, again, has already
6 suffered all the consequences of a criminal prosecution,
7 so the -- even if there's a trial and the company is
8 acquitted and the individuals are acquitted, of course the
9 company is still done.

10 So, we think that the due process claims trump
11 all the other issues, and we think that if the Court were
12 so inclined, that the Government should take certain steps
13 in order to effectuate service, then -- or if the
14 extradition proceedings would be the relevant time line
15 for that, again, the company should have an opportunity
16 during that period of time to try to rehabilitate itself,
17 because there isn't currently a criminal case that is
18 sufficient for purposes of service and they've suffered
19 massive harm.

20 So, of course, that would not be our
21 preference, and we do think that the Supreme Court has
22 said you can't change the rules of service, et cetera, but
23 the -- that's all in our brief -- but we do think that the

1 alternative would be dismissal without prejudice, allow
2 the Government at the appropriate time to then supercede
3 the indictment again, add the corporation into the
4 indictment.

5 And at that point, a year down the road, two
6 years, however long it takes and wherever the MLAT process
7 or the extradition process takes, at that point we could
8 have this argument as to specific individuals,
9 corporations, entities.

10 But, in the meantime, having the company
11 subject to the burden of a -- the incredible burden of a
12 criminal prosecution with no ability to defend itself and
13 no service is an extraordinary result and one that is
14 unprecedented.

15 THE COURT: All right. Thank you.

16 MR. BURCK: Thank you, Your Honor.

17 THE COURT: Mr. Dickey, did you want to
18 respond to the interlocutory appeal question?

19 MR. DICKEY: Yes, very briefly, Your Honor.

20 THE COURT: All right. Take whatever time you
21 need.

22 MR. DICKEY: Thank you. Although, if it's
23 okay with the Court, may I just address the second point

1 that counsel discussed and then come back to the --

2 THE COURT: All right. Go ahead.

3 MR. DICKEY: So, Your Honor, Defense counsel
4 is saying that if the Defendant is dismissed without
5 prejudice in this case -- I mean, first of all, that would
6 be a huge waste of resources to put another grand jury,
7 the Government and this Court through another round of
8 bringing them into the case at a later date.

9 And meanwhile they've asked for a stay in
10 their civil litigation based on this criminal litigation,
11 and so I think that even if the Court were to let them out
12 of the criminal case, that's not a -- they're not going to
13 be free, so to speak, to use Defense counsel's words, to
14 do whatever they want. They're still going to have to be
15 dealing with that litigation.

16 As to the 4th Circuit, Your Honor, I think
17 that they would be waiting for -- although I'm a bit rusty
18 on the rules for bringing the appeal, I think they would
19 be waiting for a final disposition in this case. And so,
20 it's not clear if they would be willing to take that
21 interlocutory appeal.

22 THE COURT: What -- not to put you on the
23 spot, but what's the Government's intent with service on

1 the company?

2 I mean, I have alluded to the fact that, you
3 know, the Government likely would wait until it sees
4 individual defendants present here in the district before
5 enjoining the corporation.

6 But, you know, that was my musing. What's the
7 present intent of the Government?

8 MR. DICKEY: Your Honor, I'll say two things
9 about that. First, the Government intends to comply with
10 whatever order the Court rules in this case and this issue
11 before you.

12 But second, that yes, it is the Government's
13 intent, as we've intended from the beginning of this case
14 when it was first indicted, to extradite the individual
15 defendants. We've been working diligently toward that.

16 And then when we get them here to the
17 district, to serve a summons on them and mail a copy for
18 the corporations -- both corporations, Your Honor, not
19 just the one that's at issue in this motion but the other
20 one as well.

21 THE COURT: All right. Thank you.

22 All right. As I've said before, it's a really
23 interesting issue. There's lots of issues raised in the

1 case that are interesting.

2 But we'll look at it a little further and
3 we'll get you a ruling, and then you can decide what to do
4 at that point once you get it.

5 All right. I appreciate the quality of the
6 arguments today. We're in recess. Have a good weekend.
7 Thank you all.

8 MR. BURCK: Thank you, Your Honor.

9 MR. DICKEY: Thank you, Your Honor.

10 * * *

11 (Whereupon, at approximately 12:05 o'clock
12 p.m., the hearing in the above-entitled matter was
13 concluded.)

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CERTIFICATE OF REPORTER

I, KATHLEEN M. ELIAS, a Certified Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings which I thereafter reduced to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

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KATHLEEN M. ELIAS, CVR
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