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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AF HOLDINGS LLC,)	Civil Action No.
)	12-00048-BAH
Plaintiff.)	
)	
v.)	
)	
DOES 1-1058,)	April 27, 2012
)	11:42 a.m.
Defendants.)	

Washington, D.C.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE BERYL A. HOWELL
UNITED STATES DISTRICT JUDGE

COURT REPORTER: PATRICIA A. KANESHIRO-MILLER, RMR
Certified Realtime Reporter
Official Court Reporter
Room 4704B, U.S. Courthouse
Washington, D.C. 20001
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PROCEEDINGS

THE CLERK: Civil Action 12-48, AF Holdings, LLC
versus Does, et al.

Counsel, please step forward to the podium and state
your appearances for the record.

MR. STEELE: Good morning, Your Honor. John Steele
here on behalf of plaintiff, AF Holdings.

THE COURT: Good morning.

MR. FOX: Good morning, Your Honor. Benjamin Fox for
Verizon, Bright House Communications, and Cox Communications.

THE COURT: Oh, all in one body. How pleasant.

MR. HUFFMAN: Good morning, Your Honor. Bart Huffman
for SBC Internet Services, doing business as AT&T Internet
Services.

THE COURT: Good morning.

MR. STOLTZ: Good morning. Mitchell Stoltz, the
Electronic Frontier Foundation for amicus and for the witness,
Mr. Seth Schoen.

MR. SEIVER: Good morning, Your Honor. John Seiver,
Davis, Wright, Tremaine, for non-party Comcast.

THE COURT: Okay. Thank you. Could you all please
get seated. My court reporter is going to make a seating
chart with your names, so I can keep track of who's who, as
can she.

All right. We are here on the plaintiff's motion to

1 compel Comcast. And who is for Comcast?

2 MR. SEIVER: I am, Your Honor. John Seiver.

3 THE COURT: John Seiver, great.

4 Mr. Fox, you're here for all the other four or five
5 ISPs?

6 MR. FOX: Except for AT&T, who is Mr. Huffman.

7 THE COURT: For AT&T?

8 MR. HUFFMAN: Yes, Your Honor.

9 THE COURT: And Mr. Stoltz, you're here for EFF and
10 the amici?

11 MR. STOLTZ: Yes, Your Honor.

12 THE COURT: Got it. All right.

13 Let me just start by understanding who has a witness
14 that they think they need to present here. I think you have
15 two witnesses that you would like to present, is that correct?

16 MR. STEELE: We have just one witness, Your Honor.

17 THE COURT: One witness. And who is that?

18 MR. STEELE: Our witness is Steve Stoltz, Your Honor.

19 THE COURT: Steve?

20 MR. STEELE: Stoltz, Your Honor.

21 THE COURT: Oh, another Stoltz?

22 MR. STEELE: Smoot, Your Honor. I'm sorry. Smoot,
23 S-M-O-O-T.

24 THE COURT: Okay. That would have been unusual.

25 MR. STEELE: Yes. I apologize.

1 THE COURT: I have received the declarations from the
2 ISPs. Do you have any witnesses that you plan to present oral
3 testimony from today?

4 MR. HUFFMAN: Yes, Your Honor. We intend to present
5 as a witness Mr. Seth Schoen, from the Electronic Frontier
6 Foundation, who has submitted a declaration in this case, as
7 well.

8 THE COURT: And is he going to add something to that
9 declaration?

10 MR. HUFFMAN: We could explore further some of the
11 topics with respect to geolocation, if it is of interest to
12 the Court.

13 THE COURT: And nothing on undue burden?

14 MR. HUFFMAN: No, Your Honor, except insofar as the
15 proceeding, we believe the discovery is improperly sought and
16 any burden would be undue.

17 THE COURT: All right. Why don't we start with your
18 witness.

19 MR. STEELE: Yes, Your Honor. I call Steven Smoot.

20 THE COURT: Mr. Smoot, please step forward to the
21 witness stand and raise your right hand.

22 **STEVEN W. SMOOT,**
23 having been first duly sworn to tell the truth, the whole
24 truth and nothing but the truth, was examined and testified as
25 follows:

1 MR. STEELE: Your Honor, would it please the Court if
2 I approach the podium or if I --

3 THE COURT: No, please approach the podium. You have
4 to speak into the microphone so the court reporter can capture
5 what you say.

6 **DIRECT EXAMINATION**

7 BY MR. STEELE:

8 Q. Mr. Smoot, just to be clear, please state your name and
9 address for the record.

10 A. Yes, my name is Steven W. Smoot. I live at 713 Fox Gate
11 Court in Plant City, Florida.

12 Q. And your occupation?

13 A. I'm a technology consultant.

14 Q. And how long have you been a technology consultant?

15 A. For over 20 years.

16 Q. And what is your current employment?

17 A. I'm currently an independent consultant with a consulting
18 firm known as eComp Consultants.

19 Q. And as part of that employment, what is the description of
20 your responsibilities?

21 A. I consult on technology involved in everything from
22 assessing new businesses to assessing technology and
23 understanding the issues related to patents on technology. I
24 also have been involved with forensic investigations involving
25 technology.

1 THE COURT: And what is the name of your company
2 again?

3 THE WITNESS: eComp Consultants, E-C-O-M-P
4 Consultants.

5 THE COURT: Thank you.

6 THE WITNESS: Yes, ma'am. Yes, Your Honor.

7 BY MR. STEELE:

8 Q. All right. And as part of your consulting, have you had
9 any experience with communication protocols in the internet?

10 A. Yes, I have. In fact, my early career was heavily
11 involved in telecommunications, product design, both hardware
12 and software engineering. My work has also led to the
13 acceptance of protocols that I have designed by the American
14 National Standards Institute for level two and level four
15 communications.

16 Q. Have you performed any other work related to internet or
17 communication protocols?

18 A. Yes. A number of products that I was involved in the
19 design of, for instance, the first high speed data encryption
20 device that was accepted by the National Security
21 Administration, and I designed the protocols for implementing
22 what's called the line protocol for those encryptors.

23 Q. Okay. Do you have any experience with what's referred to
24 as a BitTorrent protocol?

25 A. I am knowledgeable on BitTorrent protocol, yes.

1 Q. Okay. And do you have any experience or knowledge with a
2 technology called geolocation?

3 A. I'm aware of geolocation and have used similar techniques,
4 in fact, in testimony where I have testified as to how
5 location systems work.

6 Q. Speaking of your experience as an expert testifying, how
7 many times have you been qualified as an expert to testify in
8 court?

9 A. Five times.

10 Q. Okay. And in addition to those experiences, have you been
11 called to testify in other matters?

12 A. Yes, I have.

13 Q. And what are those other matters?

14 A. I have testified in theft of corporate secrets in cases
15 involving -- one case was a very serious traffic infraction in
16 which the evidence did not support the state's case, and I
17 have also consulted on a number of cases relating to murders
18 in which location technology was a major factor in the case.

19 Q. And just so that I'm clear, when did you first begin
20 working in the technology sector or field?

21 A. That would go back to 1977 -- 1976.

22 Q. Pardon me?

23 A. 1976.

24 MR. STEELE: Your Honor, I proffer this person as an
25 expert in the area of internet telecommunications and

1 communications.

2 MR. HUFFMAN: Your Honor, we object to that proffer.

3 THE COURT: And why is that?

4 MR. HUFFMAN: For a number of grounds. First of all,
5 Your Honor, there has been no showing at all with respect to
6 internet or telecommunications technology or a need or
7 relevance of any expert in that general field. Secondly, he
8 has only stated that he has knowledge, not even any particular
9 level of knowledge, with respect to BitTorrent technology
10 and/or with respect to IP address geolocation.

11 THE COURT: Well, I think the appropriate way to deal
12 with that is for you to conduct your own voir dire if you have
13 questions about his underlying qualifications.

14 Plaintiff's counsel may be seated.

15 Conduct your voir dire.

16 MR. HUFFMAN: Thank you, Your Honor.

17 **VOIR DIRE**

18 BY MR. HUFFMAN:

19 Q. What experience do you have specifically with respect to
20 BitTorrent protocols?

21 A. I have studied the protocol because I keep up on protocols
22 as a matter of keeping up my expertise in communications. I
23 have also, at times, used BitTorrent protocols to download,
24 for instance, Linux distributions, as I'm also very involved
25 in operating system development. So I'm aware of both how it

1 works from the user's standpoint, as well as the technical
2 underpinnings of the protocol itself.

3 Q. To what extent have you studied the operation of the
4 BitTorrent other than your experience as a user downloading
5 operating systems?

6 A. As I said, I explicitly studied the BitTorrent protocol as
7 I keep up with a number of different protocols that are
8 currently in use on the internet. It is just a matter of
9 keeping my skills up in my field.

10 Q. In what way have you studied it?

11 A. I studied the mechanisms, primarily to understand what's
12 the difference between BitTorrent and other protocols that are
13 out there; why is it better, why is it not; the potential for,
14 you know, problems with the protocol. Every protocol you
15 design has issues such as losing synchronization or losing
16 packets and these kinds of things, and there must be ways of
17 dealing with those, so I studied the protocol to understand
18 exactly what they were doing in that area.

19 Q. Have you ever provided any expert witness testimony on the
20 use of BitTorrent protocol?

21 A. No, I haven't.

22 Q. Have you ever provided any consulting services with
23 respect to the use of BitTorrent protocol?

24 A. No, I haven't.

25 Q. Or with respect to file-sharing?

1 A. Yes, I have.

2 Q. What type of file-sharing?

3 A. Well, it was conventional file-sharing, one-to-one
4 file-sharing. And the company that I did that work at was
5 Paradigm Corporation, in which we had a number of
6 communications products that had file transfer capabilities,
7 and so I was one of the lead engineers.

8 Q. Other than one-to-one file-sharing, what consulting
9 services, if any, have you provided?

10 A. I have not consulted on BitTorrent.

11 Q. Or peer-to-peer of any kind?

12 A. No.

13 Q. With respect to IP address geolocation, what is the nature
14 of your experience and expertise?

15 A. Location, in general, is my area of expertise, and I
16 have -- I have testified on cell phone location systems, on
17 GPS location systems, on automatic vehicle location systems.
18 I've also been aware of the mechanisms that the geolocation
19 providers use today in terms of receiving blocks of addresses,
20 for example, and the regions that those blocks of addresses
21 are associated with and how that information is used to
22 attempt to locate, to some degree, an IP address.

23 Q. Have you ever provided any consulting services with
24 respect to IP address geolocation?

25 A. No, I haven't.

1 Q. Have you ever been qualified or testified as an expert
2 before with respect to IP address geolocation?

3 A. No, I have not.

4 Q. Have you ever examined or performed any study with respect
5 to the difference between GPS location or geolocation, mobile
6 location, if you will, and IP address geolocation?

7 A. Could you state the question again?

8 Q. Yes. Have you ever examined the difference between
9 geolocation or locational technology involving GPS systems in
10 mobile phones, for example, on the one hand, and geolocation
11 with respect to individual subscriber IP addresses?

12 A. Not before this case. I did that study as a part of this
13 case.

14 Q. Have you ever studied or analyzed the accuracy,
15 independent of your study for this case, the accuracy of IP
16 address geolocation techniques?

17 A. No, I haven't.

18 MR. HUFFMAN: I submit, Your Honor, that this witness
19 is not qualified in these two particular areas.

20 THE COURT: Do you have a CV for this witness?

21 MR. STEELE: Yes, I do, Your Honor.

22 THE COURT: Would you like to have it marked as an
23 exhibit for this hearing?

24 MR. STEELE: Yes, Your Honor.

25 THE COURT: Have you shown it to opposing counsel?

1 MR. STEELE: I provided it to opposing counsel via
2 email. I can tender it.

3 THE COURT: And what is this exhibit?

4 MR. STEELE: Exhibit 1, Your Honor.

5 THE COURT: Plaintiff's Exhibit 1.

6 It will be accepted.

7 (Plaintiff's Exhibit 1 admitted into evidence)

8 THE COURT: I will hear testimony from this witness as
9 an expert --

10 MR. STEELE: Thank you, Your Honor.

11 THE COURT: -- under Federal Rule of Evidence 702.

12 MR. STEELE: Thank you, Your Honor.

13 I apologize. I had a little technical difficulty with
14 printing out something this morning.

15 **DIRECT EXAMINATION (CONTINUED)**

16 BY MR. STEELE:

17 Q. Mr. Smoot, how did you come to be involved in this case?

18 A. I was contacted last Friday to determine whether or not I
19 would have information or knowledge related to the area of the
20 use of BitTorrent products or systems, and I replied that I
21 did.

22 Q. And what technical areas were you asked to look into?

23 A. Specifically, the areas of geolocation dealing with
24 accuracy and/or the lack thereof; how geolocation works; how
25 the data that is used for the geolocation process is

1 generated; how that data is sometimes enhanced for use by
2 people who would lease or license this data for various kinds
3 of business applications. I also was asked to look at
4 specifically the differences in BitTorrent between -- or
5 between BitTorrent and other protocols that have existed both
6 relatively recently and going back further to give basically a
7 summation of how things have changed over the years.

8 Q. Okay. Just so we're clear, briefly what is BitTorrent
9 protocol?

10 A. BitTorrent is a protocol that allows users to share files.
11 The files are typically broken down into pieces and
12 distributed over a number of what probably are best called
13 peers. They are more technical terms such as leachers and
14 seeders, but I think peers would be best for this discussion.

15 Q. Okay. Please describe how the BitTorrent protocol
16 operates between these peers.

17 A. Basically, a user will obtain what is called a torrent
18 file. There are a number of ways to obtain them. They could
19 be published on websites, is one of the most common ways of
20 accessing them. They could also be emailed between users.
21 They could be shared in private networks of people who have
22 similar interests. And once the user has a torrent, he loads
23 the torrent into what would be a BitTorrent client
24 application. That's a piece of software that runs on his
25 local personal computer and allows him to do the file download

1 that he desires to do.

2 Once that torrent is loaded in, the application checks
3 information within the torrent to determine, one, you know,
4 how big is this file; two, how many parts has it been broken
5 into as it has been distributed throughout the internet. It
6 also has a table or an index inside it that indicates what
7 machines will be cooperating in the downloading process, the
8 IP addresses of other users.

9 Q. How would you describe the process between the various
10 peers?

11 A. Once the client application has read that information, it
12 contacts each of the peer computers if they're available
13 online and requests information about what pieces of the file
14 that particular peer is holding at that time, and they have to
15 be complete pieces, not incomplete pieces. And that peer will
16 respond with information indicating which pieces it has. And
17 so simultaneously it is asking multiple peers for this
18 information. After receiving all that back, the downloader's
19 client software is able to determine which blocks it can
20 access at that time out of, you know, the number of blocks
21 that it still needs to complete a file download, and it then
22 starts a download with each of the peers that has a block of
23 interest to the downloader's client.

24 Q. I want to show you -- let me go back to the microphone. I
25 want to show you what's labeled 2, Exhibit 2. Do you

1 recognize that document?

2 A. Yes, I do.

3 Q. And what is that document?

4 A. It is a portion of a study that was commissioned by NBC,
5 and it is specifically dealing with an analysis of the top
6 10,000 or most active torrents during the 2010 period,
7 December 2010 period, and it's identifying out of all the --

8 THE COURT: Excuse me. Can you just tell us the
9 source of the document? And have you shared this with
10 opposing counsel?

11 MR. STEELE: I have, Your Honor.

12 MR. SEIVER: I'm sorry. I don't have a copy. Did you
13 send one to me?

14 MR. STEELE: I apologize. I sent it to Counsel
15 Huffman, and it may not have gotten cc'ed to -- I can provide
16 now my copy to other counsel.

17 THE COURT: Can't people at that table share a copy of
18 this document?

19 MR. SEIVER: We can share, Your Honor.

20 MR. STEELE: Ironically, counsel's employer actually
21 commissioned the study.

22 THE COURT: It's commissioned by Comcast?

23 MR. STEELE: Comcast's parent company.

24 Hold on one moment. I can give you my copy.

25 MR. SEIVER: For the record, Comcast is NBC's parent

1 company.

2 MR. STEELE: I apologize, Your Honor. I will have to
3 look for it.

4 THE COURT: I'm sure other people at the table can
5 share a copy of this with counsel.

6 MR. FOX: Your Honor, we just need one copy.

7 MR. HUFFMAN: I received an email from Mr. Steele last
8 night that said "expert documents" on the "re" line and had
9 10 megabytes of documents attached. I think I was on a
10 flight, actually. I have no printout. I can't access the
11 documents now because they just reside on my email.

12 MR. STEELE: Your Honor, there's more to the story. I
13 requested --

14 THE COURT: I don't want to hear the story. Let's
15 proceed.

16 MR. STEELE: Thank you.

17 THE WITNESS: So let me finish --

18 MR. STEELE: Yes.

19 THE WITNESS: -- my statement there.

20 What the particular page that we were reviewing here
21 is indicating is that a very large amount of the content
22 downloaded in these top 10,000 torrents was of copyrighted
23 material or pornography. The remaining small percentages were
24 unknown torrents, and the torrents that were identifiable as
25 non-copyrighted actually came out to .01 percent of the

1 content.

2 THE COURT: But Mr. Smoot, what is the date of the
3 document you're holding?

4 THE WITNESS: The date -- the study was completed in
5 December 2010, and the document was copyright 2011. That's
6 the only date that I have.

7 THE COURT: And over what period of time did this
8 study collect data that it is reporting on?

9 THE WITNESS: I believe this was a -- I'm trying to
10 remember. I've read several. The ones I recall reading were
11 one month. I believe this was a one-month time frame.

12 THE COURT: So it was a one-month time frame in
13 December of 2010?

14 THE WITNESS: Yes. That's my recollection.

15 MR. SEIVER: Your Honor, if I might, it says it's page
16 number 12. We don't know the other pages -- what the other
17 pages included with the disclosure --

18 MR. STEELE: Your Honor --

19 MR. SEIVER: -- it's problematic. If it's his study,
20 that is one thing, but I don't think it's his study. It says
21 Envisional.

22 MR. STEELE: Your Honor, I have a copy -- Envisional
23 was the one hired by NBC to prepare the study. I have a full
24 copy of it here, and I can provide my copy to counsel. If we
25 would like to take a break, fine; but if we could just move

1 along, I would be more than happy to give counsel my copy. I
2 don't think this is the issue at the moment. If I could just
3 finish my examination.

4 MR. SEIVER: Your Honor --

5 THE COURT: Well, Mr. Steele, let me just be clear
6 from my perspective, putting aside the objections. You're
7 creating a record here I presume for a purpose, and you're
8 going to share with us at some point what the purpose is, but
9 I personally would like to know exactly what I'm looking at,
10 who did it, when it was performed, and what the source of the
11 evidence is that you're putting before the Court for
12 consideration. If this is an excerpt from a report, I think
13 it would be better practice for you to put the entire report
14 in. And when you identify it for the record as Plaintiff's
15 Exhibit 2, have the witness explain exactly what the document
16 is, not what the contents of the document are, but what the
17 document is, so I have a sense of where are we going with
18 this.

19 MR. STEELE: I apologize.

20 THE COURT: We have a Plaintiff's Exhibit 2 that has
21 been marked as one excerpt. Why don't we mark the entire
22 study, if you have a copy, as a plaintiff's exhibit, of which
23 Exhibit 2 is an excerpt.

24 MR. STEELE: One moment.

25 All right. Your Honor, I found -- I apologize. I

1 found the document, and I marked it Plaintiff's Exhibit 3,
2 just for clarity. I can have the witness provide the
3 foundation if Your Honor would like. I apologize again.

4 THE COURT: Have you shared the entire report with
5 opposing counsel?

6 MR. STEELE: I provided the entire report to Counsel
7 Huffman, but I can also first provide this copy to the other
8 counsel before providing it to the witness, if you would like.

9 THE COURT: Okay. Why don't you let them have an
10 opportunity to inspect it.

11 MR. SEIVER: Indulge us.

12 Your Honor, could we be heard briefly on the Exhibit?

13 THE COURT: Well, I don't think this is the
14 appropriate time. He hasn't moved for its admission.

15 MR. SEIVER: Very well.

16 BY MR. STEELE:

17 Q. Showing you a document marked Exhibit 3, are you familiar
18 with that document?

19 A. Yes, I am.

20 Q. In fact, is that document -- in fact, is Exhibit 2 one
21 page of Exhibit 3? Or specifically page 12 of Exhibit 3?

22 A. Yes, it is.

23 Q. Okay. And what document -- what's the title of document 3
24 or Exhibit 3?

25 A. The title is "Technical Report, an Estimate of Infringing

1 Use of the Internet," published in January of 2011,
2 version 1.8.

3 Q. Does it state who prepared that report?

4 A. It was prepared by Envisional Limited.

5 Q. Does it have any other information as to who either
6 prepared it or who paid for the report or who sponsored the
7 report?

8 A. Yes, it does. It indicates in the first paragraph that
9 Envisional was commissioned by NBC Universal to analyze
10 bandwidth usage.

11 Q. Back to page 12 or Exhibit 2, as you will, you stated that
12 according to --

13 THE COURT: Mr. Steele, I know this is just a hearing,
14 we can be a little bit more informal than we would at a
15 trial --

16 MR. STEELE: Yes, Your Honor.

17 THE COURT: -- but typically even at a hearing, if you
18 want the Court to actually look at this in consideration of
19 the pending motions, you would have to introduce it into
20 evidence at the hearing --

21 MR. STEELE: Of course.

22 THE COURT: -- which would then give the opportunity
23 to defense counsel to be heard if they have an objection.

24 MR. STEELE: Yes.

25 THE COURT: So before you start discussing it, unless

1 this is further foundation argument, are you moving for its
2 introduction?

3 MR. STEELE: Well, Your Honor, I was going to move for
4 introduction after but --

5 THE COURT: If he is going to be discussing the
6 contents --

7 MR. STEELE: Yes.

8 THE COURT: -- it might be more appropriate for you to
9 move for its introduction first, and then I can hear what the
10 objections are since I think some of your opposing counsel --

11 MR. STEELE: I will submit to your wisdom, Judge.

12 THE COURT: -- might be getting antsy in their seats.

13 MR. STEELE: I can feel the tension behind me, Your
14 Honor. I'll defer --

15 THE COURT: I don't think so --

16 MR. STEELE: Thank you.

17 THE COURT: -- everybody likes to talk.

18 So are you moving the admission of both --

19 MR. STEELE: Yes, Your Honor.

20 THE COURT: Excuse me. Let me finish speaking.

21 Are you moving the admission of Exhibits 2 and 3?

22 MR. STEELE: Yes, Your Honor. I apologize.

23 THE COURT: Is there objection?

24 MR. SEIVER: Yes, Your Honor.

25 THE COURT: Please state your objection.

1 MR. SEIVER: It's a hearsay exhibit. It wasn't
2 prepared by this witness. We don't know what its relevance is
3 to this proceeding, either. There has been no connection at
4 least in the foundational part that it has anything to do with
5 what the issues are for the Court's resolution or even for the
6 resolution of the Complaint.

7 THE COURT: Thank you. Overruled.

8 Please proceed.

9 They will both be admitted.

10 (Plaintiff's Exhibits 2 and 3 admitted in evidence)

11 MR. STEELE: Thank you, Your Honor.

12 BY MR. STEELE:

13 Q. Mr. Smoot, you stated that the identified and
14 non-copyrighted percentage of the top 10,000 torrents tracked
15 in December 2010 was .01 percent, but as an actual number, of
16 those 10,000 torrents, how many of those torrents were found
17 to be non-copyrighted?

18 A. One.

19 Q. One torrent?

20 A. One torrent was of non-copyrighted content.

21 Q. Okay. I'm going to show you a page entitled number 4. Do
22 you recognize that document?

23 A. Yes, I do.

24 Q. And what is that document?

25 A. This is a screen capture of a application running on a

1 Macintosh. It is known as uTorrent. The same application is
2 available for the PC. The particular screen capture here
3 indicates that a single torrent is being downloaded. It
4 happens to be a Ubuntu Linux distribution --

5 THE COURT: Before you go into what the contents are
6 again, Mr. Smoot, what is the date of the screen capture?

7 THE WITNESS: I did not take the screen capture. I'm
8 not sure of the date.

9 THE COURT: And do you know who did the screen
10 capture?

11 THE WITNESS: I believe Mr. Steele did. I don't know
12 the time or date that occurred.

13 THE COURT: But you did not do it?

14 THE WITNESS: I did not.

15 THE COURT: And have you ever used uTorrent yourself?

16 THE WITNESS: Yes, ma'am, I have.

17 THE COURT: All right. Please proceed, Mr. Steele.

18 MR. SEIVER: Your Honor, may I be heard if he's going
19 to move it in?

20 THE COURT: I don't know whether he is or not.

21 MR. STEELE: I'm not, Your Honor.

22 BY MR. STEELE:

23 Q. I have handed you a document titled number 5. Do you
24 recognize that document?

25 A. Yes, I do.

1 THE COURT: Just to be absolutely clear for the
2 record, this is Plaintiff's Exhibit 5, the document itself is
3 not titled 5; correct?

4 MR. STEELE: You're right, Your Honor. I apologize,
5 Your Honor. It is Plaintiff's Exhibit 5.

6 THE COURT: All right. Please proceed.

7 BY MR. STEELE:

8 Q. Do you recognize Plaintiff's Exhibit 5?

9 A. Yes, I do. I recognize the content of the document. It's
10 another screen capture. It happens to be on the PC platform
11 this time.

12 Q. And I believe . . .

13 Your Honor, for the record, this has been admitted.
14 This is a part of a pleading that has already been admitted in
15 this case. It is a document that is already in the court file
16 in this case. I believe it's pleading document 27-1 in this
17 case.

18 THE COURT: 27?

19 MR. STEELE: Yes, Your Honor, 27-1.

20 BY MR. STEELE:

21 Q. And you said you're familiar with this screen shot,
22 Steve -- Mr. Smoot?

23 A. Yes, I recognize what this screen shot represents, yes.

24 Q. Okay. Is this a typical screen shot that one would see if
25 they were downloading a file using BitTorrent?

1 MR. HUFFMAN: Your Honor, may we object if he is going
2 to move to admit this?

3 THE COURT: I'm just getting to this. Hold on a
4 second.

5 Yes, what's your objection?

6 MR. HUFFMAN: Your Honor, this is, I believe, an
7 exhibit to the declaration of Mr. Hansmeier, who was
8 designated as a potential witness today, who we were hoping
9 would show up because he, in fact, is the sole evidentiary
10 basis on which this plaintiff seeks to obtain the discovery of
11 thousands of individuals, and Mr. Hansmeier is not here to
12 testify to this. There is no foundation laid for this. And
13 this witness has absolutely no knowledge of it. It hasn't
14 been admitted at all. To the contrary, it was submitted as
15 part of an ex parte submission to the Court that the very
16 inability to challenge which goes to the core of the reasons
17 why we believe this discovery is improper.

18 THE COURT: It's overruled.

19 Go ahead.

20 BY MR. STEELE:

21 Q. Mr. Smoot, just so I remember your answer here, is this
22 typical of what it looks like when someone is downloading a
23 file using BitTorrent?

24 MR. SEIVER: Objection, Your Honor. It's leading, but
25 I was letting it go before. I apologize. He's suggesting the

1 answer to the witness.

2 THE COURT: Overruled. Please proceed.

3 THE WITNESS: Yes, this is typical. It shows the
4 files that are being downloaded and various statistics and
5 other information related to the download process.

6 BY MR. STEELE:

7 Q. Okay. On the right-hand side, what does -- there's a
8 number underneath the word "seeds." What does that mean?

9 A. That's the number of other computers that are cooperating
10 and providing information about the network of computers that
11 are involved in the download and providing information about
12 the parts of the download that are available.

13 Q. Okay. So when someone is running this program, is this on
14 their screen?

15 A. Yes, it would typically be. The application must be
16 running in order to perform its function, and as part of its
17 function, it collects this information during the download
18 process.

19 Q. Okay. And on the bottom half of the screen --

20 THE COURT: Before you leave the question, under
21 seeds, as I read it on document 27-1, page 2 of 2, under
22 seeds, it has the number 11, and then, in parentheses, 184.
23 What is the difference between the 11 and the 184?

24 THE WITNESS: The 184 is actually the number of seeds
25 that are collected in the torrent. The 11 is the currently

1 active seeds.

2 THE COURT: Meaning the 11 reflects the number of
3 users who are actively online at that time?

4 THE WITNESS: Providing parts of the file.

5 THE COURT: Got it, thank you.

6 BY MR. STEELE:

7 Q. In the bottom half of the screen shot, what are
8 these -- all these numbers underneath the word "IP"?

9 A. The numbers are the IP addresses or the apparent IP
10 addresses of the machines that are actually taking part in the
11 download.

12 Q. So these IP addresses are the other computers or other
13 identifying numbers of the people that are sharing the
14 information with the person?

15 MR. SEIVER: Objection, Your Honor. It's leading.

16 THE COURT: Given the informality of this hearing, I'm
17 going to allow -- just so we don't keep interrupting with a
18 number of objections, I'm going to allow great leeway for both
19 this witness and your witnesses since it is almost 12:30, so
20 just so you all can relax, enjoy the testimony. If there is
21 something severely objectionable that you really think ought
22 to be cautioned before I hear it, please do not hesitate to
23 rise and let me know.

24 Please continue, Mr. Steele.

25 BY MR. STEELE:

1 Q. All right, so -- one moment.

2 So you stated earlier that there were 11 peers
3 actively sharing data with this person at this screen shot.
4 How many IP addresses are underneath the word "IP" here?

5 A. Eleven.

6 Q. In your expert testimony, is there a correlation between
7 these 11 IP addresses and the word "11" -- or the number "11"
8 underneath the word "seeds" in the screen shot?

9 A. It is my expectation that the 11 in the top part of the
10 screen represents the number of users who were participating,
11 and it is my expectation that the addresses of those users are
12 shown in the bottom.

13 MR. STEELE: I would ask that Exhibit 5 be entered
14 into evidence.

15 MR. SEIVER: We object, Your Honor.

16 THE COURT: Overruled. It will be admitted.

17 (Plaintiff's Exhibit 5 admitted into evidence)

18 MR. STEELE: Thank you, Your Honor.

19 BY MR. STEELE:

20 Q. Lastly, I'm going to show you document --

21 THE COURT: Before we leave this, I understand that
22 you have some digital forensic expertise.

23 THE WITNESS: Yes.

24 THE COURT: And is this list of IP addresses involved
25 in this download, is this logged anywhere on the application

1 so that -- and stored so it is retrievable?

2 THE WITNESS: It depends on the application. Some
3 applications do log this information. I'm not sure it is a
4 requirement that all applications must log this information.
5 But during the time that --

6 THE COURT: And even if not within the application
7 itself, within the operating system, which has internet
8 history, logs of all different kinds, I mean are there other
9 places, depending on the operating system of the computer,
10 where this kind of information through a forensic examination
11 could be obtained?

12 THE WITNESS: Yes. At least in the area of the IP
13 addresses itself. You won't necessarily receive all the other
14 information unless that is completely logged, but the history
15 of IP addresses that are contacted is typically logged at the
16 operating system level.

17 MR. STEELE: May I proceed?

18 THE COURT: Proceed.

19 MR. STEELE: Thank you, Your Honor.

20 BY MR. STEELE:

21 Q. I'm showing you a document marked number 6. Are you
22 familiar with this document?

23 A. Yes, I am.

24 Q. How are you familiar with this document?

25 A. I reviewed this document online as part of my

1 investigation into the uTorrent application.

2 Q. And what is this document?

3 A. It's an end user license agreement, which means it's an
4 agreement between the provider of the application and the
5 ultimate user of the application. In this particular case,
6 the product is not sold; it is licensed.

7 Q. Okay. And what product are we looking at here?

8 A. This is the uTorrent application.

9 Q. What is the uTorrent application?

10 A. It is a BitTorrent client application.

11 Q. What's -- please describe to the Court the relevance in
12 particular of uTorrent.

13 A. It's -- that's the name of the application, and it happens
14 to be the application that is also developed and distributed
15 by BitTorrent, Incorporated, the developers of the original
16 BitTorrent protocol and servers.

17 Q. How would you describe the market share of uTorrent?

18 MR. SEIVER: Objection. Sorry.

19 THE WITNESS: uTorrent has the majority of the market
20 share. I don't know the exact figures, but I do know that
21 it's the largest, the most widely used BitTorrent application.

22 THE COURT: Okay. About how many BitTorrent
23 applications are there that are available?

24 THE WITNESS: That I didn't study, but I can tell you,
25 from my own experience, there are probably at least 15 on the

1 PC; and there's probably at least 10, 9 or 10, on the
2 Macintosh; and there's probably some on the Linux, which I'm
3 not aware of, Linux operating system.

4 Q. Do you have to agree to the end user license agreement
5 with uTorrent before you can use it?

6 A. Typically, if the user is required to execute or accept
7 the license before a download of the application, there might
8 be a button on the bottom of the screen that says, I accept
9 this, and then it takes you to the download. I don't see that
10 here, but that does not indicate that they're not required to.

11 MR. SEIVER: Your Honor, if I can state for the
12 record, it is beyond his expertise, calling for a legal
13 conclusion, and should not be admitted, but I understand Your
14 Honor is giving leeway.

15 THE COURT: Thank you.

16 MR. STEELE: I have no further questions on this. I
17 just ask it be admitted into evidence.

18 THE COURT: The uTorrent application end user license
19 agreement?

20 MR. STEELE: Yes, Your Honor.

21 MR. SEIVER: We object.

22 THE COURT: The objection is overruled. It will be
23 admitted.

24 (Plaintiff's Exhibit 6 admitted into evidence)

25 MR. STEELE: Thank you, Your Honor.

1 THE COURT: Do you have any further questions of this
2 witness?

3 MR. STEELE: Yes, Your Honor. Yes, Your Honor.

4 BY MR. STEELE:

5 Q. I want to talk a little bit about geolocation. Please
6 provide a brief overview of geolocation.

7 A. Geolocation is the -- this is a term that is specific to
8 the internet industry, and has to do with placing an IP
9 address within a certain geographical location, using data
10 from databases to look up the IP address against that database
11 and return information about the location. It can be very
12 specific or not very specific.

13 Q. Do you have an expert opinion as to the accuracy of
14 geolocation?

15 A. Yes, I do. It's not an absolute system of location. It's
16 an approximate system of location. It is appropriate for some
17 uses.

18 Q. Okay. When you use a service to obtain the geolocation of
19 an IP address, do you know from the service how accurate that
20 information you get back is?

21 A. In rare exceptions, yes; but in most cases, no.

22 Q. Okay. Can you give us an example?

23 A. If I were to, as an individual user, go and search for my
24 IP address or any other person's IP address without a license
25 to subscribe to these kinds of databases, then I will not get

1 an indication of the accuracy. If I were a subscriber to
2 this, some services do provide what are called confidence
3 factors to indicate whether or not -- to indicate that
4 service's confidence of the accuracy of the location.

5 Q. Okay. In preparing for your testimony here today, did
6 you, in fact, examine various geolocation services?

7 A. I did a survey of seven different services to determine
8 whether they could place me accurately under several different
9 circumstances. One was from my home in Plant City, Florida.
10 Another one was from up here in Washington, D.C., after I
11 arrived and --

12 Q. Let's first talk about you being in Plant City. Going
13 to -- one moment, Your Honor. I realize these weren't
14 organized.

15 I'm going to show you a document that is titled
16 Plaintiff's Exhibit 7. I want you to describe for me what
17 this document is.

18 MR. HUFFMAN: Is this three separate documents?

19 MR. STEELE: It is all one document. It's a
20 compilation document.

21 THE COURT: How many pages?

22 MR. STEELE: It is seven pages, Your Honor.

23 THE COURT: And this is among the material you've
24 already forwarded to opposing counsel?

25 MR. STEELE: Yes, Your Honor, Counsel Huffman.

1 BY MR. STEELE:

2 Q. Do you recognize this compilation document?

3 A. Yes, I do.

4 Q. And what is this document?

5 A. These were individual results that I compiled, testing the
6 various services to determine whether they could accurately
7 place me at the locations that I tested it from.

8 Q. Can you describe the results that you observed?

9 A. Yes. Of the seven, two were able to place me in Plant
10 City accurately. The other placements were New York City; I
11 believe Washington, D.C.; and Reston, Virginia; and Tampa,
12 Florida.

13 Q. Okay.

14 THE COURT: And how far is Tampa from Dale City?

15 THE WITNESS: Pardon?

16 THE COURT: How far is Tampa from Dale City?

17 THE WITNESS: Plant City?

18 THE COURT: Plant City.

19 THE WITNESS: It's 35 miles, Your Honor.

20 MR. STEELE: I'm going to apologize, Your Honor. I'm
21 going to also -- there's one missing here. I'm going to show
22 you a document titled number 8.

23 THE COURT: Is this Plaintiff's Exhibit 8?

24 MR. STEELE: Yes, Your Honor.

25 THE COURT: Are you moving the admission of

1 Plaintiff's Exhibit 7?

2 MR. STEELE: I didn't hear Your Honor.

3 THE COURT: Are you moving the admission of
4 Plaintiff's Exhibit 7?

5 MR. STEELE: Yes, Your Honor, I am.

6 MR. SEIVER: We object, Your Honor.

7 THE COURT: Overruled.

8 (Plaintiff's Exhibit 7 admitted into evidence)

9 BY MR. STEELE:

10 Q. Do you recognize Exhibit 8, Mr. Smoot?

11 A. Yes, I do.

12 Q. And what is document 8?

13 A. That is one of the services that I did include in my
14 survey, and this happens to be the one that identified my
15 location while I was in Plant City, Florida, as being in
16 Reston, Virginia.

17 Q. All right. Thank you.

18 And you stated earlier that when you had arrived in
19 D.C., you also did this search, what you described, using the
20 services with geolocation; is that correct?

21 A. Yes, I did.

22 Q. Okay. How many different services did you use?

23 A. I believe I tested five of the seven.

24 Q. Okay. I'm going to show you a compilation, which is three
25 pages marked Exhibit 9.

1 Do you recognize -- do you recognize that document?

2 A. Yes, I do.

3 Q. What is that document?

4 A. These were the additional items that I tested to
5 determine, again, the accuracy of these services. The one
6 service here, IP2 location, is the name of the service,
7 identified me as being in Baltimore, Maryland, while I was in
8 Washington, D.C.

9 THE COURT: Could you precisely describe how you did
10 this?

11 THE WITNESS: Yes. The services that I chose to use
12 were services that automatically identify your IP when you
13 come in. In other words, I don't have to type anything in.
14 They know me by the fact that they've collected my IP address,
15 and they respond with this information as a result of that.
16 So all I did was go there, and I look at the results that they
17 gave. They also give you the option, though it is not the
18 point of my survey, to enter an IP address and find that at
19 the time, as well.

20 MR. HUFFMAN: Your Honor, in addition to the other
21 objections we would have to this exhibit and the ones
22 preceding it, we object to any conclusions based on any study
23 done using a sample of one without respect -- in addition to
24 the other, of course, lack of foundation.

25 THE COURT: Overruled.

1 BY MR. STEELE:

2 Q. Before you had run your searches, these surveys in D.C.,
3 would you have been able to predict which one would have been
4 the accurate one?

5 MR. SEIVER: Objection, Your Honor.

6 THE COURT: Overruled.

7 THE WITNESS: No, I would not have been able to
8 predict. The only way I can tell whether or not a particular
9 response is inaccurate is I have the firsthand knowledge of
10 where I was. If I did not have that firsthand knowledge, I
11 would have no idea as to whether or not it is giving me
12 accurate information.

13 THE COURT: Mr. Smoot, didn't you say that a number of
14 these sites have some indication of how accurate they are?

15 THE WITNESS: Documentation on some of these sites do
16 indicate that. For instance, a company called MindMax
17 publishes that kind of information. If you're subscribers to
18 databases that contain that type of information, you can get
19 that. As an end user using a service like this, it is not
20 displayed to you.

21 THE COURT: Okay.

22 BY MR. STEELE:

23 Q. Lastly, I just want to understand why -- what's
24 your -- what was your determination as to why this geolocation
25 varies from service to service?

1 A. There are a number of factors involved in the accuracy of
2 this, and it is probably a little bit too deep and too
3 technical, but it basically comes down to a few things: the
4 accuracy of the data that's supplied to the database; the
5 algorithm that is used to search the database and make
6 determinations; and then finally, the IP address that comes
7 in, whether or not that has been masked or in any other way
8 changed so that the IP address that comes in is not the actual
9 IP address of the end point user.

10 Q. Who provides -- do you know who provides the information
11 to the services that provide geolocation services?

12 A. Generally, the ISPs, the people who actually own the
13 network's address space, they provide that information to a
14 third party, and that third party collects all that
15 information and makes it available to other people. The
16 information that is provided is very narrow. It generally
17 only allows you to make a location determination to within the
18 range of about a country or a region within that country. To
19 get more specific than that, you have to what's called augment
20 or enhance the data.

21 Q. Who provides this augmented or enhanced data?

22 A. That could be provided by a number of different sources.
23 It all depends on the company who is compiling the information
24 and what deals they make to gain this information.

25 Give you an example: One might make a deal with a

1 very large e-commerce company so that every time that
2 e-commerce company sees a hit on their website and someone
3 makes a purchase, they collect not only that IP address but
4 information about the individual and they keep that in a
5 database and they sell that to some of the list managers.

6 Q. So is it possible that if an e-commerce site has some
7 wrong data in their database it could result in a geolocation
8 result being incorrect?

9 A. There are many factors that could affect the quality of
10 data provided by an e-commerce provider, e-commerce company.

11 MR. STEELE: No further questions, Judge.

12 THE COURT: Do you have any questions?

13 MR. HUFFMAN: Just a couple, if I may, Your Honor.

14 THE COURT: Please proceed.

15 **CROSS-EXAMINATION**

16 BY MR. HUFFMAN:

17 Q. Mr. Smoot, you said that you had used BitTorrent to
18 download a Linux operating system?

19 A. Yes.

20 Q. Can you describe how that worked, in general. I mean, did
21 you download a whole operating system using BitTorrent?

22 A. Yes, I did. I went to a site where the Linux provider,
23 developer, published a torrent for downloading their
24 particular distro, and I clicked on that and received a
25 torrent and went through the process that I outlined earlier.

1 Q. So large open source software files are one legitimate use
2 of BitTorrent file-sharing?

3 A. Yes, sir.

4 Q. Skipping for a moment to the IP address geolocation issue,
5 do you know what IP address geolocation technology
6 Mr. Hansmeier, who is both with the Steele Hansmeier firm, now
7 known as Prenda Law, and also with the alleged forensic
8 investigator in this case?

9 A. Could you shorten that?

10 Q. Yes. Do you know what IP address -- what IP address
11 geolocation technology Mr. Peter Hansmeier uses?

12 A. It's not been fully disclosed to me. I've heard it
13 discussed, but I don't have a full disclosure on it.

14 Q. Do you know of any that he uses?

15 A. No, I don't.

16 Q. Do you know whether he uses any geolocation technology?

17 A. Again, I have heard discussions of it and how it has been
18 applied and so forth, but I don't know the details.

19 Q. So you don't know one way or the other whether he's used
20 it in connection with these type of cases?

21 A. In a very absolute sense, I can't say that he has, but I
22 know nothing particular about it.

23 Q. Do you have any opinion as to whether or not the use of
24 geolocational technology would result in a good faith basis
25 for a contention that somebody was likely to live somewhere?

1 A. Please restate the question.

2 Q. Certainly. Do you have any opinion as to whether or not
3 the use of IP address geolocation technology could result in a
4 good faith basis for the contention that an individual is
5 likely to be located somewhere when using the internet on
6 that IP address --

7 A. Within -- pardon me. Within some degree of questionable
8 accuracy, it can put you within a reasonable region in some
9 cases; in other cases, it will be way off.

10 I ran another example that put me in Kansas while I
11 was here.

12 Q. But do you have any opinion as to whether or not such use
13 could constitute a good faith basis for a contention?

14 MR. STEELE: Objection, Your Honor. Calls for a legal
15 conclusion, "good faith basis."

16 THE COURT: It does, but overruled. If he can answer
17 it, he can try to; if he can't answer it, he can say he can't
18 answer it.

19 THE WITNESS: I'm trying to parse accurately the good
20 faith aspect of it versus what he's trying --

21 BY MR. HUFFMAN:

22 Q. Let me ask you this question then: Do you know whether
23 the lawyers representing the plaintiff in this case have
24 alleged that the use of IP address geolocation technology, in
25 fact, forms a good faith basis for such a contention?

1 A. I do have knowledge of that.

2 Q. Do you know whether they have?

3 A. I believe that they have stated that the geolocation
4 methods that are available to them were not sufficient to make
5 a good faith estimate of the location.

6 Q. Would it surprise you if I told you that in over 100 cases
7 they have contended that it did, in fact, form a good faith
8 basis for the likely location of an individual? That would be
9 surprising to you?

10 A. Not surprising.

11 Q. Why not?

12 A. Pardon?

13 Q. Why not?

14 A. Because there are cases, obviously, that have gone before
15 this that have dealt with issues that were pertinent to the
16 case, and this being one of them, the facts surrounding it I
17 have no idea how they came to that conclusion.

18 Q. What is unique about this particular case and the location
19 of individuals using IP addresses that would render
20 determination as to whether or not IP address geolocation was
21 more or less likely to be a good faith indicator of where
22 somebody is likely to be located when using the internet?

23 A. I would say that what makes this case unique is, one, the
24 accessibility of technology that would give them that type of
25 result. I don't know how the Court judges, you know, did they

1 have the appropriate technology, did they not, how does that
2 affect the outcome. And there was -- I think there was a
3 second aspect to that.

4 Q. So do you think the geolocation technology, in general,
5 has improved over the years or deteriorated or do you have an
6 opinion?

7 A. My opinion is that it has improved.

8 Q. And would it surprise you if I told you that this very
9 plaintiff, AF Holdings, Inc., has contended in five other
10 cases that the use of geolocation technology was a good faith
11 basis for the assertion of where somebody is located when
12 using the internet? Would that be surprising to you?

13 A. It's not surprising to me. It's also beyond my knowledge.

14 Q. Why would it not be surprising to you?

15 A. Again, I don't know the facts and circumstances of all the
16 other cases, so it has no bearing on how I understand what
17 the --

18 Q. Well, let me go back to my other question earlier because
19 maybe I misstated it. I was trying to understand what could
20 be different -- if we take two cases that involved Doe
21 Defendants allegedly using BitTorrent file-sharing to commit
22 copyright infringement, what might be different in one case
23 versus another in terms of whether or not any given IP address
24 is likely to resolve to a particular location as indicated
25 by geolocation technology?

1 MR. STEELE: Your Honor, I understand it's loose, but
2 he is asking a non-attorney about cases that he has never even
3 heard of.

4 THE COURT: Overruled. He will respond if he can.

5 THE WITNESS: I think the best answer I have there is
6 that the -- each case is going to have various
7 technology -- or may have various technologies involved. I
8 don't know the histories of all the cases. But each service
9 that might be used or any technology that might be put
10 together in order to do tracing or any of those kinds of
11 things, unless it's exactly the same for every case, then I
12 would have -- my expectation is that they may produce very
13 differing results, widely differing results. I have no
14 knowledge of the facts surrounding that.

15 BY MR. HUFFMAN:

16 Q. What technologies, what BitTorrent technologies were
17 employed in this case?

18 A. Not the BitTorrent technologies but the geolocation
19 technologies.

20 Q. So you think that it would depend upon whether or not a
21 particular geolocation technology was being used in terms of
22 whether or not that should be viewed as likely to indicate
23 where somebody is located when using the internet?

24 A. That is one factor, yes.

25 Q. And so how would that be different -- if we're talking

1 about the same plaintiff, the same company doing it,
2 how -- I'm trying to understand how it is different from one
3 case to the next? Is it the case that two months ago
4 different technology was available to the same company than it
5 is today?

6 A. I have no idea of the continuity of the technology.

7 THE COURT: I actually have to say I'm a little
8 puzzled by this whole line. I don't think anybody disputes
9 that geolocation information may be improving. I don't think
10 anybody disputes that geolocation information is inexact. I
11 don't think anybody disputes that no geolocation tool that is
12 available today is 100 percent accurate on all IP addresses.
13 I don't think anybody disputes that in those courts that
14 require geolocation information that counsel in good faith
15 uses geolocation tools fully understanding that it is not
16 100 percent and that they can say, using good faith, this is
17 what geolocation tools that are not 100 percent show us about
18 the location of an IP address. That doesn't mean that anybody
19 has said in any case that I've read, in no representation that
20 I have ever seen, that every geolocation tool is 100 percent
21 accurate or that, frankly, any geolocation tool is 100 percent
22 accurate.

23 So where are you going with this, Mr. Huffman?

24 MR. HUFFMAN: Just trying to understand whether there
25 is a distinction between the different cases and the different

1 positions that have been taken by the plaintiff and their
2 lawyers, if there's a different factual basis --

3 THE COURT: But if any lawyer has said in any court
4 that they have a good faith basis for believing that
5 particular IP addresses are associated with particular
6 locations, understanding that no geolocation tool is
7 100 percent accurate, why is that a good faith basis? I still
8 don't really understand your point.

9 MR. HUFFMAN: I think they have alleged that and then
10 they're trying to show something different here is the point.

11 THE COURT: Well, then, I'm missing your point.
12 Are you finished?

13 MR. HUFFMAN: I think so. Thank you, Your Honor.

14 THE COURT: I have a question for you. Going back to
15 Plaintiff's Exhibit 5, which is ECN number 27-1, which is the
16 screen shot that talked about the seeds --

17 THE WITNESS: Yes, ma'am.

18 THE COURT: -- when in BitTorrent -- when using
19 BitTorrent technology, when people refer to swarms, is the
20 swarm that list of IP addresses that's indicated on that
21 sheet, or is the swarm something different?

22 THE WITNESS: The swarm is the collection of computers
23 that can cooperate to effect the download.

24 THE COURT: Is the swarm the 184 computers under seeds
25 or what is the swarm?

1 THE WITNESS: At any point in time, only a portion of
2 the seeders may be online with their computers; at other
3 points in time, other seeders may be online. They would all
4 be considered part of the computers that are cooperating to
5 download the file.

6 THE COURT: And that is the swarm?

7 THE WITNESS: Yes, that is my understanding, that a
8 swarm is the collection of computers that are identified in
9 the torrent.

10 THE COURT: Okay. And under seeds, where we talked
11 about the difference between the 11, which are the online
12 computers offering up parts of the file being downloaded
13 versus the 184, which are part of the torrent, and when we say
14 they're part of the torrent, they're part of the torrent with
15 the same file that if any one of those 184 went online they
16 would then be available to offer parts of the file for the
17 downloader? Is that correct?

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: Okay. Thank you.

20 MR. SEIVER: Your Honor, a few questions of the
21 witness. Thank you.

22 THE COURT: Okay.

23 **CROSS-EXAMINATION**

24 BY MR. SEIVER:

25 Q. Mr. Smoot, good morning -- well, almost afternoon.

1 Following up on Exhibit 5, do you have that handy, or
2 do you need to look at it?

3 A. I do not have it in front of me.

4 THE COURT: Just so you know, my clock is wrong.

5 MR. SEIVER: By an hour. Thank you, Your Honor.

6 THE COURT: So if your stomach is rumbling, that's
7 why.

8 BY MR. SEIVER:

9 Q. Do you remember Exhibit 5, or do I need to show it to you?

10 A. It's the exhibit the Judge referred to, yes.

11 MR. SEIVER: May I approach the witness, Your Honor?

12 THE COURT: Yes, you may.

13 THE WITNESS: Thank you, sir.

14 BY MR. SEIVER:

15 Q. Mr. Smoot, I want to follow up and understand -- and part
16 of what Judge Howell was asking -- of these 11 IP addresses,
17 there are some indications under the word "downloaded" -- do
18 you see that, where it says KBs and there are some blanks,
19 also? -- does that mean that of these 11, the ones that have
20 blanks were not doing anything, they just happened to be noted
21 as having the file available?

22 A. In this case, all the data in the bottom represents what's
23 called a session, which is the time that this particular
24 application was running and in communication with other
25 computers. This particular column downloaded shows what,

1 during this session, this computer has downloaded from each of
2 those sources.

3 Q. And do we know how long the session was? Or even when or
4 the date of the session?

5 A. Not from the screen shot.

6 Q. Does the -- in the top gray bar going across, do you see
7 where you had the seeds, there is an ETA, it says four hours
8 zero minutes -- am I reading that correct?

9 A. Yes.

10 Q. Does that have anything to do with the time or the
11 length --

12 A. It's the estimated time to complete the download given the
13 current data rates.

14 Q. Oh, that's an estimated time to complete a download, not
15 whether a download occurred?

16 A. That's correct.

17 Q. And because there are no files listed as uploaded -- do
18 you see that? -- I'm back down to the bottom half -- does
19 that mean during the period of time, whenever it was, that
20 nothing was uploaded from these particular seeders?

21 A. Nothing was uploaded to them.

22 Q. Nothing was uploaded to them --

23 A. Yes.

24 Q. -- I see.

25 Do you know -- did you ever look at the complaint that

1 was filed in AF Holdings in this case?

2 A. I have briefly.

3 Q. Did you look at the exhibit that was attached that listed
4 1,058 IP addresses?

5 A. Yes, sir, I did.

6 Q. And is it your testimony or do you have knowledge that
7 those IP addresses were drawn from an exhibit or a screen shot
8 such as the one that we're looking at for Exhibit 5?

9 A. It is my understanding they were obtained with the
10 technology that either AF Holdings or someone representing
11 them was able to collect using whatever tool that was, not
12 collected with something like this.

13 Q. Okay. Because there had to be something to show a date
14 and time; is that right?

15 There had to be something that would show the date and
16 time that an IP address was actually active to do something
17 consistent with the exhibit?

18 Do you need to look at the exhibit?

19 A. Yes, please.

20 MR. SEIVER: May I approach, Your Honor?

21 THE COURT: Yes, you may.

22 BY MR. SEIVER:

23 Q. This is the complaint, which is document 1 in the
24 proceeding, and I'm open to page 9 of 33, which is the
25 beginning of the exhibit. If you'll look at the IP addresses,

1 do you see that there is also a date and time?

2 A. Yes, sir, I do see that.

3 Q. So your understanding is there is something else other
4 than what we've been shown today that would indicate the date
5 and time that anything was occurring?

6 A. Yes, sir, that's my understanding.

7 Q. One last question, Mr. Smoot.

8 If I may approach again, Your Honor?

9 THE COURT: Yes, you may.

10 BY MR. SEIVER:

11 Q. The geolocation technology, whatever was used, is not only
12 just to give city and state, but it also gives the ISP; is
13 that right?

14 Let me start over. If you have an IP address and you
15 plug it in, you have no idea, it could be Comcast or AT&T, but
16 the geolocation technology is the one that gives you the ISP?

17 A. There's several ways of obtaining that information, but
18 typically, because of the way the addresses are distributed in
19 these list management services, that is part of the
20 information that's included -- that comes from the ISP to the
21 services --

22 Q. And people that are under contract with the geolocation
23 services can get more detailed than, for example, IP2 location
24 that you used when you were just testing yourself?

25 A. Yes, sir, that's correct.

1 MR. SEIVER: Thank you, Your Honor. That's all I
2 have.

3 THE COURT: Yes, please proceed, Mr. Fox.

4 MR. FOX: Your Honor, I am mindful of the time and I
5 have --

6 THE COURT: And I haven't even gotten to my questions,
7 which are extensive.

8 MR. FOX: I will be very brief. And my stomach is
9 grumbling.

10 Perhaps we are all in agreement that geolocational
11 makes it likely that someone is in a certain area but it's not
12 certain. I just want to ask the witness, if I may, about a
13 statement in the declaration by Peter Hansmeier. It is dated
14 January 12, 2012.

15 If I may approach.

16 THE COURT: You may.

17 **CROSS-EXAMINATION**

18 BY MR. FOX:

19 Q. I direct your attention to paragraph 24, and I have tabbed
20 it.

21 MR. STEELE: Could I see it?

22 MR. FOX: If I may, Your Honor.

23 BY MR. FOX:

24 Q. I direct your attention to paragraph 24 in this
25 declaration, and in it -- I quote -- Mr. Hansmeier states, "If

1 one knows a computer's internet protocol address, one can,
2 using publicly available reverse lookup databases on the
3 internet, identify the ISP used by that computer and the city
4 (or county) and state in which the computer was located at the
5 date and time that the internet protocol address was obtained.
6 Using this information MCG was able to determine that the IP
7 addresses associated with John Doe and his peers listed on
8 Exhibit A of the amended complaint were all most likely
9 located in California."

10 Sir, do you have any opinion one way or the other
11 about whether a consultant or an expert could make a
12 determination that John Does or IP addresses were likely
13 located in California? And I want to focus you on "were all
14 most likely located in California."

15 A. It's my opinion that it would be very difficult to say
16 that they are all most likely located in California. I don't
17 know of a method of making that determination.

18 Q. You have not had any discussions with -- have you had any
19 discussions with Mr. Hansmeier about this declaration or his
20 opinions with respect to the reliability of geolocational
21 services?

22 MR. STEELE: Your Honor, for clarification, there
23 might be a little confusion. There's two Hansmeiers. There's
24 a Peter Hansmeier and there's a Paul Hansmeier. I can inform
25 the Court that, as an officer of the Court, that this witness

1 has never seen, heard, or talked to a Peter Hansmeier.

2 THE COURT: And I just note for the record that this
3 is a declaration filed by a Peter Hansmeier in the Eastern
4 District of California on January 12, 2012.

5 MR. FOX: Thank you, Your Honor.

6 And this is the same Peter Hansmeier -- I believe it's
7 the same declarant who submitted the declaration in this case
8 at the time of the original application for expedited
9 discovery.

10 THE COURT: I'm sorry. I'm missing the point of this.
11 No one has said that they're 100 percent. I don't think this
12 says that it is 100 percent, either. "All most likely." So
13 what is your point just before lunch?

14 MR. FOX: My point is only that it is something that
15 is available and that the plaintiff's expert has used in other
16 cases.

17 THE COURT: Thank you.

18 Any other questions?

19 MR. FOX: Thank you.

20 THE COURT: Any other questions?

21 You're excused.

22 THE WITNESS: Thank you, Judge.

23 THE COURT: All right. My matters this morning took
24 up a little bit longer than I was anticipating, which has
25 delayed us a little bit longer than I had planned. So we're

1 going to take a break for a short lunch for 45 minutes, and
2 we're going to resume at a quarter of 2. Do not believe that
3 clock. Look at your own wristwatches, which I hope are more
4 accurate. In 45 minutes we're going to resume here. You're
5 excused for lunch.

6 (Luncheon recess taken from 1:00 p.m. to 1:45 p.m.)

7
8 **AFTERNOON SESSION**

9 THE COURT: All right. Counsel, do you have any
10 more witnesses? Mr. Steele?

11 MR. STEELE: No other witnesses.

12 THE COURT: Because I thought that I would get all the
13 witnesses out of the way so that during Q and A and argument,
14 if you guys wanted to refer to the witnesses, we would all be
15 on the same page.

16 Do you all have witnesses?

17 MR. FOX: We do, Your Honor.

18 THE COURT: Okay. Why don't you --

19 MR. STEELE: I don't mean to interrupt you. I was
20 going to finish and say other than, quite possibly, a brief
21 rebuttal in the event depending on what opposing counsel
22 brings.

23 THE COURT: Understood. Brief rebuttal by Mr. Smoot?

24 MR. STEELE: Yes, Your Honor.

25 THE COURT: I see.

1 MR. HUFFMAN: Your Honor, we would also like to
2 introduce a demonstrative summary exhibit to the Court, if I
3 may --

4 THE COURT: Okay, that's fine.

5 MR. HUFFMAN: -- offer that.

6 THE COURT: Have you shown that to Mr. Steele?

7 MR. HUFFMAN: I'll give him a copy.

8 Your Honor, we would like to submit a summary chart
9 evidencing cases filed by Prenda Law and its predecessor firm
10 involving multiple John Does, and the pertinence of this
11 chart -- there's several reasons why this chart is pertinent.
12 First of all, in some rulings, it has been said that the undue
13 burden can be viewed in the aggregate, and we believe the
14 aggregate burden of these proceedings is pertinent. We also
15 believe that the chart which shows that in only a couple of
16 cases, a handful of cases at most, has any defendant, Doe
17 Defendant, actually been named and included in the lawsuit.
18 Some Courts have also taken into account the actual purpose of
19 the discovery, whether it is for actual litigation or for some
20 other purpose. And in addition, we believe that the
21 overwhelming -- over 100 cases where they've asserted, as
22 we've already discussed with Your Honor, the IP address,
23 geolocation is pertinent to the personal jurisdiction and
24 venue issue, is of some significance. We would like to offer
25 this, Your Honor.

1 THE COURT: Mr. Steele, is that the reason for your
2 motion in limine to bar evidence and argument about unrelated
3 cases that was filed, like, today?

4 MR. STEELE: This morning, Your Honor.

5 Yes, this is a common issue that comes up.

6 THE COURT: And is it related to this document?

7 MR. STEELE: Well, this is the first time I've seen
8 this document. I don't know if this is replacing the proposal
9 to bring in an attorney instead. I would object to bringing
10 in this law firm or any other law firm or any other cases that
11 this firm handles for other clients in other states and other
12 countries, just like I would object to whatever attorneys, law
13 firm, does for other clients in other states, in other
14 countries, I think that -- besides the obvious fact, clearly
15 the facts are different. Just glancing at this, some of these
16 are class actions. Some of these are so glaringly different.
17 I could go through a list in about a couple of minutes showing
18 you judges that have granted us expansive orders just like
19 Your Honor has, and we've proceeded along -- we've
20 named -- I'll just leave it at that. It's pretty obvious.

21 THE COURT: Let me just be clear about my perspective
22 on all this, which is that there are times when the District
23 Court feels like a mere speed bump on the way to a higher
24 court, and since the ISPs have made clear that they want
25 certification to get to the circuit, which is an issue we'll

1 address whenever we get to questioning, my view is let both
2 sides build whatever record they feel is necessary for the
3 arguments that they might want to both present to me; and that
4 should this case go to the circuit, that people feel that
5 they've had an opportunity to put into the record at the
6 District Court level whatever they think is pertinent for the
7 Court of Appeals to review.

8 So, with that, I will -- you know, my general view is
9 that what goes on in other cases, given the differences in
10 different judges' views about what's necessary at this stage
11 of these file-sharing cases, is of limited help or relevance
12 to my review.

13 At the moment, I don't know exactly, although I have
14 an idea based on the papers, exactly what arguments will be
15 made based on this chart, let alone what arguments parties may
16 want to make should this go to the Court of Appeals.

17 So with that, I am going to deny your motion that you
18 filed today to bar evidence and argument about unrelated
19 cases; and as a consequence of that denial, I will accept the
20 compilation summary document that the ISPs are putting in.

21 Is this put in on behalf of all the ISPs, Comcast,
22 AT&T, and the other ones, or just you, Mr. Huffman?

23 MR. HUFFMAN: I believe all of the ISPs.

24 Is Comcast joining in that?

25 MR. SEIVER: We'll join in that, Your Honor.

1 THE COURT: So on behalf of all the ISPs.

2 MR. SEIVER: All the ISPs, that's correct. Just for
3 clarity, this exhibit is not designed to reflect what judges
4 have necessarily ruled, and there are no class actions
5 included in here, but it is more designed to be descriptive of
6 the various cases for the purposes of the Court's
7 consideration.

8 THE COURT: And you will point out to me what about it
9 is at all relevant to my consideration of the pending motion
10 to compel and the pending motions to quash, which is really
11 the focus of what I would like to get to.

12 MR. STEELE: Judge, just for the record, I'm not sure
13 what predecessor firm means, but Prenda Law has no legal
14 relationship with another law firm or does not -- was not
15 owned by another firm. I don't know exactly what that means,
16 but Prenda Law is its own law firm.

17 THE COURT: I have no idea what it means, either.

18 MR. HUFFMAN: Your Honor, sometime about the beginning
19 of this year, Mr. Steele himself called me to tell me that
20 Prenda Law had acquired his prior firm, Steele Hansmeier. So
21 the predecessor firm, to my understanding, as reflected in
22 numerous filings around the country, is the Steele Hansmeier
23 law firm.

24 THE COURT: All right. Let's get the oral testimony
25 out of the way, to the extent that you have or wish to present

1 testimony of Mr. Schoen, I believe, whose declaration is
2 already in the record. So please limit it to supplementing
3 what is already in the record if you're going to call him.

4 And so the record is clear, plaintiff's motion at ECF
5 number 37 is denied.

6 MR. HUFFMAN: Thank you, Your Honor. AT&T calls Seth
7 Schoen.

8 SETH SCHOEN,
9 having been first duly sworn to tell the truth, the whole
10 truth and nothing but the truth, was examined and testified as
11 follows:

12 THE COURT: Please be seated.

13 MR. STEELE: Your Honor, I will stipulate that
14 Mr. Schoen is an expert, for judicial economy.

15 THE COURT: That's fine, but if you could just
16 describe his background generally.

17 **DIRECT EXAMINATION**

18 BY MR. HUFFMAN:

19 Q. Good afternoon, Mr. Schoen.

20 A. Good afternoon.

21 Q. Would you please state your full name for the record.

22 A. My name is Seth, S-E-T-H; Schoen, S-C-H-O-E-N.

23 Q. What is your current position?

24 A. I'm a senior staff technologist at the Electronic Frontier
25 Foundation in San Francisco.

1 Q. For how long have you held that position?

2 A. I have been working as a staff technologist there for ten
3 years.

4 Q. And where did you work before that?

5 A. Before that I worked for a technology company called
6 Linuxcare.

7 Q. Did you work with Linux, presumably, in connection with
8 that?

9 A. Yes, I did.

10 Q. What about before that?

11 A. Before that I worked for a web firm called Atrenet.

12 Q. Your duties and responsibilities with EFF as a senior
13 staff technician, do those involve internet traffic
14 technologies?

15 A. Excuse me?

16 Q. Have your duties and responsibilities involved internet
17 traffic technologies in the analysis of internet traffic
18 technologies?

19 A. Yes, they have.

20 THE COURT: What is an internet traffic technology?

21 BY MR. HUFFMAN:

22 Q. Can you describe that, please, in terms of the delivery.

23 THE COURT: I know about internet traffic, I know
24 about technologies, I know about technologies that are used on
25 the internet, but the combination of internet traffic

1 technologies, what is that?

2 THE WITNESS: I understood that as a reference to
3 internet protocols and --

4 THE COURT: That's a word I understand.

5 THE WITNESS: -- technologies related to internet
6 protocols.

7 BY MR. HUFFMAN:

8 Q. In the delivery of packets of data via the internet?

9 A. Yes, that's correct.

10 Q. Have you, in fact, programmed software dealing with
11 internet packet deliveries?

12 A. Yes, I have.

13 Q. And in connection with peer-to-peer file-sharing systems?

14 A. Yes, I have.

15 Q. Have you served as an expert witness on matters pertaining
16 to internet packet deliveries, internet protocols?

17 A. Essentially, yes.

18 Q. What about, have you testified before Congress?

19 A. No, I have not.

20 Q. Did you testify before this Court before?

21 A. No, not before this Court.

22 Q. Have you testified before other courts, Federal Courts?

23 A. I testified before the District Court in San Francisco.

24 Q. And what was the nature of that testimony?

25 A. I was analyzing some evidence related to telephone calls.

1 Q. And did it involve the delivery -- did it involve the
2 internet at all?

3 A. No. Only the telephone system.

4 Q. Okay. And have you studied and written about BitTorrent
5 technology?

6 A. I have studied and written about BitTorrent technology,
7 yes.

8 Q. And what about matters dealing with IP address
9 allocations?

10 A. I've studied matters relating to IP address allocation.

11 MR. HUFFMAN: We would like to offer Mr. Schoen as an
12 expert on geolocation technology and BitTorrent peer-to-peer
13 file-sharing systems.

14 THE COURT: I believe it's been stipulated to --

15 MR. STEELE: That's correct.

16 THE COURT: -- and he can be accepted as an expert.

17 MR. HUFFMAN: Thank you, Your Honor.

18 BY MR. HUFFMAN:

19 Q. So just a quick overview of an IP address, if you could,
20 please, Mr. Schoen.

21 A. Sure. An IP address is a number used to identify a
22 computer on the internet for purposes of letting internet
23 routers determine where to send, where to deliver traffic. An
24 IP address is a 32-bit-long number. So there are about
25 4.2 billion of them. And it is usually written equivalently

1 as a series of four numbers of eight bits each separated by
2 periods.

3 Q. And does an individual IP address identify the
4 corresponding internet user?

5 A. The IP address is an identifier for a computer rather than
6 a user. Today with network address translation technology, it
7 might actually identify a network containing multiple
8 computers rather than, as it traditionally did, identifying
9 only a single computer.

10 Q. And how does a network then -- a network which is
11 addressed by a single IP address reallocate computer traffic
12 to devices within a home or other location?

13 A. That's a technology called network address translation or
14 NAT. A network address translating router keeps track of
15 connections from computers inside the router that are outbound
16 to other computers on the public internet, and it remembers
17 when each connection is established, which computer on the
18 internal network was responsible for or associated with that
19 connection.

20 Q. And the ISP would not typically -- excuse me -- the
21 internet service provider would not typically retain or
22 allocate the internal IP addresses on a NAT; is that correct?

23 A. So, if a, say, residential or business internet subscriber
24 is using a network address translation device, then the
25 internal addresses on the internal network created by that

1 device are so-called private addresses, and they're not
2 allocated by or directly visible to the upstream internet
3 service provider.

4 Q. Moving for a moment to -- or moving on to geolocation,
5 could you please describe IP address geolocation technology
6 briefly.

7 A. Sure. IP address geolocation is a technology that's about
8 mapping from an IP address onto a physical location in the
9 physical world by making an estimate of where the connection
10 associated with that IP number is likely to be.

11 Q. And is that typically done in connection with, say, mobile
12 phones?

13 A. Mobile phones use different approaches to location. So
14 mobile phones, for example, determine their own location using
15 the global positioning system. That's different from IP
16 geolocation.

17 Q. Typically, IP geolocation, is it a home or other premises
18 -- residential or normal physical stable location?

19 A. Yeah, it's typically used to get an estimate of a location
20 for a device that is not a mobile device. Since mobile
21 devices may also use the internet protocol, there may be a
22 possibility of using IP geolocation to get an estimate for the
23 location of a mobile device.

24 Q. But it is not typically done, it would be more frequently
25 done through GPS; would that be correct?

1 A. Yeah. So mobile applications may have access to a much
2 more precise position estimate because they have access to a
3 GPS receiver inside the phone.

4 Q. How is IP address geolocation technology used in commerce?

5 A. So one example would be for a website to determine what
6 language to present to a visitor, so if you were to access a
7 site like Google or Facebook from Germany, it would generally
8 come up in German because the site is using a geolocation
9 technology to get an estimate indicating that you're in
10 Germany. And if you were in France, it would typically come
11 up in French.

12 Q. And that also might affect things like currencies or the
13 goods that are offered?

14 A. Yes, certainly.

15 Q. And is that same -- does that same basis for use apply to
16 the copyright context at all in terms of copyright licensing?

17 A. Well, one example is that there are some sites that have
18 licensed copyrighted content, and they say that their licenses
19 only extend to showing that content to people in particular
20 territories. So, for example, Canadians are very irritated
21 when they try to access a site like Hulu, a licensed video
22 streaming site which deals with big entertainment companies,
23 because a site like Hulu will use geolocation technology and
24 say, essentially, you're in Canada, this content is not
25 licensed for display to you. Americans might have the same

1 experience trying to access video programming from the BBC.
2 The BBC may respond, well, you don't seem to be in the United
3 Kingdom, so you're not licensed to view this video
4 programming.

5 Q. Do other websites that provide goods and services use
6 geolocation technology to tailor the goods and services that
7 are presented to a particular user?

8 A. I would associate that especially with advertising, so in
9 terms of what they advertise to someone. If you had a site
10 like Yelp, a site that's used to find a directory of or
11 reviews of restaurants or local businesses, a site like that
12 might use geolocation to decide by default where to start your
13 search for a restaurant.

14 Q. What about for fraud prevention; is geolocation used for
15 fraud prevention purposes?

16 A. Yes, it is.

17 Q. In what way?

18 A. So sites might find, if they're e-commerce sites, that
19 they have trouble with stolen credit cards being used to
20 purchase goods or services, which could result ultimately in a
21 charge back to the site if the legitimate owner of the credit
22 card finds out about the fraudulent charge and disputes it, so
23 it is very unfortunate for an e-commerce merchant, if they
24 have sold something to someone who turned out to be using the
25 credit card fraudulently, and then the merchant is out both

1 the payment and the goods and services.

2 THE COURT: Mr. Huffman, before we spend any more time
3 on this, what is your point?

4 MR. HUFFMAN: Just wanting to get into the record that
5 geolocation is a measure of accuracy in commerce and accepted
6 as such, but I'm ready to move on.

7 THE COURT: Good.

8 MR. HUFFMAN: We can discuss some of the different
9 technologies and different things that are available for
10 geolocation, but I'm not thinking that that is going to be
11 particularly pertinent to Your Honor's consideration at this
12 point.

13 THE COURT: No, it is not.

14 BY MR. HUFFMAN:

15 Q. If I can just ask him to list, list what they are, in
16 addition to private companies that were discussed earlier,
17 could you just list the other several ways that geolocation
18 technology can be -- the other available references for
19 geolocation information for the record?

20 A. I'm sorry. I didn't understand what you meant by
21 "references."

22 Q. The other publicly available references.

23 A. Okay, so if you wanted to find out a physical location
24 that was likely to be associated with an internet
25 connection --

1 Q. Yes.

2 A. -- you could get that kind of information from a
3 commercial geolocation provider, and there are several
4 companies that provide that kind of information.

5 Q. Right.

6 A. You can also look in public records, which I think were
7 briefly discussed before, such as the American Registry For
8 Internet Numbers --

9 Q. Yes.

10 A. -- a registration database which indicates which internet
11 service provider has had a certain range of IP addresses
12 allocated to them.

13 Q. And what else?

14 A. There is also a thing called reverse DNS, DNS for the
15 domain name system. The domain name system is used to make a
16 mapping from names like uscourts.gov to internet protocol
17 addresses. Reverse DNS is used to make the reverse mapping
18 from an internet protocol address back to a human readable
19 name. And many internet service providers commonly configure
20 reverse DNS names for IP addresses that have been allocated to
21 them. And consulting those names may provide an indication of
22 the identity of the internet service provider and often
23 contain some kind of a geographic indication of the region in
24 which the IP address is used.

25 Q. Thank you.

1 And then trace routes would be the same thing but with
2 respect to routers as opposed to individual websites; is that
3 correct?

4 A. Yeah, that's correct.

5 Q. Okay. Moving on then to BitTorrent protocol, what is
6 BitTorrent, in your understanding of the term, briefly?

7 A. BitTorrent is a peer-to-peer file-sharing protocol
8 invented by Bram Cohen, and it is a relatively efficient way
9 to distribute very large files, especially if the first party
10 that originally wanted to distribute the files has limited
11 network resources.

12 Q. And we discussed earlier the distribution of Linux
13 operating software via BitTorrent. Are you familiar with that
14 practice?

15 A. Yes, I am.

16 Q. Can you think of another example of the use of BitTorrent
17 aside from the distribution and sharing of movie files?

18 A. My understanding is that the video game company Valve uses
19 BitTorrent to distribute video games that they sell to
20 customers.

21 Q. And how, then, do they ensure that only licensed customers
22 use the video game?

23 A. They have a license key that some customers will have and
24 some customers won't.

25 Q. When we speak about a tracker in the context of a

1 BitTorrent protocol usage by multiple users, what does the
2 tracker, what information about a given swarm does the tracker
3 retain?

4 A. Well, the tracker is a computer that facilitates
5 BitTorrent transfers by introducing peers to one another.

6 Q. So the peers don't direct -- the peers don't introduce
7 themselves to one another?

8 A. There are technologies that move in that direction. In
9 the context in which I think BitTorrent has been discussed in
10 this case by all of the declarants and all of the witnesses so
11 far, we're talking about the traditional style with
12 centralized trackers which have the responsibility for
13 introducing peers to one another.

14 Q. So a given user doesn't necessarily know who they're
15 uploading or downloading from or to, nor do they direct that
16 traffic; is that correct?

17 A. Well, that relies on making a distinction between the user
18 and between their software or their computer. So their
19 software or their computer certainly does have that
20 information and is certainly using it and directing it.

21 That's information that would be available to the user if they
22 were interested. It's not information that the user is
23 required to know in order for BitTorrent to work properly.

24 Q. So in the typical use of the BitTorrent software, to
25 upload or download files, is the user going to be directing a

1 given packet, either in or out of that user's computer, or is
2 that going to be done automatically by the software?

3 A. That's going to be done automatically by the software.

4 Q. When we speak about a swarm, a swarm can involve thousands
5 of individuals or thousands of individual users; is that
6 correct?

7 A. Yes, an enormous number of users.

8 Q. Are they typically global swarms or typically restricted
9 to a given country?

10 A. It's possible that interest in joining a particular swarm
11 might be concentrated in a particular country. For example,
12 if the swarm is distributing something in a certain language
13 that's commonly spoken in a particular place, it might be
14 primarily in that place, but generally swarms are open to
15 participation by people all around the world. And certainly
16 if we look at swarms, for example, distributing Linux
17 operating system CDs, those typically do include people from
18 all around the world simultaneously.

19 Q. So if a given number of Does are served in a particular
20 lawsuit and are said to be members of a swarm, is there any
21 necessary connection between the percentage of does in that
22 list, in that list that had been sued in the lawsuit, and the
23 percentage of does in the overall swarm from which the subset
24 of defendants were chosen?

25 A. Presumably, the plaintiffs in bringing a lawsuit would

1 have the ability to choose which Does they want to sue in the
2 lawsuit, and not necessarily all the participants in the swarm
3 would be known to them.

4 Q. For an individual in a swarm on let's just say point in
5 time X and another individual in a swarm at point in time X
6 plus 3 months, is it the case that the individual at the
7 3-month later point in time necessarily had any connection to
8 the first Doe? Any direct connection to the first individual?
9 Excuse me.

10 A. I think it depends on what you mean by "connection."

11 Q. I mean uploading or downloading of files in common with.

12 A. Well, they haven't necessarily communicated directly with
13 one another, if that's what you mean.

14 Q. In fact, does that grow less likely as time passes?

15 A. Yeah, as people's presence in or participation in a swarm
16 is more removed in time, it's less likely that those people
17 have communicated directly with one another using BitTorrent.

18 Q. Do most people stay in the swarm --

19 THE COURT: Excuse me just a second. When you say
20 "users," we're talking about computers communicating with one
21 to another, we're not talking about the actual computer user
22 communicating with anyone else in the swarm; right?

23 THE WITNESS: I think computing may be more afflicted
24 with metonymy than any other field or profession. So I hope
25 you'll excuse my metonymies. We sort of use them all day long

1 and say, you know, user Alice and user Bob, and we actually
2 mean software that someone else wrote that user Alice
3 installed awhile ago and may not even remember that she has.
4 Yes, so . . .

5 THE COURT: If somebody has downloaded a file using
6 the BitTorrent application and they have -- this user has his
7 or her BitTorrent application open and has made available that
8 particular file that's been downloaded sitting in their
9 application, it is then available for excerpting, which is a
10 term I think some people use, or for bits of it to then be
11 shared with other people perhaps in a different swarm but for
12 however long their computer is on and the application is open,
13 even if it is running in the background and the computer user
14 him or herself is using Word; correct?

15 THE WITNESS: I think that's correct, Your Honor.
16 There's only one exception that I would take to what you just
17 said --

18 THE COURT: Uh-huh.

19 THE WITNESS: -- which is even if it is a different
20 swarm, because in fact the use of BitTorrent to upload or
21 download a particular file is really tightly coupled to a
22 particular swarm. So people wouldn't just sort of jump over
23 or fall over into another swarm, because their BitTorrent
24 software is communicating with a particular tracker or set of
25 trackers about a particular version of a particular file, and

1 so in terms of your point that if the user has the file
2 available for sharing and has the application continuing to be
3 open and connected that it will be shared with other people
4 even if the user is doing something else, I think that is
5 completely correct.

6 THE COURT: It could be if they have the computer on,
7 and many people just keep their computers on all the time and
8 many people keep their applications open all the time, it
9 could be day 1, day 1 plus 30 days, day 1 plus 35 days; is
10 that correct?

11 THE WITNESS: There has been a bit of empirical
12 research about this, which I mentioned in my declaration,
13 where some people have attempted to measure this by observing
14 swarms. I think that the techniques that they use to observe
15 the swarms for academic purposes are probably quite similar to
16 the techniques that plaintiff's declarants in litigation like
17 this have used.

18 It seems that when people look at this for academic
19 purposes that they find that a lot of people seem to drop out
20 of the swarm relatively quickly. That certainly doesn't mean
21 that everyone has dropped out of the swarm quickly; it simply
22 means that empirical observations seem to suggest that it is
23 typical that most people drop out of the swarm relatively
24 quickly after their downloads are finished. But certainly
25 there are presumably people who continue to be part of the

1 swarm for a long time, even while they're doing other things
2 on their computer.

3 BY MR. HUFFMAN:

4 Q. And does it vary, does the ability of a tracker to call
5 upon a given piece that's been uploaded or downloaded to or
6 from the tracker or into the swarm, if you will, does the
7 ability of the tracker subsequently to get it when a user is
8 no longer involved in that swarm, in other words, if I'm a
9 user and I have downloaded a complete file and thereby I have
10 become a seed effectively within the swarm, do some of the
11 BitTorrent systems then cut off my participation in the swarm
12 unless I sort of voluntarily say that I want to continue to be
13 a part of the swarm?

14 A. By "BitTorrent systems," did you mean client application
15 software?

16 Q. Yes. Yes.

17 A. My understanding is that some BitTorrent client software
18 can be configured to drop out of the swarm as soon as the
19 download is complete. Users might want to do that in order to
20 conserve their network resources because although other users
21 would consider it altruistic and beneficial if someone
22 remained in the swarm and shared the file for a longer period
23 of time, the user might be annoyed about this because it's
24 slowing down other things that they want to do. So that's an
25 option that users may be given by their client software.

1 THE COURT: Can I ask you a question about the whole
2 tracker software or tracker computer. Can a computer that
3 holds the BitTorrent application be turned into a tracker
4 without the user being aware of that? I mean, is it part of
5 how the BitTorrent protocol works that it selects
6 automatically certain computers to be trackers without the
7 user having to be aware of it at all?

8 THE WITNESS: Well, I would hate to introduce more
9 technical complexity into the picture; but when the BitTorrent
10 protocol was originally designed by Bram Cohen and originally
11 implemented, the trackers were exclusively servers that were
12 running special tracker software and that were chosen by the
13 people who created particular torrent files.

14 THE COURT: But we're way beyond that now; right?
15 Aren't we beyond that?

16 THE WITNESS: So modern BitTorrent clients still
17 support and commonly use that mode of operation, but they also
18 support a mode of operation called trackerless torrents, also
19 known as distributed hash table mode. I was thinking it might
20 not be better to get into this simply because I don't think
21 that anybody in this case has found it necessary on either
22 side to address the difference between centralized trackers
23 and distributed hash table mode. But since you've asked, in
24 modern practice, there is available this mode of operation in
25 which essentially people can also become trackers. So to

1 summarize, as BitTorrent was originally designed, the
2 file-sharing aspect was decentralized in a peer-to-peer way,
3 and the tracking aspect of introducing peers to each other was
4 centralized at least with regard to a particular swarm.
5 Subsequently, people have invented and implemented a mechanism
6 where both functionalities can be distributed.

7 Q. And is there any evidence of the more modern potential for
8 trackering at the peer level, is there any evidence of that in
9 this case that you're aware of?

10 A. I think Mr. Hansmeier didn't directly state in his
11 declaration in this case whether the swarms he was monitoring
12 were using distributed so-called trackerless mode or not.

13 Q. Would he have been able to determine that?

14 A. If it had been of interest to him, he would have been able
15 to determine that. I think it's not obvious to me that it
16 directly impacts his ability to gather the evidence that he
17 says he's gathered one way or the other.

18 Q. And that's the last point I want to ask you about here
19 today, is the gathering of the IP addresses. Have you viewed
20 the IP address list that was gathered in connection with this
21 case?

22 A. Yes, I spent a long time viewing it.

23 Q. I think you have actually run some tests on it; haven't
24 you?

25 A. Yes. So I did a lookup in the service of a geolocation

1 provider called Quova, and I have submitted that to this Court
2 based on the IP addresses.

3 Q. I remember that from your declaration, but I want to know
4 if you understand from the testimony -- or the declaration of
5 Mr. Hansmeier and the list how Mr. Hansmeier obtained the list
6 from the swarm or at least how he said he obtained the list
7 from the swarm, which list was attached to either the
8 complaint or the motion for expedited discovery in this case?

9 A. I feel like I do in a general way but not in a specific
10 way.

11 Q. What do you generally understand?

12 A. So any participant in a BitTorrent swarm is able to
13 immediately see the IP addresses of at least some of the other
14 participants in that swarm. By joining a swarm, by contacting
15 a tracker, a participant is told about the IP addresses of
16 other participants in the swarm. Although I believe that
17 BitTorrent clients commonly don't save that information, like
18 in a text file, it would be possible to write software that
19 would save or record that information, for example, with a
20 date or a time stamp. So my general understanding is that
21 Mr. Hansmeier has probably developed or modified software to
22 connect essentially as an ordinary user would to a particular
23 BitTorrent swarm and start to observe and record IP addresses
24 attributed to participants in that swarm.

25 Q. And would it necessarily be the case that the IP addresses

1 attributed to participants in the swarm would be the same as
2 IP addresses of people who had successfully completed a
3 download in the swarm?

4 A. It's possible for someone to join a swarm and fail to
5 successfully complete a download. While they're in the swarm,
6 they could still be observed by other participants in the
7 swarm, whether or not they had been successful in completing a
8 download.

9 Q. So we don't know for sure whether these IP addresses
10 successfully completed a download based on Mr. Hansmeier's
11 declaration?

12 A. I don't remember whether Mr. Hansmeier explained having a
13 way to know that for sure. Based on what I remember of his
14 declaration, I'm not confident that he knew that for sure.

15 Q. And do you recall from his declaration any indication of
16 the software that he used other than his statement that it was
17 a proprietary software?

18 A. I don't. That statement was the reason that I said that I
19 thought he had written or modified software for this purpose.

20 Q. So you have no way of knowing based on his declaration
21 whether that software was reliable or accurate or otherwise?

22 A. That's correct.

23 MR. HUFFMAN: I have no further questions at this
24 time, Your Honor. Thank you, Mr. Schoen.

25 THE COURT: Mr. Steele, go ahead.

CROSS-EXAMINATION

BY MR. STEELE:

Q. Good morning. Is it Schoen?

It's afternoon, by the way.

Schoen?

A. One syllable, Schoen.

Q. I apologize if I butcher that.

I'll try to go through a couple of points as quickly as I can. You mentioned Hulu and how the geolocation knows general areas where you are based on that. Obviously, there's ways that you can mislead geolocation, isn't that correct, if you're using something like proxy servers and whatnot?

A. Yeah. So the geolocation database would return an address where the connection appears to originate from.

Q. Right. So, hypothetically speaking, if you used a proxy server based out of Sweden and you went to the site, you would suddenly get Swedish language on your web browser?

A. Yes, that's correct. A lot of users of proxy software like Tor have noticed that they actually get such a thing.

Q. Okay. I think the important thing about geolocation that I'm trying to ask about here is the accuracy. Is it -- let's see here -- would you say -- you were talking about the other things besides copyrighted content as being used on BitTorrent is Linux and Valve, is that correct, Valve?

A. Those were some examples that I mentioned of uses of

1 BitTorrent.

2 Q. Okay, let me get past that. You stated that the people
3 that are using BitTorrent software don't know who they're
4 connecting with, but isn't it true that they know that they
5 are connecting with people?

6 A. Well, not every BitTorrent user knows exactly how
7 BitTorrent works. Clearly, there are some BitTorrent users
8 who understand that BitTorrent is a peer-to-peer system and
9 that they're connecting to other people.

10 Q. Let me ask it this way: If I'm sitting there at my
11 computer and want something I don't have, don't I, by
12 definition, know that I'm going out somewhere to get it?

13 A. I'm sure that users who download things understand that
14 the things have come from somewhere else.

15 Q. Right. It's not fallen from the sky, they know they have
16 to go to another computer to get that software, that program,
17 or that file; correct?

18 A. I think there's been a level of confusion between, say,
19 peer-to-peer and non-peer-to-peer systems. For example, I
20 have seen journalists report on BitTorrent as a site, which I
21 would consider rather inaccurate. So, I mean, I think there
22 is a level of confusion floating around about these topics;
23 but I think people do understand that when they download
24 things that those things are coming from somewhere else.

25 Q. Okay. You stated that there was some study or

1 some -- some studies that looked at how long, on average,
2 people might stay on these torrent swarms. Do you have any
3 proof or any study that's been done as to how long people
4 stayed on this swarm relating to this litigation?

5 A. No, I don't.

6 Q. Okay. You stated that it is possible to automatically
7 leave a swarm once you finish getting your movie -- I'm
8 sorry -- your file. Let me rephrase that. Your file. Is
9 that correct?

10 A. Yes.

11 Q. Okay. But isn't there a benefit, also, to -- and correct
12 me, I'm not trying to put words in your mouth, I'm not an
13 expert on this -- but if you remain giving out this
14 information after you have gotten the entire movie, don't you
15 get some kind of benefit like increased ratio where you get to
16 then download more stuff in the future easier or faster?

17 A. So there are two different things that you might be
18 referring to. One is that there are some trackers which
19 attempt to measure the amount of uploading and downloading
20 that particular users have done in order to essentially reward
21 those users or allow them to be part of the community of
22 uploaders and downloaders of particular material. And so
23 that's implementing what is referred to as a ratio test, which
24 is a concept that long predates BitTorrent. And the idea of
25 the ratio test is that someone might be measuring whether

1 you're being sufficiently cooperative or altruistic with your
2 resources to allow you to participate in that community. If
3 people are a part of such a community and using its trackers,
4 then they definitely do have an incentive to stay connected
5 longer in order to improve their measured ratios.

6 Q. Okay.

7 A. I don't know whether the swarm that is at issue in this
8 case is in that category or not. It's true that that's a
9 reason in general that some BitTorrent users would have an
10 incentive to stay connected longer.

11 Q. All right. Thank you.

12 And you stated -- and last issue -- you stated that
13 you, when discussing Mr. Hansmeier's -- I will say Mr. Peter
14 Hansmeier's -- software declaration, referring to his
15 software, that you were essentially guessing as to how he
16 conducted or managed his software. Is that fair to say, that
17 you are just attempting your best guess as to how he, in fact,
18 performs this analysis?

19 A. Well, I read his declaration, and so I feel like it's an
20 informed guess, but I feel like there are details of the
21 analysis that are, perhaps, not set forth in his declaration.

22 Q. That's fair.

23 But would it -- would it be reasonable if you were to
24 find out down the road, say, in the actual trial or when it's
25 time for evidence to come out against an actual party or a

1 defendant that the actual system used to obtain this
2 information was much more advanced than your reasoned guess at
3 this point?

4 A. Well, with any network protocol, there are limits to what
5 can be done through that network protocol. So we have, for
6 example, the simple mail transfer protocol to send email
7 messages, and it has certain commands and certain features
8 that are associated with sending email addresses. So if
9 someone implemented email software using that protocol, there
10 are limits to what can be done with it, what kinds of
11 information the email software can get. And I think the same
12 is true of BitTorrent. There's a protocol, there are certain
13 capabilities and certain features in the protocol. It's hard
14 for me to imagine that there's sort of an unlimited range of
15 what you can do with the BitTorrent protocol.

16 Q. That's fair. That's fair.

17 Thank you. No further questions.

18 THE COURT: Anything further from any of the ISPs?

19 Mr. Schoen, is there any way you can think of
20 technically, if you're a copyright owner who believes your
21 work has been infringed, to obtain information about the
22 subscriber other than to subpoena that information from an
23 ISP?

24 THE WITNESS: I think it's always an interesting
25 question to think about. You know, at my work, we talk about

1 how personally identifying is an IP address or not, and that's
2 an issue that has come up in a lot of cases and a lot of
3 contexts. There, in many cases, may be other parties than the
4 ISP who have records that would tend to identify users. One
5 example would be a service like Google or Facebook. If users
6 have accounts, then those services have records showing which
7 IP address a user has logged in from. And so, for example,
8 Google has records that show that my IP address at home has
9 something to do with my roommate because my roommate logs into
10 Google services every day from that same IP address. The ISPs
11 are clearly the most direct source of that information and the
12 ones who are most likely to have it.

13 I guess my observation is just that because other
14 services are also recording personally identifiable
15 information together with IP addresses, there may actually be
16 other parties who turn out to have that same information.

17 THE COURT: Right. Thank you.

18 Any other questions?

19 You're excused. Thank you.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Thank you very much.

22 Okay. There are a number of areas that I would like
23 to inquire about just to make me sure that I'm understanding
24 everything that you all want me to understand from the papers
25 that have been submitted.

1 Under Rule 45, there are two prongs under which a
2 subpoena can be quashed, a mandatory prong and a permissive
3 prong. And I just want to be absolutely clear that the ISPs
4 are moving to quash under the requisite prong of 45(c)3(A).
5 Is that correct for those of you who are speaking for
6 the -- not Comcast, I know you're here in a position of a
7 motion to compel -- but for the other ISPs?

8 MR. FOX: Your Honor, I know that you said Rule 45
9 generally; I'm looking at the notice of motion.

10 THE COURT: Can you please come forward to the
11 microphone.

12 You represent the biggest cluster of ISPs.

13 MR. FOX: Ben Fox for Verizon, Bright House, and Cox.

14 The moving papers moved under Rule 26 and 45, yes, and
15 the specific provision, I believe it is 45(c)(1).

16 THE COURT: Well, Rule 45(c)(3)(A) requires a court to
17 quash or modify a subpoena that fails to allow reasonable time
18 to comply; (2) requires a person to travel more than
19 100 miles; (3) requires disclosure of privileged or other
20 protected matter; or (4) subjects a person to undue burden.
21 So I take it --

22 MR. FOX: (C)(3)(A)(iv), you're correct, Your Honor.

23 THE COURT: The main focus of your motion to quash is
24 because of undue burden; is that correct?

25 MR. FOX: Yes, Your Honor. And we cite secondarily

1 Rule 26 (b) (2) (C) (iii) requiring Courts to limit discovery
2 where the burden or the expense of the proposed discovery
3 outweighs its likely benefit. So that's another grounds in
4 the moving papers.

5 THE COURT: Okay. Before I get to the undue burden, I
6 also understand from your papers that the ISPs are arguing
7 that any burden in this case is undue because of what the ISPs
8 view as -- and I'll quote -- the procedural defects of the
9 case. But in addition, at least some of the ISPs, I think,
10 cite to the administrative burdens, substantial administrative
11 burdens on the ISPs.

12 Are the ISPs that you're representing relying on any
13 substantial administrative burden as the reason that the
14 subpoena should be quashed under Rule 45(c) (3) (A)?

15 THE WITNESS: Yes, Your Honor. In the context of this
16 case, we ask the Court to look both at this case and at the
17 other cases that have been brought to the Court's attention
18 both in the briefs and by the chart submitted by Mr. Huffman
19 and AT&T.

20 THE COURT: And the factual support for the
21 substantial administrative burden is where in this record?

22 MR. FOX: It is in the declaration of Mr. Cadenhead,
23 Mr. Frenfield, the AT&T witness, and Mr. Sean Moriarty from
24 Verizon.

25 THE COURT: All I see in those declarations are fairly

1 conclusory statements of there's been a burden. No statement
2 about -- or any further explanation. Frankly, when I asked
3 for the parties to submit witness lists, I was expecting
4 witnesses about the administrative burden. So I've been
5 scratching my head a little bit for most of this day with you
6 all.

7 MR. FOX: Well, Your Honor, I will --

8 THE COURT: So, you know, I just want to be clear that
9 the only part of the factual support for the substantial
10 administrative burden that the ISPs are asserting in
11 connection with their motion asking me and urging me to quash
12 the subpoena based on undue burden is fairly, to say the
13 least, conclusory.

14 MR. FOX: Your Honor, they are the declarations that
15 we have, and the chart, and I recognize that there is not a
16 voluminous record here; and we would ask the Court to consider
17 this evidence in connection with the cases that we have
18 submitted. And we will acknowledge that the burden in
19 responding to a single subpoena is not --

20 THE COURT: Well, let me just say --

21 MR. FOX: -- very substantial --

22 THE COURT: -- because I think when I'm evaluating
23 undue burdens in other cases and usually have a fairly
24 voluminous record in those cases about what the burden is, I
25 think it's fair to evaluate the burden in context; what's the

1 cost of subpoena compliance versus the benefits to the person
2 having to produce the subpoena. So if you can speak on behalf
3 of your clients, multiple as they are, what is the cost of
4 complying with a subpoena for one person, ten persons,
5 whichever way you're best able to articulate that.

6 MR. FOX: My understanding of the administrative
7 burdens for the client group that I represent is that they
8 have devoted at least one and I think for some of them several
9 employees, not full-time, but a substantial amount of their
10 time has been spent, and that is articulated --

11 THE COURT: How many employees?

12 MR. FOX: At least one per ISP and probably several
13 staff people, including in-house lawyers, have devoted their
14 time responding to these subpoenas.

15 THE COURT: How much revenue does each ISP derive from
16 each subscriber to the extent that you can tell me on average
17 per month, per year? What is that amount?

18 MR. FOX: That I don't know, and I don't know that
19 there is a direct tie between any of the IP addresses that are
20 at issue here and this motion. To say it in another way, I
21 don't know that any revenue would be lost by complying.

22 THE COURT: Okay. You may sit down.

23 Mr. Seiver for Comcast.

24 MR. SEIVER: Yes, Your Honor.

25 THE COURT: I was interested in seeing that Comcast

1 has proposed in its papers, at ECF 12 at page 15, that it can
2 reasonably respond to no more than 50 IP address lookup
3 requests per month. But again, what is the basis for that
4 statement?

5 MR. SEIVER: Well --

6 THE COURT: Because all I have is your conclusory
7 statement on that regard with no other evidentiary support.

8 MR. SEIVER: It is a difficult one to pin down because
9 there are a lot of subpoenas and a lot of IP addresses that
10 are requested on a daily basis to Comcast. And when we had
11 our first case, and it was before Judge Collyer, and it was
12 probably the *Achte Neunte*, or I think it was before Your
13 Honor, *Call of the Wild*, there is one other case that I'm
14 drawing a blank on, and we did have declarations and we talked
15 about it, and that was at the infancy, and Comcast was hiring
16 people to handle it, and we did a breakdown of the
17 administrative costs, and we came out with it. And we have
18 also worked with people like Mr. Steele and other copyright
19 plaintiff lawyers to come up with a dollar amount per address.
20 So our undue burden was either based on the legal relevancy --
21 and one Court has said, well, if it is not legally relevant,
22 then any burden is undue. Instead of going from that, we
23 moved to the administrative aspect of timing. And for
24 example, in another case with Mr. Steele, the judge ordered us
25 to come up with 1,200 IP identifications in 60 days, and

1 that's because I went on the phone and we came up, and the
2 most, with their analysts, they could do in a week was 180,
3 and that's putting everybody else's to the side except for law
4 enforcement, the child pornography, the runaways, there are a
5 number of FBI requests, and the reason I have been directed to
6 stick to 50 is because if everybody comes in at the same time,
7 we just can't do it. We have to do it on a rolling basis.

8 THE COURT: You can't do it without hiring more people
9 or investing more resources?

10 MR. SEIVER: Exactly. But then the time today to hire
11 and train and to get them implemented and get it working is
12 going to take time. And we don't know, because so many other
13 Courts, after we have gone through the process of notifying
14 and doing all this, have then come back and revoked their
15 discovery orders and quashed. That's why we were hoping,
16 because Your Honor's court has become, not the focal point of
17 the filings, but since many plaintiffs do come to D.C. now for
18 their cases, we needed to know, do we need to go on another
19 massive hiring or are things going to get quashed, as they
20 have been in California and in Chicago and in other
21 jurisdictions, because we're at the whim and caprice of the
22 -- we don't know how many cases somebody is going to file
23 tomorrow, how many orders -- we can't keep track of the
24 ex parte orders because we don't know about them until we get
25 a subpoena. That's why I have tried to keep it at 50, because

1 then it's going to reward -- we're going to have to drop off
2 and either commit contempt in another case or delay somebody
3 else where we're working along in order to come up with that.

4 THE COURT: I do understand that Comcast is also
5 relying, as the other ISPs are, not on just conclusory
6 administrative burden arguments, but also on this argument
7 that any burden is undue because of the merits of the
8 underlying case. Am I correct?

9 MR. SEIVER: That is correct, Your Honor.

10 THE COURT: Okay. And I have to say that this has
11 been a very interesting argument to read because, as
12 non-parties, that all these ISPs are scrutinizing the merits
13 of an underlying case to which they're not a party to evaluate
14 whether or not it is sufficiently meritorious for the ISPs, as
15 third parties, to produce information. I mean, as you just
16 said, Comcast -- I'm sure all the ISPs -- get a number of
17 discovery requests in all types of cases --

18 MR. SEIVER: Yes, Your Honor.

19 THE COURT: -- in discovery that may be ongoing in a
20 child porn case or a criminal case, civil case. And the
21 effort to evaluate the merits of all of those cases to make a
22 determination of whether or not the underlying case is
23 meritorious in terms of whether or not it's an undue burden
24 for you to comply with a subpoena is a pretty amazing argument
25 for the ISPs to make. From my perspective, since I have

1 criminal cases, I've got other cases where parties located
2 here are probably subpoenaing and performing discovery all
3 across the country for relevant evidence, that might lead to
4 relevant evidence in a case, which is really, from my
5 perspective, the stage we're at in this case, we don't have
6 named defendants, IP addresses are not defendants, they're
7 not, so is this case special, are file-sharing cases
8 special --

9 MR. SEIVER: Well, yes.

10 THE COURT: -- that ISPs are going to review the
11 merits of the underlying cases before they decide whether or
12 not to comply with subpoenas?

13 MR. SEIVER: Thank you, Your Honor. I do want to
14 engage in this debate because I think it is critical to
15 understanding what's going on. At the beginning, because it
16 was a civil case, and under the cable act, cable operators are
17 in a much deeper hole than non-cable providers because of
18 47 U.S.C. 551, we have to give notice to our subscribers, and
19 there has to be a court order, so anytime a civil subpoena
20 would come in, not --

21 THE COURT: And you have a court order here --

22 MR. SEIVER: I understand, Your Honor.

23 THE COURT: -- and it requires notice --

24 MR. SEIVER: I understand --

25 THE COURT: -- your whole cable act argument is really

1 a puzzle to me --

2 MR. SEIVER: If you will just let me finish.

3 And so when these subpoenas come rolling in to Comcast
4 by fax or by email, the first thing the analysts look for is a
5 court order, and they see it, and notice, that's great. And
6 at the beginning, you know, we were getting subpoenas for
7 maybe 100, maybe 50. It wasn't the 26,000 like in Hurt
8 Locker. It wasn't like the thousands that we'll get from
9 Mr. Steele. We have 55,000 IP address look-ups at issue now
10 from the hundreds of cases that have been filed, and we went
11 along. And at the beginning, Your Honor, that's why I gave
12 you the history of this, that's all we did. As long as we
13 could get a reasonable amount of money, and that was anywhere
14 from 70 to 100 dollars per IP address, depending on the timing
15 and whatnot, we had the analysts do it, send out the notice,
16 it went by FedEx so there was no question that there was a
17 signature, came back, we put it in the Excel chart, which is
18 what they wanted, and we did all that. The problem was is
19 that after these ex parte orders were being granted and the
20 subpoenas were being issued and we were complying, some Courts
21 started changing course, and that's the whole reason we're
22 here today, is to at least bring to Your Honor's attention the
23 number of courts that have kind of put us, Comcast, and I
24 think the other ISPs, in a bind, because here we are, we
25 have -- and pardon the common use of the word "ratted out" --

1 maybe in these thousand IPs, since we're doing it on a rolling
2 basis, we may have ratted out a hundred or a hundred and fifty
3 before the Court then says, well, wait a minute, I'm quashing
4 all these subpoenas. And then we've got subscribers saying:
5 We are being shaken down for \$2,500 and the judge revoked the
6 order. Why are you doing this to us?

7 As that problem grew, that's when we started having
8 some resistance. And despite the fact that it does
9 appear maybe disingenuous to say, well, we don't have a fight
10 in this and as long as we're doing what we're supposed to do
11 under our court order, we're getting whip-sawed because under
12 the cable act a subscriber could bring a statutory damage
13 claim against us for violation. And if we gave it, I think we
14 have the cover of a court order, and we also have the cover of
15 the fact that, you know, there is an allegation of
16 infringement, but some of the Courts have said, no, we're
17 going to sever, this is not right, we're not going to allow
18 all these people to be joined, we're not going to allow the
19 co-conspirators. And we have got six or seven different
20 flavors now of cases. And maybe it is good for outside
21 counsel and not good for the ISP. We have, for example, here,
22 where there is a thousand Doe defendants, that's one way to
23 look at it, then we have a single Doe defendant with a
24 thousand co-conspirators. That's another way to look at it.
25 Then we have the Rule 27 cases. Then we have the state court

1 cases.

2 And they're saying: Well, what do we do? If we
3 comply or not comply, we're stuck.

4 And so we wanted to bring it to Your Honor's
5 attention, and so I had a supplementary authority with the
6 Northern District of Illinois, and I believe there is one case
7 from Texas, another case from Michigan, another case from
8 Maryland, where judges are saying either I'm not going to
9 grant ex parte orders on discovery or, like in Texas, some of
10 them are revoking them and then quashing the subpoenas after
11 the fact, and we're like, now what do we do.

12 Now, I understand from what Your Honor says, then we
13 can call everybody off of those subpoenas and we can put them
14 on to the other subpoenas that are not being quashed and are
15 in cases where the orders haven't been revoked, but it has
16 become somewhat of a nightmare.

17 If I can make just one last point on this. When we
18 looked at what was going on and how it was being handled, we
19 noticed that there were some cases that made no sense about
20 where they were being filed because the cases were being filed
21 in one jurisdiction, subpoenas captioned in another, and it
22 was very confusing when we gave notice to our subscribers if
23 they wanted to contest it where they should go. And then we
24 had the example, which I did in our sur-reply, Your Honor,
25 where counsel, Prenda, filed a case here in D.C. and got Judge

1 Wilkins. That was the Nu Image author. And so they knew
2 within a few days, I'm not going to get my ex parte order from
3 him, so they dismissed the case. But one of the ones they
4 dismissed that had been assigned to Judge Wilkins they refiled
5 in Texas. Instead of being 1 -- versus 350 defendants, it was
6 against 1, with 349 as the subpoena. And then they came back
7 to this Court and issued the subpoena out of this Court even
8 though the case was in Texas.

9 My client says: What do we do? I mean, that doesn't
10 seem right.

11 If it was Judge Wilkins, we knew that it wasn't going
12 to happen. So that's why I had to bring it to your Court's
13 attention, asking you to review what's been happening, and
14 some of the statements in K-Beech, for example, that your
15 Court's processes are being used to allow them to contact and
16 obtain settlements from people who have not been proven except
17 by virtue of an IP address that shows up on a screen somewhere
18 to have participated in these --

19 THE COURT: Well, among the grounds that you believe
20 that the complaint filed in this case is procedurally
21 defective is because of joinder and lack of personal
22 jurisdiction; correct?

23 MR. SEIVER: Correct.

24 THE COURT: And as I read Rule 8(a), which requires
25 short, plain statement of the grounds for the court's

1 jurisdiction, the claim showing that the pleader is entitled
2 to relief and a demand for the relief sought, and I compare
3 Rule 8(a) to the complaint filed in this case, which alleges a
4 valid copyright in the work at issue, verified that the work
5 was illegally downloaded, identified the IP address used to
6 engage in that allegedly infringing inactivity, needing one
7 key remaining, answer to the question of who done it, my view
8 is that this complaint satisfies Rule 8(a).

9 I mean do the ISPs in any way challenge whether or not
10 this plaintiff has a good faith basis for asserting copyright
11 infringement claims against the users of the IP addresses that
12 are identified in the complaint that's engaged in allegedly
13 infringing activity?

14 MR. SEIVER: Your Honor, I will let the other ISPs
15 talk. And my point is not just 8(a), but Rule 20(a). That is
16 the problem and that whether --

17 THE COURT: Well, let's talk about that for a second.
18 But, first, do you have any question, under the rule 12(b)(6)
19 rubric of failure to state a claim, that this complaint
20 sufficiently sets out a claim of copyright infringement?

21 MR. SEIVER: Your Honor, yes. If there were one
22 defendant and the discovery was sought of that one defendant's
23 address, as we have done it with Mr. Steele, there's nothing,
24 we say fine.

25 THE COURT: Well, let me be more precise. Do you

1 think that the term "jurisdiction," as used in Rule 8(a),
2 refers to joinder or personal jurisdiction?

3 MR. SEIVER: Yes.

4 THE COURT: Is that your understanding of the word
5 "jurisdiction"?

6 MR. SEIVER: That's the way we've interpreted it and I
7 believe other judges have interpreted it, as well --

8 THE COURT: And is that the way you've interpreted the
9 word "jurisdiction" in Rule 8(a), to cover both venue and
10 personal jurisdiction?

11 MR. FOX: Your Honor, we're looking at the Caribbean
12 Broadcasting standard for pre-Rule 26 discovery; and in that
13 context, we understand the Court's -- I'm sorry not to be at
14 the lectern -- I may be jumping ahead of things, but if I
15 could take a step back and try to do a little bit of
16 distillation of where I think we are.

17 I understand the Court's skepticism. I think that --
18 a few points that I think are uncontested, I think that it's
19 clear that we have a very unusual situation here because we
20 have the split of authority both in this district with
21 Nu Image and with Call of the Wild and with other decisions,
22 and there are enough --

23 THE COURT: And around the country.

24 MR. FOX: Yeah. And there are enough cases that are
25 published these days on Lexis and Westlaw that both sides can

1 have large handfuls of cases that they can hold up and say,
2 look at my authority. So that is pretty unusual in this case.
3 I think that it also is hopefully uncontested that the parties
4 will benefit from a unified rule, independent of what it is,
5 and I hear again the Court's skepticism that the Court is
6 not --

7 THE COURT: No, I mean I think that I may have -- you
8 may have noted my facial expression when you say it's
9 undisputed or not contested because I think the plaintiff has
10 strenuously objected to your certification requests to try and
11 get a uniform rule.

12 MR. FOX: Yes.

13 THE COURT: So I would say that the ISPs, as
14 Mr. Seiver has articulated, are feeling probably between a
15 rock and a hard place of which way to go and would like a
16 uniform rule. Of course, also a uniform rule that they're
17 requesting, so --

18 MR. FOX: The plaintiff does not agree but if we
19 accept --

20 THE COURT: But the plaintiff doesn't agree.

21 MR. FOX: If the plaintiff's view prevails and the
22 practical effect is that there is forum shopping around the
23 country and there will be questions even in this district as
24 to how these cases are going to turn out and it will be
25 largely determined by random assignment, and this is the kind

1 of situation where the Court of Appeals -- another point, and
2 again, they don't agree with this --

3 THE COURT: Can I just explore with you for a
4 minute --

5 MR. FOX: Please.

6 THE COURT: -- because I'm glad, Mr. Fox, that you've
7 sort of raised this to bring this, really, not a thousand feet
8 up, but actually to the heart of the issue here, which is this
9 difference of perspective on where we're at in these cases,
10 with some Courts with very thoughtful opinions, you know,
11 Judge Wilkins, you know, I have utmost respect for him, very
12 thoughtful interesting opinion that he wrote with a different
13 perspective of the procedural posture of the case than I have.
14 I view this as a case where people are seeking discovery, just
15 like they do in every other case, and the discovery is wide
16 open, and they have sufficiently alleged copyright
17 infringement, and the one last little piece of evidence they
18 need about that copyright infringement is in the hands of the
19 ISPs. And he views the IP addresses as much closer associated
20 with named defendants than I do. I don't view them as named
21 defendants at all, anywhere closely associated to the
22 defendants, they may never become a defendant. In fact, that
23 is correct in the cases before me; I have had some named
24 defendants and some not, some who have waived personal
25 jurisdiction because for whatever reason they want to come in

1 and litigate in this courthouse, and some who have raised it,
2 so I have seen the whole gamut.

3 And the real issue is if the Courts, let's say the
4 D.C. Circuit, were to accept all of the ISP's arguments and
5 those posited by EFF and the other amici on joinder or
6 personal jurisdiction and venue, so that each individual IP
7 address had to be named alone in an individual lawsuit, so
8 that instead of what the ISPs complain about are hundreds of
9 file-sharing lawsuits with tens of thousands of IP address
10 look-ups to have to do, instead the Federal Court system would
11 have tens of thousands of individual copyright infringement
12 lawsuits, and the number of subpoenas to the ISPs would be the
13 same. So your burden would be the same unless you all are
14 banking on the fact that the copyright owners will just give
15 up the ghost and not engage them in lawsuits. Is that really
16 what you're banking on?

17 MR. FOX: Well, wearing my ISP hat, I see these as
18 cases that are, as you said, generating hundreds of subpoenas,
19 and that's the only capacity in which I see them. But looking
20 at the docket, I also see these as cases that are not
21 resulting in final judgments, for the most part, and aren't
22 being litigated past this stage of the proceeding --

23 THE COURT: But let me just talk to you about that for
24 a second, because, you know, from a busy Federal District
25 Court's perspective, if parties take control of their own

1 destiny -- I don't know if you were here earlier when I was
2 talking about scheduling trials in matters and always lecture
3 the parties, you know, before you go to trial, you got control
4 of your own destiny now, seize the day, seize the opportunity,
5 go off and talk, see if you can settle this case, from my
6 perspective, there is absolutely nothing wrong with
7 settlement. So I hear you, but I don't think that there is
8 anything wrong with parties evaluating their positions and
9 settling a case. I'm being honest with you.

10 MR. FOX: Sure.

11 THE COURT: And so that really doesn't make me
12 sympathetic to your position.

13 MR. FOX: There are other Courts that have said the
14 Court has concerns about a settlement with a subscriber who is
15 in Mexico, assuming this is a D.C. Court saying that, or is in
16 Hawaii or Washington State, because the Court doesn't have the
17 ability to oversee and see that this is a fair settlement --

18 THE COURT: Very different perspectives on it.

19 MR. FOX: In addition to Call of the Wild that has
20 gone the way this Court is describing it.

21 THE COURT: Let me turn right then to the
22 certification question under 28 U.S.C. 1292(b), and a couple
23 of the questions that come up: One, whether you really meet
24 the certification requirements under 1292(b). The plaintiff
25 argues you guys are non-parties, there is no controlling

1 question of law here. So, you know, there are legal
2 requirements.

3 Let me ask you, there is another much simpler way for
4 you to get the D.C. Circuit, and that's by me holding you in
5 contempt. Have you considered that?

6 MR. FOX: We --

7 THE COURT: What would be wrong with that?

8 MR. FOX: We recognize that that generates an
9 appealable order and it is outside -- that's not
10 discretionary --

11 THE COURT: It is outside of 1292.

12 MR. FOX: Sure. And as a lawyer, I never want to be
13 held in contempt. I think that my clients --

14 THE COURT: It would be your client.

15 MR. FOX: -- don't want to be held in contempt. But I
16 think -- so I can't say on behalf of any of my clients that I
17 will volunteer them to be held in contempt, but I would
18 recommend, if the terms were not draconian and if it was
19 understood by all parties that the reason for this is because
20 we really need to give the Court of Appeals an opportunity,
21 there has been no Court of Appeals decision and there probably
22 won't be absent either a certification or a contempt citation,
23 so if the terms were palatable, I would recommend it to my
24 clients, yes.

25 THE COURT: Well, I mean, the plaintiff has

1 strenuously objected to whether or not the requirements of
2 1292(b) are satisfied here. And how do you respond to that
3 argument?

4 MR. FOX: It is a controlling issue of law as a
5 practical matter because these cases have not proceeded past
6 this stage, as we have seen. So, you know, we have cited many
7 cases --

8 THE COURT: That doesn't necessarily make it a
9 controlling question of law; does it?

10 MR. FOX: Well, it makes it an important issue, and it
11 is controlling in that if the subpoenas are quashed, there
12 will be no identification, there will be no further
13 proceedings in this Court. If the motions to quash are
14 denied, the ISPs will produce information; and that, also,
15 too, is likely to be the end of the case. So how the case
16 turns depends on whether or not the plaintiff gets the
17 personally identifiable information.

18 THE COURT: Well, the other conundrum is, of course,
19 under 1292, that even if I were to certify an appeal here, you
20 know, it has a very important proviso clause that says,
21 provided, however, application for appeal shall not stay
22 proceedings in the District Court unless so ordered. So part
23 of the plaintiff's concern, of course, is that should I
24 certify the question and not stay subpoena compliance and the
25 ISP is complying, then by the time you got to the circuit, the

1 circuit might very well view the issue as moot.

2 MR. FOX: Well, if --

3 THE COURT: Would you agree?

4 MR. FOX: If the plaintiffs were interested, we would
5 stipulate to an expedited briefing schedule. It would have to
6 be agreed by the Court of Appeals, of course. The ISPs are on
7 notice that these IP addresses are at issue and they're
8 preserving information, so it's not going to disappear. There
9 are 200 other cases like this. So it is not as if this
10 plaintiff's lawyer has nothing else to do. So I think the
11 issues will be live no matter how long the Court of Appeals
12 takes to decide it.

13 THE COURT: All right.

14 MR. STOLTZ: Your Honor, may I address some of the
15 questions you've raised?

16 THE COURT: Just a second. I want to make sure there
17 are no other certification questions that I want to have
18 addressed.

19 If you could be seated, I would like to talk to
20 Mr. Steele for a second about the whole certification
21 question, because one of the things that you say in one of
22 your briefs is that the non-parties will have every
23 opportunity to file an appeal at the conclusion of this
24 litigation and achieve their stated goal of bringing
25 uniformity to the rules. You say this at ECF number 13, at

1 page 4. I just wanted to make sure --

2 MR. STEELE: I'm sorry, Your Honor.

3 THE COURT: -- I understand what you were talking
4 about because I don't see how the ISPs, these non-parties,
5 will ever have an opportunity to file an appeal unless they're
6 held in contempt and take an appeal that way unless I certify
7 it. So what were you talking about?

8 MR. STEELE: The purpose -- well, because they're
9 non-parties, the --

10 THE COURT: How will they ever have an opportunity to
11 appeal this issue?

12 MR. STEELE: Well, the simple fact is since they don't
13 have standing -- see, this is the problem of arguing something
14 you don't have standing to argue. Since you don't have
15 standing to argue it, you'll probably never have standing to
16 appeal it, either. That's kind of interesting; isn't it? So
17 they're complaining about it will be moot because we won't be
18 able to appeal it. Well, yeah, because you shouldn't be here,
19 in the first place, to argue it. That's true. And it will --
20 the other point is that -- I'm sorry for laughing. But they
21 confuse the fact that once out of 20 cases or whatever it
22 is -- I don't remember the exact number -- but we all know
23 Prenda Law has many cases out there, and they try to point to
24 the one or two that --

25 THE COURT: I'm learning.

1 MR. STEELE: There's very few, and they're pointed
2 out, emboldened that once in a blue moon a judge will kick out
3 a case, but there is a confusion -- I think there is a little
4 sleight of hand here, Judge -- never in the history of this
5 country has a judge said these ISPs have standing to bring
6 these arguments, so there is no split of opinion in any
7 district in this country, period. So to say that there are
8 judges -- a split of opinion -- we should have a appellate
9 court review this; well, shouldn't there be a split of opinion
10 first? And so what I brought up in page 18 of this is real
11 simple. You have to have a substantial ground for a
12 difference of opinion. I would respectfully ask the ISPs to
13 please give me, and this Court, one case that holds that
14 non-parties have standing to raise personal jurisdiction and
15 joinder arguments --

16 THE COURT: Well, that is the issue that you focused
17 on --

18 MR. STEELE: Uh-huh.

19 THE COURT: -- in terms of whether or not the ISPs
20 would meet the 1292 -- in the issue before me, on a motion to
21 quash a subpoena or a motion to compel compliance with the
22 subpoena -- would satisfy the 1292 standard of a controlling
23 question of law when they don't have standing to assert that
24 question of law on personal jurisdiction and joinder. But on
25 the issue of venue, which is really where Courts are, I think,

1 having a division of authority, certainly in this district and
2 more and more so around the country, on whether or not venue
3 has to be established at this stage of the proceeding, you
4 know, is a question that could be controlling in, certainly,
5 the limited context of these file-sharing cases. So why isn't
6 that a question that has some controlling impact or authority
7 in this case? And there's certainly a substantial ground for
8 a difference of opinion on this question even in this Court.

9 MR. STEELE: Well, venue is essentially the same as
10 personal jurisdiction at this stage in this context.

11 THE COURT: And neither one needs to be pled under
12 Rule 8(a).

13 MR. STEELE: Thank you.

14 So the issue becomes how can there be a difference of
15 opinion on something that is not even required at this point?
16 So the fact of the matter is that it's not even a requirement.
17 There can't be a difference of opinion over whether or not
18 something -- a standard has been met when it is not even
19 necessary to have been started. There is no requirement for
20 me to reach -- I'm sorry -- for our law firm to reach a goal
21 when there is simply no goal. So if I don't state any -- if I
22 don't meet even the most modicum of venue and personal
23 jurisdiction, that's okay at this stage.

24 THE COURT: Well, let me just ask, because putting
25 aside the adversarial nature of this case --

1 MR. STEELE: Uh-huh.

2 THE COURT: -- where you say white, they say black;
3 they say white, you say black --

4 MR. STEELE: Uh-huh.

5 THE COURT: -- but wouldn't it be helpful to you who's
6 engaged in so much of this file-sharing litigation, and to
7 your firm, to have a uniform rule and have a circuit court
8 speak on this issue that might then be considered and followed
9 around the country and then you'd know what the rules of the
10 game are?

11 MR. STEELE: Well, not necessarily -- here's the
12 problem. The ISPs have, you know -- they're not necessarily
13 innocent bystanders in this process. They have a financial
14 interest in what's going on here. They are paid a lot of
15 money by these large number of subscribers who do leave them
16 and whatnot when we start going after them, and they do have
17 an interest in continuing the current status quo. The long,
18 despite what -- those innuendos out there, the overwhelming
19 case law and the overwhelming number of judges out there are
20 in our favor. With due respect to Counsel Seiver and
21 Mr. Huffman, they both know in the last 14 days they've both
22 had the same issues brought up before judges and they've both
23 lost, these exact same issues. It's happening over and over
24 again. So, of course, they constantly ask the judges, can we
25 please appeal this, because of course when you lose you like

1 to appeal. In fact, in some of those cases they just simply
2 are ignoring the judge's orders, and we got to keep coming
3 back on motions to compel because every month that they wait,
4 they get to make more money for their clients. And I
5 understand that, but as far as --

6 THE COURT: So this issue of certification is coming
7 up in front of other judges, and have other judges denied the
8 certification --

9 MR. STEELE: Yes.

10 THE COURT: -- request?

11 MR. STEELE: Yes. And they said no, this is an early
12 discovery matter, you are third parties.

13 THE COURT: In which courts?

14 MR. STEELE: I apologize. Can I get some water,
15 Judge?

16 I can pull the order because I don't want to speak --
17 but a Judge Kay I was in front of last week with --

18 THE COURT: Magistrate Judge Kay?

19 MR. STEELE: Yes, Your Honor.

20 That was regarding, I think -- I don't think they
21 asked for certification. I believe --

22 MR. SEIVER: Did not, Your Honor.

23 THE COURT: All right.

24 MR. STEELE: Right. So I want to make sure I'm clear
25 on that. So the certification --

1 THE COURT: Let me --

2 MR. STEELE: -- question didn't come up there.

3 THE COURT: Let me ask you because I don't agree with
4 a number of the arguments that the ISPs have raised, but it
5 has sparked my curiosity: How do you decide where to file the
6 file-sharing cases? Is it where you can use the same court to
7 file your case and issue the subpoena to the ISPs, so you're
8 looking at Rule 45 100-mile radius issues? Or how do you
9 decide where to file the file-sharing cases?

10 MR. STEELE: Well, there's a lot of different factors;
11 and quite frankly, it changes depending on different types of
12 cases. We come up with different ideas. It depends on -- for
13 instance, one of the newer type of cases is where we find
14 someone who's very involved in the infringement, someone
15 referred to as one of the, for lack of a better term, master
16 infringers, someone who is really one of the base people. And
17 this was what actually occurred, I think, in Judge Wilkins'
18 case, when we realized this person was in Texas. We went and
19 changed the whole case around and went after him in his own
20 state or whatever. We named all the people he's worked with
21 as co-conspirators. That's one way of doing it.

22 THE COURT: So where you can easily issue a subpoena
23 from a District Court to an ISP because of Rule 45's 100-mile
24 radius rule, doesn't it play a role or does it play a role?

25 MR. STEELE: Well, wherever the ISP is located is

1 important. Texas is very good for that purpose because
2 there's a lot of ISPs there; same with Illinois because,
3 obviously, most of the major ISPs have a presence in Illinois.
4 There are certain legal mechanisms that are available in
5 certain states that are not available in others for state
6 court purposes. There are, in Florida -- for instance, there
7 are a couple -- there is a very unique state law there that
8 allows us to go after some Florida residents if we can show
9 the relationship with other out-of-state residents.

10 THE COURT: Okay.

11 MR. STEELE: So there are different mechanisms.
12 That's the other thing. We have a certain limitation because
13 there's always going to be differences in facts and so on.
14 And so, for instance, you know, I had a conversation with one
15 of the counsel, and they said, well, if this judge rules in
16 your favor, we're going to stop fighting this. Well, the
17 judge ruled mostly in our favor, ruled in one way. Well, that
18 wasn't really that way, so we're going to keep fighting.
19 There's always -- I don't want to impugn any opposing counsel,
20 but it's not like just because we're going to win today that
21 the other cases in which I'm going to see counsel on two weeks
22 from now that they're going to say, you know what, you're
23 right, John, we're going to stop fighting you in every one of
24 these cases. This is a financial matter. I appreciate that.
25 And that's fine.

1 The underlying facts are real simple. These are third
2 parties. It is a Rule 45 analysis. When I heard this Court
3 go through this with counsel, I said, well, I made a lot of
4 notes last night for no reason. You know, it is really
5 simple. Non-parties give this information. If they want to
6 have an appealable issue, they can make one real quick, they
7 simply don't comply, be held in contempt, and that's how third
8 parties appeal an issue. They don't do what third parties are
9 supposed to do in a case. But what they don't do is act like
10 a second judge and say, well, I don't think you've done this
11 right in your complaint, I'm going to ask for a second order.
12 And so when they don't get their second order, they say, well,
13 I would like to appeal this now, and so why don't you give me
14 a small monetary fine, which by the way they did ask for that
15 two weeks ago in a state court action. So I don't know if you
16 want to take that under consideration. But they did ask for
17 that exact thing, they asked, not to be certified, but asked
18 to be appealed to the appellate court in Illinois, in
19 St. Clair County, and the judge said no. And the reason why,
20 he goes, no, what's the purpose here?

21 MR. HUFFMAN: Your Honor, that hasn't been ruled on.
22 That motion is set Monday. He's making stuff up.

23 THE COURT: Okay.

24 MR. HUFFMAN: I'm sorry. I sat still as long as I
25 could.

1 THE COURT: There are professional, civil ways to
2 respond.

3 MR. HUFFMAN: I know.

4 MR. STEELE: Judge, I would be more than happy to
5 provide the orders and the transcripts to show what the judge
6 in that case thinks of the various ISPs' behavior in that
7 case.

8 THE COURT: I don't need to know what another judge --

9 MR. STEELE: Sure, I understand.

10 THE COURT: -- thinks of certification. I do share
11 with all of you my own views that I think given the split at
12 least in this district, let alone the country, and the lack of
13 circuit court consideration of the issue, it would be very
14 helpful to me to have a circuit court evaluate my reasoning.
15 You know, I welcome a good editor, but I am very seriously
16 concerned that you don't meet the specific terms for
17 certification. So, I will be pondering that, and then you all
18 will have to ponder whether, if I find that certification is
19 not appropriate here, whether or not you want to take the
20 contempt route, which will give you a fast track, not
21 upstairs, downstairs to the fifth floor. So I will hear from
22 you, Mr. Fox, unless you have anything else to add,
23 Mr. Steele.

24 MR. STEELE: Just one quick thing, and that is, I
25 didn't get to bring this up, but there is an ongoing damage

1 and effect that is happening right now to my client because
2 this -- the effects that are happening is these people are
3 continuously -- you know, unknown to us and continuously
4 infringing and hurting our clients, and the fact is, as time
5 goes on, these people become aware of this litigation, they
6 get notice from different places, and they, you know, change
7 their phone numbers, change clients, they move, they get out
8 of Dodge so to speak.

9 THE COURT: So is it better for the ISPs not to send a
10 notice or to send a notice? Because I don't have -- I don't
11 know for a fact, but getting a notice from an ISP that the IP
12 address at issue has been identified as engaging in allegedly
13 infringing activity, based on what I've seen in the
14 file-sharing cases in which I have presided, it seems to have
15 a deterrent effect because then people put up security on
16 their system, they, you know, figure out how it happened if
17 they believe they weren't the person engaging in it, so I
18 think it -- the notice does have -- can have a deterrent
19 effect even if the person never gets named. But the question
20 is: Are you saying that a notice would be not helpful as
21 opposed to helpful?

22 MR. STEELE: No, I wasn't clear. What I meant by
23 notice, there are websites out there and groups that provide
24 helpful notice to each other, pirate groups, they have
25 websites saying, hey, there's a new suit out there, if you

1 have Comcast, blah, blah, blah, be careful. I'm not talking
2 about notice from the actual ISPs because I don't want to
3 speak for them, but I have a sneaking suspicion that they have
4 not given notice to their clients yet --

5 THE COURT: Well, I think they have said so.

6 MR. STEELE: Okay, I apologize. So that we know that
7 they haven't given them even though you've ordered them to. I
8 would like them to give notice. I would love to have an order
9 from this Court that they're instructed to immediately comply
10 with your Court's order so that we can move forward and
11 start -- you know, obviously move forward.

12 Thank you.

13 THE COURT: Well, you're not going to get that because
14 I view this as another opportunity to write on the issue, and
15 I will, certainly if it goes to the circuit, either on a
16 certification or on contempt, if I ultimately decide that way.
17 But let's say I do decide to grant your motion to compel, deny
18 the ISP's motion to quash, and I guess the ISP -- and decline
19 to certify the question, then I suppose the ISPs could comply
20 with the subpoena to the extent of notice to subscribers and
21 decline to comply with the rest of the subpoena in order to be
22 held in contempt in order to take an appeal. But I
23 wasn't -- you know, I really wanted to get a sense of the
24 position of the parties on notice to the subscribers.

25 MR. FOX: Thank you, Your Honor.

1 THE COURT: Yes, Mr. Fox.

2 MR. FOX: Just mechanics, not argument so much.

3 First, I appreciate the Court's interest in writing an
4 opinion. I think it will be helpful. I refer the Court to
5 our reply brief at pages 2 to 3, which deal specifically with
6 the standing issue, and I'll just leave it on the table and
7 say our best cases on certification are in the reply brief
8 at --

9 THE COURT: I'm aware of that.

10 MR. FOX: -- pages 12 and 13. I think they get us
11 there. I know the Court will read them and the Court will
12 decide whether she thinks I'm right.

13 On the case that was filed, assigned to Judge Wilkins
14 and then dismissed voluntarily and refiled in Texas, that
15 wasn't a single defendant case, that was a multi-doe defendant
16 case. And when it was refiled, it sought the same IP
17 addresses.

18 Finally, by suggestion, I think that certification is
19 the surest way to get us to the Court of Appeals because it
20 doesn't require the clients to throw themselves on the
21 chopping block, but if --

22 THE COURT: But the Court of Appeals will look very
23 closely at these requirements for certification, and if they
24 disagree that the issue is certifiable for any number of
25 reasons, then it's been for naught. The surest way to get

1 their attention is contempt.

2 MR. FOX: We still would like certification, but in
3 the event the Court declines that request, I think it would be
4 helpful to have some parameters as to what the contempt order
5 would be if there were one so that the ISPs are not marching
6 into the void, and perhaps that could be either by a
7 supplemental order or on the record in some way.

8 THE COURT: If I decide to grant the motion to compel,
9 deny the motion to quash, and determine that certification is
10 inappropriate here, I will probably give the parties
11 approximately ten days to consult and come up with a plan for
12 contempt, and then you can make your suggestions there.

13 MR. FOX: In that event, could the parties
14 submit -- how would you like it done?

15 THE COURT: I'm not sure yet. I'm sure you'll have
16 plenty of time to think about that.

17 MR. FOX: Well, thank you. I want to thank the Court
18 for its time.

19 THE COURT: This has taken far longer than I thought,
20 and Mr. Stoltz, you have been patiently waiting, I will hear
21 from you.

22 MR. STOLTZ: Thank you, Your Honor.

23 THE COURT: Excuse me just one second. My court
24 reporter, who has been diligently typing away, needs a
25 10-minute break.

1 (Recess taken from 3:30 p.m. to 3:42 p.m.)

2 THE COURT: Last but not least, Mr. Stoltz.

3 MR. STOLTZ: Thank you, Your Honor.

4 Your Honor asked the question: Are file-sharing cases
5 special, mass John Doe file-sharing cases? We would answer
6 yes. My organization and the other amici in this case
7 represent internet users, and that is essentially all we know
8 about those whom the subpoenas in this case would identify, is
9 that they are owners of internet accounts.

10 So this Court has said in the past and seems to be,
11 you know, hewing to the point that questions of personal
12 jurisdiction, joinder are premature at this point. I would
13 submit that that's premised on the assumption that the case
14 will either proceed to an adjudication on the merits or that
15 it will be settled out of court in a fair manner.

16 THE COURT: Or that the plaintiff, who always has the
17 choice to either bring a suit or name a defendant, may decide
18 not to name a defendant --

19 MR. STOLTZ: Yes, Your Honor.

20 THE COURT: -- because further investigation pursuant
21 to the jurisdictional discovery that the plaintiff is
22 undergoing now has demonstrated that the person at the other
23 end of the IP address actually didn't engage in infringing
24 activity or, for whatever the myriad of reasons that might be
25 revealed during discovery, that they did not want to name a

1 defendant.

2 MR. STOLTZ: That's true, Your Honor, but we would
3 submit that when the names of these owners of internet
4 accounts are disclosed to plaintiffs, those internet users,
5 whether they are defendants or future defendants or --

6 THE COURT: Not defendants. Not defendants.

7 MR. STOLTZ: Not defendants. They are internet users.
8 Their rights have been affected because at that point
9 plaintiff -- and we've seen evidence of this -- pursues
10 settlements against those internet account holders without
11 regard to the merits of an underlying copyright claim and with
12 the intent to avoid adjudication on the merits of those
13 copyright claims; that they're not in fact seeking a person
14 who infringed, a defendant, they are seeking a settlement by
15 whatever means.

16 And I would submit the legal point on which these
17 motions should turn and on which I think on appeal would
18 clarify is the standard for proceeding with premature
19 discovery rather than Rule 8(a). It is the law of this
20 circuit, and this is not a split among the judges of the
21 District or elsewhere, the law of the D.C. Circuit has laid
22 out in Caribbean Broadcasting Systems that discovery of this
23 type is justified when the person seeking discovery reasonably
24 demonstrates that it can supplement its jurisdictional
25 allegation through discovery. In other words, discovery of

1 this type is not granted on request; it requires more. We've
2 submitted, and the ISPs have submitted, that that's lacking.

3 THE COURT: I've read your papers.

4 MR. STOLTZ: So I would just mention, you know, on
5 that question, and we do believe that is the controlling point
6 of law in this case, Rule 1292(b) does not require that the
7 issue to be decided by the appellate court is dispositive of a
8 case, only that it materially advanced the case. We think
9 this is a paradigmatic example of such a case.

10 THE COURT: Yes, I thought your papers were quite good
11 on the 1292 argument, but I have to really think that issue
12 through.

13 MR. STOLTZ: Thank you, Your Honor.

14 We would also just mention that we believe that that
15 question would be decided and affirmed by the -- the question
16 of the propriety of the appeal would be decided and affirmed
17 quickly by the appeals court. We understand that happens
18 rather quickly and with little additional delay for plaintiff
19 or the District Court.

20 THE COURT: I think the D.C. Circuit acts quite
21 expeditiously on appeals from contempt orders. I'm not so
22 sure on certification questions the speed with which they
23 consider that compares. But that's anecdotal impression on my
24 part.

25 MR. STOLTZ: I understand. Your Honor would know

1 better. Amici would just encourage the Court to consider how
2 this decision will affect those people who are not defendants
3 in this case but whose rights will be materially affected by
4 the disclosure of their identities to the plaintiff.

5 Thank you.

6 THE COURT: I'm aware of that.

7 Thank you very much.

8 Is there anything further, counsel?

9 MR. HUFFMAN: Your Honor, I would speak briefly if
10 Your Honor would permit me.

11 THE COURT: Of course. I didn't know I was going to
12 be spending all day with you. I apologize again for the delay
13 in my morning calendar.

14 MR. HUFFMAN: Thank you for your indulgence and your
15 time, Your Honor. We appreciate the attention you're giving
16 to this issue. We view it as very important.

17 As the chart demonstrates, and we hope Your Honor will
18 take the opportunity to look at that further, we --

19 THE COURT: Your long chart?

20 MR. HUFFMAN: The long chart.

21 We're sort of echoing the sentiments of the EFF. We
22 believe this is not -- expressed by the EFF, but also
23 expressed by us in our paper -- we don't believe this is a
24 usual case or controversy. We believe this is a manifestation
25 of the implementation of a nationwide business plan and that

1 the plaintiffs here effectively are enlisting the courts for
2 an administrative function of look-ups; and that they, as
3 Mr. Steele articulated, believe that we should simply give
4 them names.

5 THE COURT: What other choice do they have if they
6 want to find out who is engaged in infringing their material?

7 MR. HUFFMAN: I believe that they can do it through
8 Rule 45 subpoenas, but I believe they have to do it in a
9 proper way. So, for example --

10 THE COURT: So you are embracing the world view of
11 10,000 individual lawsuits filed in every district in this
12 country as opposed to merely hundreds of file-sharing lawsuits
13 against tens of thousands of IP addresses? Is that right?

14 MR. HUFFMAN: I don't believe that they would do that.
15 I don't believe that meets their business plan, but there is
16 an alternative, which is --

17 THE COURT: Because of the cost?

18 MR. HUFFMAN: Right.

19 THE COURT: Which means you are banking on the
20 copyright owners simply not enforcing their rights because of
21 the expense of filing tens of thousands of lawsuits and the
22 armies of lawyers it would take to initiate and prosecute
23 those cases in every district in the country.

24 MR. HUFFMAN: Perhaps, Your Honor, one alternative is
25 that they might --

1 THE COURT: Legislation --

2 MR. HUFFMAN: -- they might -- well, yes, or they
3 might protect their works. Looking again at the chart, they
4 seem to recur, and they seem to be sort of -- maybe they
5 actually need to protect those works or pull them back out or
6 whatever they can do.

7 But secondly, there is another recurring type of case
8 that's reflected in that chart. I sometimes call it their
9 bread-and-butter case, which is where they sue a relatively
10 small number of Does believed to reside in the forum. I'm not
11 going to say we're taking any particular position with respect
12 to that except that they do it a lot, and that's where they
13 tend to articulate the notion that the IP addresses have been
14 geolocated, et cetera. So there is at least -- that's another
15 situation that they have tried.

16 THE COURT: The peculiarity with those lawsuits
17 that -- where they -- because probably rulings from that
18 particular Court, the copyright owner, whether it is the
19 Prenda firm or other copyright owners, have said, okay, to
20 satisfy the venue issues that have been raised in a whole
21 series of courts, we are going to, you know, simply file suit
22 in a particular district for those IP addresses that appear to
23 have originated at least close to that area. That still
24 doesn't necessarily address the personal jurisdiction issue,
25 and it doesn't address the joinder issue, which the parties

1 have also raised. So even when they do that, I would think,
2 although I don't know, that they would still get pushed back
3 on those other issues. So, you know --

4 MR. HUFFMAN: And some courts have done that. Some
5 courts have denied even the bread-and-butter suits.

6 THE COURT: Of course.

7 MR. HUFFMAN: But many courts have not. And then the
8 other nuance there is --

9 THE COURT: There's been a lot -- I mean I have a huge
10 notebook of paper, so there's been a lot of ink spilled about
11 what's going on in those other courts. I have my hands full
12 with what's going on in my very own courtroom. So I know it
13 took a lot of work for you to put together your big chart, but
14 I'll be honest with you, it's of very little relevance to me
15 what other courts are doing.

16 MR. HUFFMAN: Well, and again, that chart's only
17 designed to be descriptive of the suits but not necessarily
18 their outcomes. It's to display for Your Honor what's
19 actually going on. And as some of the courts have stated, the
20 courts are not required to be blind to the true purpose of the
21 discovery.

22 THE COURT: And when you raise that point, I have to
23 tell you, what I'm thinking is, what this means is that the
24 copyright owners have such widespread piracy that's ongoing
25 that they're filing all of these lawsuits, and what exactly

1 is -- Comcast; right?

2 MR. HUFFMAN: AT&T.

3 THE COURT: What exactly is AT&T doing about it?

4 MR. HUFFMAN: AT&T has done a number of things about
5 it, and AT&T is party to an industrywide memorandum of
6 understanding --

7 THE COURT: I mean, this chart, to me, represents, in
8 terms of the total number of Doe defendants, this represents
9 to me an example of quite widespread infringing activity
10 that's ongoing on these networks.

11 MR. HUFFMAN: But it's never been challenged. No one
12 has ever challenged the integrity behind which that
13 information was gathered, tens of thousands of people being
14 affected. And that's part of the difficult thing. These
15 people get calls, and they don't even know what court to go
16 to, as Mr. Seiver said, because in the Southern District of
17 Texas, for example, it has been repeatedly held, as elsewhere,
18 that you need to go to the Northern District of Illinois if
19 that's where the subpoena is issued. So if you imagine, to
20 your point, you're a subscriber, maybe you have been sued in
21 the right place, but wait a minute, you can't even challenge
22 the subpoena there, you got to go to the Northern District of
23 Illinois because Prenda Law is based in Chicago, and they
24 issued the subpoena from the Northern District of Illinois.
25 So there are all kind of complexities. It is a real problem.

1 THE COURT: So at least in this case, they filed the
2 lawsuit here and they issued the subpoena here, and what
3 you're telling me is that my world view of -- if all of the
4 ISPs and EFF and the amici's arguments were accepted of single
5 IP addresses in lawsuits around the country, that we could
6 quadruple that or double that because even if they filed an
7 individual lawsuit in each of those cases, they might yet
8 still file miscellaneous lawsuits elsewhere to issue the
9 subpoena. That's even a scarier world view.

10 MR. HUFFMAN: Well, what's troubling here is that it's
11 an IP address which results to Seattle, Washington, for
12 example, and the person, as is likely, resides in Seattle
13 Washington. If that person is contacted by the plaintiffs'
14 lawyers and told that they're going to be sued if they don't
15 pay a settlement and they're going to be sued in D.C. with
16 respect to a work that has some controversial impact
17 potentially to them and that person is not likely to
18 be -- it's going to be a coercive environment, that's what a
19 lot of the courts have recognized, that there hasn't been a
20 showing of the value of the work, right, what's the
21 appropriate amount to demand in that type of a situation. So
22 there could be, around the good cause -- if I'm going to dream
23 up legislation, there could be some more to the good cause
24 showing that might be required of the plaintiff initially so
25 that when the settlement demands go out, especially given the

1 commonality of the genre that we're dealing with here, when
2 the demands go out, they have passed some sort of a fairness
3 test and so that there's not a coercive environment if we're
4 going to use the courts to facilitate massive administrative
5 extrajudicial settlements.

6 THE COURT: As a mere judge, I just have to deal with
7 the federal rules as they're given to me and the case law the
8 best I can interpret it.

9 MR. HUFFMAN: I understand, Your Honor.

10 And the last thing is I just want to say that in
11 silence -- I actually sat and argued in Florida against their
12 bill of discovery proceeding that they filed, the judges in
13 both of those arguments --

14 THE COURT: Of what --

15 MR. HUFFMAN: They were Florida State Court procedures
16 -- I'm sorry. Florida State Court procedures mentioned by
17 Mr. Steele, the Courts in both of those cases on the motions
18 of the ISPs, one of them, they dismissed the entire
19 proceeding, and the other Court quashed all subpoenas. And
20 I'm just saying that's one example. I'm not going to go into
21 a litany, because as you saw, I got excited. By my silence, I
22 don't agree with Mr. Steele's characterization of any of the
23 cases or their outcome anywhere else in the country.

24 THE COURT: Thank you.

25 MR. HUFFMAN: Thank you, Your Honor.

1 MR. SEIVER: Your Honor, I apologize. It will take
2 three seconds.

3 I just wanted to address your point -- and Mr. Fox
4 went to it -- about what do we do, what else, what's the
5 alternative. Either individual suits, which aren't going to
6 happen, or some sort of a mass suit with Comcast and other
7 ISPs, along with the Motion Picture Association, the RAA, and
8 some of the studios and producers have a memorandum of
9 understanding recognizing that none of the current methods are
10 perfect, and in fact, far from perfect. And there is a
11 six-step graduated, which I think is far more likely to stop
12 infringement if that is what Your Honor is actually looking at
13 here, where subscribers get notices, they get thrown to a
14 certain landing site, there's a whole method where it requires
15 cooperation. I have even invited some of the other producers
16 that Mr. Steele represents, that they should join that, and
17 that would be a far more effective way.

18 And then, Your Honor, on the issue about what you're
19 concerned about, you said that if, in fact, it's certified,
20 and it takes time, we will be producing and rolling them out,
21 so I didn't know if Your Honor was going to take the approach
22 of staying it, or at least having the materials preserved so
23 they could be produced at some later point or giving notice
24 but not disclosure but some aspect, so that if there's going
25 to be an appeal and some other appellate resolution that it's

1 not moot by the time it's decided.

2 THE COURT: Well, I actually -- I think that if I
3 grant the motion to compel and if I were to deny the motions
4 to quash and agree to a certification and the ISPs then
5 produced the identifying information for the subject of the
6 subpoena, that the Circuit Court could quite appropriately
7 find the issue moot, and so I think that's also Mr. Steele's
8 concern, that the whole certification process would be for
9 naught, unless if it's part of the certification, a stay was
10 imposed so that the issue wouldn't be moot for the circuit,
11 and that I think is part and parcel of his concern about the
12 certification, in addition to his very legitimate legal
13 concerns about whether the requirements for 1292 are met.

14 So, I mean, in answer to your question of whether
15 while going through the certification and appeal process you
16 would still be producing and complying with the subpoena, I
17 think that would defeat appellate review.

18 MR. SEIVER: Unless we produced it to you in camera,
19 Your Honor.

20 MR. FOX: Your Honor, if you certified, we would move
21 for a stay.

22 THE COURT: Of course.

23 MR. FOX: We could go to the Court of Appeals for a
24 stay, as well.

25 THE COURT: Of course.

1 MR. STEELE: If I may have three minutes to get my
2 turn, I just want to deal with the brief issue -- I only need
3 two minutes or three minutes on this. If there is a -- excuse
4 me. The issue of this -- raised by Attorney Fox about if
5 there is a contempt that there's some sort of nominal
6 guideline for a contempt so that it is sort of a soft landing
7 and they can have contempt and there not be any really, as
8 mentioned, void, I would like to address that for a moment
9 because the ISPs are here de facto -- in my opinion --
10 de facto representing their clients, which is the subscribers
11 that pay them every single month to -- and they pay them a
12 lot, Comcast has 18 million subscribers. That's a lot of
13 money. When you add up all the people just in this case,
14 that's a lot of money every month they don't want to lose. So
15 they're here to protect their financial bottom line, not
16 altruistic sense of this Federal Court system. So they have
17 raised arguments that our client would charitably describe as
18 specious and I think that this Court has indicated it has some
19 trouble with, such as joinder, even though they're
20 non-parties, and I think that it is important to not allow
21 non-parties to walk into a courtroom that they probably
22 shouldn't be standing in and raise whatever they like, and
23 then when those arguments get thrown out, they say, well, do
24 you mind, since we're here, can you just give us a \$25 nominal
25 or whatever contempt citation so that we could not really get

1 punished while we delay this another six months or year or
2 whatever because really what we want to do is another year of
3 subscriber fees, if possible. I think if you want to play
4 that chicken game of holding contempt and saying, look, I'm
5 not going to comply, then that's what contempt is about. It's
6 about saying, look, we really believe that the District Court,
7 with all due respect, is wrong, that's what we're going to do.
8 We're going to not comply, and then we're going to go up to
9 the appellate court and see if we were right, because if all
10 it is is a \$25 fee -- and I use that number because that's
11 what one of the attorneys asked for last week, you know, when
12 they applied for appeal -- then what's the point.

13 THE COURT: What was the number?

14 MR. STEELE: I think it was \$25 or \$50.

15 THE COURT: \$25 or \$50 per day?

16 MR. STEELE: No, total. As the contempt.

17 And I said, well, what's the point of appeal? I would
18 ask that for every single time a judge ruled against me. I'd
19 say, can I just pay \$50 and appeal this right now, judge? But
20 that is not the point of the contempt, you know, process. The
21 point is that you always respect a judge's order. If the
22 judge tells you to do something, you do it. You don't say,
23 no, that judge -- this other judge said something different,
24 maybe I will just make that judge tell me again. That's not
25 the contempt process. You do what the judge says. If the

1 judge changes her mind later, you stop doing it; but until she
2 does, you keep doing it. And I've had this conversation with
3 all these counsel, and they have all ignored your order up
4 until this moment. And now they want some nominal contempt
5 amount so that they can keep doing this.

6 I will just end by saying, I respectfully suggest, if
7 they want to say, nah, I want to keep ignoring this, Judge,
8 then let's have a real contempt hearing and a real open, as
9 Mr. Fox said, void.

10 THE COURT: Okay. Is there anything further?

11 No?

12 MR. FOX: Thank you, Your Honor.

13 THE COURT: Mr. Steele, for all of your exhibits that
14 have been submitted today, I need them properly marked with
15 plaintiff exhibit stickers; and if you want the Court to
16 consider them, I need a copy of them, the ones that were
17 admitted.

18 MR. STEELE: Yes, Your Honor. I gave a copy, but I
19 did not use stickers. I can put them on right now.

20 THE COURT: While I'm leaving, if you could please
21 make sure your exhibits are in order.

22 Thank you, all.

23 (Proceedings concluded at 4:05 p.m.)
24
25

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

PATRICIA A. KANESHIRO-MILLER

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