

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

DISCOUNT VIDEO CENTER, INC.
Plaintiff

vs.

Civil No. 1:12-cv-10805-NMG

DOES 1 - 29
Defendants

PATRICK COLLINS, INC.,
Plaintiff

vs.

Civil No. 1:12-cv-10532-GAO

DOES 1 -79
Defendants

PATRICK COLLINS, INC.,
Plaintiff

vs.

Civil No. 1:12-cv-10758-GAO

DOES 1-36
Defendants

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEO T. SOROKIN
UNITED STATES CHIEF MAGISTRATE JUDGE
AT BOSTON, MASSACHUSETTS
ON OCTOBER 12, 2012

APPEARANCES:

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Court Reporter:

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1 COURT CALLED INTO SESSION

2 (10:02:29 a.m.)

3 THE CLERK: The case of Patrick Collins v. Does
4 1-36, 12-10758, 12-10532; and Discount Video v. Does 1-29,
5 12-10805 will now be heard before this Court.

6 Counsel, please identify themselves for the
7 record.

8 MR. PERKINS: Good morning, Your Honor. I'm Sam
9 Perkins here representing Doe 22 and Discount Video.

10 MR. SWEET: Jason Sweet representing Doe 21 in
11 Patrick Collins.

12 MR. BOOTH: Dan Booth from Booth Sweet
13 representing Doe 69 in Patrick Collins.

14 MR. CABLE: Marvin Cable, attorney for the
15 plaintiffs.

16 THE COURT: So what happened, Mr. Cable, on
17 Friday? I thought like a young computer-savvy guy like you
18 with your --

19 MR. CABLE: Yes.

20 THE COURT: -- fancy laptop would have a Smart
21 Phone, iPad, iPhone. You'd be looking at your email every
22 four minutes.

23 MR. CABLE: Yeah, I do. Usually when I see a
24 hearing come through, I didn't -- you know, I don't think
25 it's going to be that next day or a couple of days after, so

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1 I let it pass and then come back to it at the end of the
2 week. It was an overlook, and I apologize. I apologize for
3 not having giving a call.

4 THE COURT: All right. So my suggestion to you --

5 I can tell from your demeanor today and also the
6 other time you were in front of me is it's not intentional,
7 that you take seriously your responsibility.

8 But you have to look at your email. You have to
9 read the emails from the Court every day, --

10 MR. CABLE: Right.

11 THE COURT: -- because we're more nimble than you
12 think. And so there are times when we'll schedule hearings
13 quickly depending on the circumstances, and you can't really
14 wait a week at a time to look and see what's what.
15 Especially in the situation you're in where you have a lot
16 of cases and a busy federal practice at this point.

17 MR. CABLE: Right.

18 THE COURT: And you need to be on top of those
19 cases and checking those emails every day when they come out
20 from the Court to see. Or even, you know, potentially
21 emails that come from the Court as filings, not just the
22 Court's filings but filings from the parties, because it's
23 certainly possible that people would file emergency motions.
24 And sometimes lawyers file more emergency motions than there
25 are emergencies; but nonetheless, you need to be on top of

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1 that in case somebody asks for a quick relief for a motion,
2 so you need to look at them.

3 MR. CABLE: I apologize.

4 THE COURT: All right. So now is it your practice
5 to look at those every day?

6 MR. CABLE: Yes, it is.

7 THE COURT: Okay, good. All right.

8 So I have a number of questions. You had some
9 flavor of them from the electronic order --

10 MR. CABLE: Right.

11 THE COURT: -- setting up for the hearing, so I'll
12 hear from you first as to that.

13 MR. CABLE: Sure. You had asked two questions:
14 Basically what information we have, and what we need.

15 Information we have. We have the time stamp and
16 the IP address, so we have the IP address that was
17 identified in downloading or uploading --

18 THE COURT: So see if I can -- let me just see if
19 I understand exactly what the forensics showed.

20 MR. CABLE: Okay.

21 THE COURT: And if I'm wrong -- and I could be
22 wrong, so please correct me.

23 Essentially, your forensics people went into an
24 existing BitTorrent swarm.

25 MR. CABLE: Uh-huh.

1 THE COURT: Joined the swarm, so to speak. When
2 they joined the swarm, they can see movies that are
3 available. They see -- they draw in a particular swarm that
4 has a particular movie available to it. Right?

5 MR. CABLE: Correct.

6 THE COURT: So they've looked in the client for --
7 searched for "XYZ" movie, okay? And they eventually call it
8 "XXX" movie, and they search for "XXX," and they see it, and
9 it may be available on more than one swarm possibly. Right?

10 MR. CABLE: Uh-huh.

11 THE COURT: And they pick for our purposes one
12 swarm where that movie is.

13 MR. CABLE: Uh-huh.

14 THE COURT: And then essentially the forensic
15 person downloads that movie to his or her computer.

16 MR. CABLE: Correct.

17 THE COURT: And in the course of doing that,
18 they're able to identify those computers that actually
19 uploaded it to them, or --

20 MR. CABLE: Yes.

21 THE COURT: -- those computers that actually
22 uploaded it to them.

23 MR. CABLE: Right. If that person's inactive; in
24 that, they're not uploading but they have -- they're in part
25 of the swarm, we don't identify them as -- in the complaint.

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1 THE COURT: So it's possible that somebody would
2 have that movie "Triple X" on their computer.

3 MR. CABLE: Correct.

4 THE COURT: Their computer is on at the moment
5 that your forensic investigator's in the swarm.

6 The BitTorrent client is active on that other
7 person's computer, but for however BitTorrent works, your
8 forensic person didn't get any portion of his or her copy of
9 the movie from that particular person.

10 MR. CABLE: Right.

11 THE COURT: And in that circumstance that person
12 wouldn't be listed on Exhibit A.

13 MR. CABLE: Correct. And that is different from
14 other forensic people around the country, so other forensics
15 people in other cases -- similar cases might say that they
16 are part of the complaint.

17 THE COURT: I see. All right. So some cases I
18 read about there might be circumstances where that person is
19 part of the Exhibit A, so to speak.

20 MR. CABLE: Correct. Correct.

21 THE COURT: All right. So your Exhibit A lists
22 those IP addresses from which your forensic person obtained
23 at least part of the particular movie named in the
24 complaint.

25 MR. CABLE: Right. And that at least is a filter.

1 So there's a certain amount that we have to get or that the
2 computer program says, okay, we have this amount. Okay, now
3 we're going to mark them part of Exhibit A.

4 THE COURT: So if the movie just by way of example
5 for 124 bytes --

6 MR. CABLE: Uh-huh.

7 THE COURT: -- of information to download the
8 whole movie, if somebody gave you one byte, they might not
9 make the threshold.

10 MR. CABLE: Correct.

11 THE COURT: If they gave you a certain portion,
12 percentage, it's at that point that you would put them in.

13 MR. CABLE: That's correct.

14 THE COURT: Now, is there any way for you to know
15 --

16 The conclusion that they have the entire file on
17 their computer rests upon the fact that it's listed in
18 BitTorrent.

19 MR. CABLE: There's some meta information that's
20 given. So besides the IP address, it says how much of that
21 file they have. So let's say they have a hundred percent or
22 they have 60 percent.

23 THE COURT: So by the nature of the way BitTorrent
24 works, it's sending over to you metadata that's telling you
25 what percentage of the file they have.

1 MR. CABLE: Exactly.

2 THE COURT: Is it that metadata that you look to
3 to determine whether to put them in Exhibit A?

4 MR. CABLE: Sometimes. It's not conclusive. So
5 if there's somebody that's going to have 30 percent, we may
6 not put them in the complaint. If there is someone who has
7 a hundred percent, yes, almost absolutely. If somebody has
8 80 percent, we may; we may not.

9 THE COURT: What would that determination rest
10 upon?

11 MR. CABLE: The clients.

12 THE COURT: So some clients might want to have a
13 lower or higher threshold.

14 MR. CABLE: Correct.

15 THE COURT: I see.

16 And so it's not correct to say that the metadata
17 reveals that everybody in Exhibit A has a hundred percent.

18 MR. CABLE: That's correct, but a substantial
19 majority do.

20 THE COURT: Okay.

21 MR. CABLE: I would say if I had to make a guess
22 -- and it's not good to make guesses. -- I would say it's
23 more than three quarters.

24 THE COURT: In each of the three cases.

25 MR. CABLE: Yes. Well over. I mean, there's some

1 that have almost a hundred percent. A hundred percent. A
2 hundred percent of the movie.

3 THE COURT: I see. All right. So when you get to
4 the download, you obtain the IP address of the computer or
5 computer -- you obtain the IP address of the computer or
6 computers --

7 MR. CABLE: Uh-huh.

8 THE COURT: -- that uploaded the movie to your
9 forensic --

10 MR. CABLE: Correct.

11 THE COURT: -- computer.

12 MR. CABLE: Uh-huh.

13 THE COURT: And that IP address is essentially the
14 address of the router, not the address of the device
15 connected to the router.

16 MR. CABLE: To the modem.

17 THE COURT: To the modem.

18 MR. CABLE: Because there could be multiple
19 routers.

20 THE COURT: All right. So that's the modem, so
21 that's essentially the modem from Verizon, --

22 MR. CABLE: That's correct.

23 THE COURT: -- Comcast or the like.

24 MR. CABLE: And there can be a modem that is a
25 router at the same time, so there can be a combined --

1 THE COURT: All right. But in any event, it's the
2 address of the modem. But it doesn't give you --

3 If there's multiple devices connected to that
4 modem either because it's a combined modem/router or through
5 another -- through one or more routers connected to that
6 modem, it doesn't let you -- the IP address doesn't let you
7 distinguish between them.

8 MR. CABLE: That's correct.

9 THE COURT: Now, the metadata that you get gives
10 you --

11 What comes across in the metadata? One thing that
12 comes across in the metadata is the percent of the file --

13 MR. CABLE: Right.

14 THE COURT: -- that the sending computer has.

15 MR. CABLE: Right. Also the hash mark which is
16 the identifier of that file, also the file name, the file
17 size.

18 And from what I understand that's it. There could
19 be more. I'm not the technical expert as to what -- how the
20 computer software works, but that's from what I see --

21 From my clients and from the forensic team, that's
22 what I see.

23 THE COURT: All right. And so you're not aware of
24 the metadata giving you any device-specific identifying
25 information.

1 MR. CABLE: No.

2 THE COURT: Do you know whether that's obtainable
3 or not?

4 MR. CABLE: We can get the MAC address from the
5 ISP to see -- to confirm that that -- to confirm that the
6 download came from that modem, because people can scoop IP
7 addresses.

8 So if we, for example, get --

9 If we subpoena the ISP for an IP address, the
10 person/owner of the IP address, that IP address actually
11 could have been spoofed and be somebody else. So when we
12 get --

13 THE COURT: The IP address, not the one from
14 Verizon, but the one you got from the metadata.

15 MR. CABLE: Right. It could actually be someone
16 in Alaska or wherever, and so to confirm that it's actually
17 that modem we ask for the MAC address, so --

18 THE COURT: So when you're asking in the subpoena
19 for the MAC address, you're asking for the MAC address of
20 the modem.

21 MR. CABLE: The modem. That's correct.

22 THE COURT: But how will that -- if you don't have
23 the MAC address of the modem you got it from, how does that
24 confirm anything?

25 MR. CABLE: We -- we -- that's as far as we can go

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1 at this point, and I think you hit the crux of the issue.

2 THE COURT: So one of my questions was and --

3 What does obtaining the MAC address from the ISP
4 help you determine?

5 MR. CABLE: It determines that that IP address --
6 that the owner of the IP -- or the owner of the IP address
7 that we get from the ISP is the same person, so Person X --
8 Person X --

9 THE COURT: I'm confused. You have it -- you down
10 --

11 Your forensic person downloads this movie. Okay?
12 You have an IP address --

13 MR. CABLE: Uh-huh.

14 THE COURT: -- from that download. You now
15 subpoena -- you look up on the Internet who owns that IP
16 address at Verizon.

17 MR. CABLE: Right.

18 THE COURT: Right? So then you come to me, and
19 you say, "Let us subpoena Verizon for that IP address."

20 MR. CABLE: Uh-huh.

21 THE COURT: For the owner, the various information
22 of that.

23 MR. CABLE: Right.

24 THE COURT: Verizon says, "We own that IP
25 address."

1 And let's say there's no objections, and I allowed
2 it and so forth, and you get back the name and the address
3 of the person who subscribed to that IP address on January
4 12 --

5 MR. CABLE: Right.

6 THE COURT: -- which was the day you did this.

7 MR. CABLE: Uh-huh.

8 THE COURT: And you get the MAC number of that
9 subscriber's modem on that day.

10 MR. CABLE: Uh-huh.

11 THE COURT: That's what you're asking for. Right?

12 MR. CABLE: Right.

13 THE COURT: And you get that from Verizon.

14 How does that -- what does that tell you about
15 whether or not the IP address you got on January 12 from the
16 download is the -- was actually the subscriber's IP address?

17 MR. CABLE: From what I understand, if a forensic
18 expert were to go in and examine the devices at the home,
19 they would check the MAC address of the device, and they'd
20 confirm that that modem was the modem that did the download.

21 THE COURT: Well, they could confirm that the -

22 If the person still has Verizon service and still
23 has the same modem and didn't swap it out, they could
24 confirm that the modem in the house is the one that Verizon
25 told them about, but how would they confirm that it wasn't

1 somebody in the Ukraine spoofing?

2 MR. CABLE: I don't know. I'm not the technical
3 expert. That's what I'm told that the forensic expert needs
4 to confirm the --

5 THE COURT: That the download --

6 MR. CABLE: -- occurred there, right.

7 THE COURT: The question I'm wondering then is --

8 Maybe I'm being too concrete, but I would think
9 that in order to confirm that the sending computer actually
10 used that IP address as opposed to spoofed it, --

11 MR. CABLE: Uh-huh.

12 THE COURT: -- you would require -- you'd need to
13 know the metadata, the MAC address of the modem. Then if
14 they didn't spoof that, --

15 MR. CABLE: Right.

16 THE COURT: -- then you would know -- you'd have
17 two sides.

18 MR. CABLE: Yes, that would be the better.

19 But from what I understand getting the MAC address
20 is helping in building a case. I'm not sure exactly which
21 situation --

22 THE COURT: So my question is this. Is it helpful
23 in discovery in the merits of the case, --

24 MR. CABLE: Yes.

25 THE COURT: -- or is it helpful in identifying

1 sufficiently the infringer such that you can amend your
2 complaint?

3 MR. CABLE: Not -- not for amending the complaint,
4 no. For the merits of the case.

5 THE COURT: Okay. So you don't need the MAC
6 address in order to identify the subscriber. The infringer,
7 rather.

8 MR. CABLE: I'm told I need it by our forensic
9 guy, but I am unclear as of now. I can probably get back to
10 you and have that response to you.

11 THE COURT: Okay. So how do you --

12 Putting the MAC aside, assuming that that doesn't
13 --

14 It sounds like it won't specifically identify the
15 infringer, because it doesn't sound like you obtained --

16 MR. CABLE: Right.

17 THE COURT: -- in the metadata the MAC address of
18 the sending device.

19 MR. CABLE: Correct.

20 THE COURT: So it sounds to me -- just a summary
21 --

22 What you know at the time you filed the complaint
23 is the IP address of the sending computer.

24 MR. CABLE: Uh-huh.

25 THE COURT: Sorry. The IP address that sending

1 computer seemingly used when it uploaded the movie to your
2 forensic person who downloaded it.

3 MR. CABLE: Uh-huh.

4 THE COURT: And from the metadata that BitTorrent
5 supplies --

6 MR. CABLE: Yes.

7 THE COURT: -- the percent of the file the sender
8 has, the hash mark on the file which is just another way of
9 identifying the file really, the file name, and the file
10 size, and no device-specific information.

11 MR. CABLE: That's correct.

12 But we can also make inferences from the IP
13 address, too. So we can put the IP address into a database,
14 and it's not totally accurate, but we can see which city
15 they might live in -- or which city the download had
16 occurred. We might be able to tell the longitude and
17 latitude.

18 Now, there's a center deviation of a couple miles,
19 so it's not totally accurate, but this also helps us
20 determine that this person is in the district.

21 THE COURT: Right. Okay. So from the IP address
22 you can simply gather information that helps you both
23 determine the name of the ISP --

24 MR. CABLE: Yes.

25 THE COURT: -- and the venue.

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1 MR. CABLE: And again, that's -- there's a
2 standard deviation of a couple miles. So if somebody's on
3 the fringes of Rhode Island and Massachusetts, that person
4 could actually be in Rhode Island; whereas, the database
5 might say they live in Massachusetts.

6 THE COURT: Right, I understand that. So I
7 understand that in the discovery -- at some point in the
8 process you might determine that, in fact, somebody's --

9 MR. CABLE: Right.

10 THE COURT: -- case should be dismissed, because
11 there's no venue here, and you might have to refile it
12 against them somewhere else.

13 MR. CABLE: Correct.

14 THE COURT: But is there any other information you
15 can define from the IP address as far as you know,
16 vis-a-vis, to determine the identity of the subscribe -- the
17 infringer or any other information you get?

18 MR. CABLE: Yes. We know what they call the
19 client or the software that is used to do the -- that the
20 person on the other end is doing the download or uploading
21 to us, so we can tell -- it's called "the client." We can
22 tell what BitTorrent client they have, and we can tell what
23 version number.

24 This is helpful in figuring out what type of
25 operating system that they may have, what type computer that

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1 they might have and other information that we can infer from
2 them.

3 THE COURT: So you might be able to infer from --

4 So you also learn the particular brand, so to
5 speak, of BitTorrent client and the version number, and from
6 that it might be -- you might be able to infer whether
7 that's on a smart phone, a tablet, a computer, whether it's
8 operating Windows or which version of Windows --

9 MR. CABLE: Right.

10 THE COURT: -- or whether it's Mac OS and which
11 version of that.

12 MR. CABLE: That's correct.

13 THE COURT: Okay. Anything else?

14 MR. CABLE: From what I understand, no.

15 THE COURT: So then what information -- what do
16 you need to know -- what do you need to acquire in order to
17 be in the position to file a motion to amend your compliant
18 substituting an actual person for any particular Doe?

19 MR. CABLE: Well, I don't think there is a
20 specific set of information we need. I think there's a
21 principle that is behind it. I think we need a good-faith
22 basis to amend the complaint, and that can come in many
23 ways.

24 If I were to get a phone call from somebody
25 saying, "Hey, look, I did it, and I want to fight through

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1 trial -- in court," that's a good-faith basis.

2 Whereas, if someone said, "Hey, look, I've never
3 used a computer before in my life. I just like having
4 Internet at my house. I don't use Internet. It's just
5 something I want to do," I would not have a good-faith basis
6 to go after that person.

7 So anything that would give me a good-faith basis.

8 THE COURT: Anything that would --

9 MR. CABLE: And I --

10 THE COURT: -- narrow the focus down --

11 MR. CABLE: Yes.

12 THE COURT: -- from the physical address --

13 The IP address which you don't yet know, but
14 presumably when you're done with the ISP, you'll have a
15 physical address associated with the IP address.

16 MR. CABLE: That's correct.

17 THE COURT: Anything that narrows -- any set of
18 information that narrows down the physical address
19 sufficiently with this other information to identify --

20 MR. CABLE: Uh-huh.

21 THE COURT: -- a person such that you have a
22 good-faith basis under Rule 11 to file a motion to amend.

23 MR. CABLE: Right. Right.

24 And I would argue the standard's just a little
25 higher. I'd argue good-faith basis for a competent

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1 attorney.

2 THE COURT: All right. So how does the --

3 The information you seek is the name and address

4 -- I understand the significance of that -- of the

5 subscriber, and the MAC address you're not sure whether

6 that's for merits down the road or whether that's for

7 identifying --

8 MR. CABLE: Right.

9 THE COURT: -- the infringer.

10 Then what's the plan?

11 MR. CABLE: Well, I'd like to keep this as least

12 burdensome as possible and as least costly as possible.

13 Opening communications between me and the Does or

14 me and the subscribers is, I think, the best course of

15 action. Sending a letter saying, "Hey, look, you know, your

16 Internet has been identified in infringing copyrights."

17 You know, anything that opens up this course of

18 discussion before going into more burdensome discovery like

19 depositions or things like that or examining devices and

20 things like that.

21 THE COURT: So the problem and concern I have with

22 that --

23 Which essentially what you're saying to me is,

24 "What I'd like to do, Judge, is give me the name and

25 address..." -- or, "...the name, address, email and phone

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1 number," --

2 But I'm not sure it really matters whether I give
3 you the email or phone number, because I imagine the name
4 and address they'll find the rest in about a minute.

5 "Judge, what I want to do is get that, and then I
6 want to go talk to people, and then I'm going to settle a
7 bunch of cases. I'm going to get information. We'll see
8 where the dust settles and whether I want to do that or not.
9 That's going to be a time-consuming process, the back and
10 forth, there's phone calls --"

11 MR. CABLE: Right.

12 THE COURT: "-- and so forth."

13 And the concern that I have is that when I read
14 the case law, *ex parte* discovery, which is what this is, *ex*
15 *parte*, This is *ex parte* and third party discovery, because
16 the discovery you're taking is not of parties to the
17 litigation.

18 MR. CABLE: Right.

19 THE COURT: At the moment everybody from whom you
20 seek discovery is a third party. Both obviously ISP's a
21 third party. At the moment I don't sense any possibility
22 that they're going to be named as defendants in this
23 litigation.

24 MR. CABLE: Uh-huh.

25 THE COURT: But even the subscribers at the moment

1 are third parties. I understand that some -- that there's
2 some subscribers in the universe -- certainly given the
3 number of people Patrick Collins has sued -- that some of
4 those people the infringers are the subscribers. And you
5 all could bicker over what the percentage is, but the fact
6 of the matter is at the moment none of them are defendants.

7 MR. CABLE: Correct.

8 THE COURT: The infringers are named. They
9 haven't been identified as infringers. They're wearing
10 their hat as subscribers, and that's the capacity in which
11 they're being addressed.

12 So it's *ex parte* discovery of third parties, and
13 the way I read the rules is that you need a plan under the
14 rules that will not guarantee you, but as a reasonable
15 likelihood or a reasonable possibility that at the end of
16 the discovery that I allow --

17 MR. CABLE: Uh-huh.

18 THE COURT: -- you will actually identify the
19 infringer --

20 MR. CABLE: Right.

21 THE COURT: -- and be able to file a motion to
22 amend.

23 MR. CABLE: Uh-huh.

24 THE COURT: And the concern I have with what you
25 propose is that the discovery I allow, it's a forgone

1 conclusion, it seems to me, that it won't identify the
2 infringer; that is, giving you the name, address. With or
3 without the MAC of the subscriber isn't going to tell you
4 whether they're the infringer or not or who the infringer
5 is.

6 MR. CABLE: Uh-huh.

7 THE COURT: You need more information than that.

8 MR. CABLE: Uh-huh.

9 THE COURT: And the only other mechanism I
10 understand under the rules that would be available to you as
11 a matter of formal discovery would be a deposition either on
12 written questions or on oral questions, and is that
13 something you want or you don't want?

14 MR. CABLE: I mean, if that's the only course,
15 yes. But in terms of keeping costs down, in terms of just
16 keeping the expenditure of resources down, I wouldn't like
17 that obviously. But we're willing to go that route if
18 necessary.

19 THE COURT: I see. All right.

20 I have another question. Judge Stearns issued an
21 order to show cause. I know you're familiar with it. I
22 think he issued it on more than one case.

23 MR. CABLE: Yes.

24 THE COURT: But I read his order to show cause. I
25 read your response to the order to show cause in the New

1 Sensations case you filed I think over the weekend.

2 In order to not create more work than is
3 necessary, can I --

4 And I've read Judge Young's opinion.

5 MR. CABLE: Uh-huh.

6 THE COURT: You've seen that. Right?

7 MR. CABLE: Correct.

8 THE COURT: And I know Judge Saylor's issued the
9 order to show cause --

10 MR. CABLE: Right.

11 THE COURT: -- equivalent -- I think it's the same
12 as what Judge Stearns issued.

13 MR. CABLE: Exactly the same.

14 THE COURT: I don't know if the time has run on
15 that. It hasn't. All right.

16 Is there any reason --

17 Rather than me going through the exercise of
18 issuing an order to show cause, on that issue I think I
19 should at least consider the issue in light of what other
20 judges in this court are doing. Can I simply -- if I wish
21 to address that issue -- treat your filing in New Sensations
22 as if it were filed in this case. Say that, so that it's on
23 the record in this case, --

24 MR. CABLE: Sure.

25 THE COURT: -- and then if I want to address the

1 issue, I can address it rather than giving you two weeks to
2 file the same thing and go through the --

3 MR. CABLE: Absolutely. The only thing I'd like
4 to add --

5 THE COURT: Certainly.

6 MR. CABLE: -- is Judge Young --

7 I admire Judge Young very much.

8 The only thing I did not like about his order is
9 that he said that --

10 THE COURT: Only one thing?

11 MR. CABLE: Well, reasoning wise is that one of
12 the reasons for severing was potential course in settlement,
13 and that's something that I don't engage in. And that's --

14 Other attorneys around the country do that; and,
15 you know, that potential thought of -- the idea there's a
16 potential for that, you know, and that being the reason for
17 severance really bothers me.

18 THE COURT: Well, okay. As to Judge Young's case,
19 you have to -- if you wish to bring that to his attention or
20 file a motion, whatever you want to do in his case, that's
21 on his case.

22 As to my case -- the cases before me, what I hear
23 you saying is, Judge, yes, you can consider what I filed in
24 the other cases, but here's an additional piece of
25 information that I want you to keep in mind which I will --

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1 which is what you're saying is don't tarnish you with the
2 conduct of lawyers around the country --

3 MR. CABLE: Right.

4 THE COURT: -- that is not your conduct and don't
5 tarnish your clients with the conduct of other companies
6 around the country.

7 MR. CABLE: Correct.

8 THE COURT: To the extent that the Court is
9 concerned about that issue, judge that issue based on what
10 you've done in your cases and, to the extent that it's a
11 client issue, judge what your clients had done, but don't
12 hold them accountable for the actions of others for whom
13 they're not responsible --

14 MR. CABLE: Right.

15 THE COURT: -- or for who you're not responsible.

16 MR. CABLE: Correct, correct, correct.

17 And beyond that, too, I think there's many methods
18 that we could use to adjudicate multiple Does in one case,
19 and I think there can be a lot of creative ideas --

20 THE COURT: Have you ever tried a jury trial?

21 MR. CABLE: No.

22 THE COURT: So just to be practical here, --

23 MR. CABLE: Right.

24 THE COURT: -- you're never going to try 79 Does
25 together. I mean, no judge in the United States is going to

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1 let you have 79 Does in one case at trial, because it's
2 unwieldy.

3 There's no question that there are certain common
4 questions; the nature of the BitTorrent software, some of
5 the expert testimony.

6 MR. CABLE: Uh-huh.

7 THE COURT: And there is no question that those
8 Does that litigate -- and unless these cases are different
9 than all other cases, there's --

10 It's unlikely that a hundred percent of the claims
11 will go to trial. Right?

12 MR. CABLE: Right.

13 THE COURT: Most cases don't go to trial and get
14 resolved at various stages along the way.

15 But the defenses of Does while they may -- there
16 may be a range of defenses that arise on a recurring basis,
17 the particular facts that support any individual Doe's
18 defenses will be individual to that Doe.

19 MR. CABLE: That's right.

20 THE COURT: And so whatever happens at a later
21 point in time in the cases --

22 MR. CABLE: Uh-huh.

23 THE COURT: -- is going to be determined, I think,
24 by every judge whether they sever all the cases as Judge
25 Young and Judge Stearns have done; or if they didn't, by

1 sort of the development of the case in thinking about how to
2 manage these cases in a practical way.

3 And frankly, if they're all severed and you filed
4 them all, if you --

5 Judge Young's case had, what, thirty defendants?

6 MR. CABLE: I forget.

7 THE COURT: And I think Judge Stearns had 200?

8 MR. CABLE: 201, yeah.

9 THE COURT: 201.

10 MR. CABLE: Right.

11 THE COURT: So if you turn around and file 200
12 more cases on those, at some point in time there's going to
13 be discussions with counsel properly about how to manage the
14 -- assuming they go into discovery and they proceed in the
15 ordinary course -- how to manage the discovery.

16 You're not going to have 200 Rule 16 conferences
17 before Judge Stearns, I wouldn't think, or 201 in each of
18 those cases. I'm sure that he will figure out a way to
19 efficiently manage them and not -- you know, consolidate
20 them.

21 One Rule 16, because really the discovery client
22 in those cases once people appear will be very similar.

23 MR. CABLE: Uh-huh.

24 THE COURT: It might differ in an individual case
25 here and there, so there are a variety of mechanisms.

1 A question I have about severance as opposed to
2 joinder at this stage or trials often, but where it's not a
3 conclusive decision necessarily about trialing it away, why
4 can't --

5 One of the things you said in your memo in the New
6 Sensations case was, well, it's not practical to do
7 individual cases. It's too expensive. It's much more
8 burdensome.

9 But the question I have is why. What's the
10 difference other than \$350?

11 MR. CABLE: That's the biggest thing. Besides
12 that, it's me or whomever -- plaintiff's attorney -- having
13 to file all this paperwork, too.

14 And also on the Court I would presume. I haven't
15 been a clerk. I haven't been a judge. I would presume that
16 also having multiple dockets and pulling everything together
17 would also be burdensome.

18 And practically speaking, a lot of these cases --
19 I was looking at the numbers last night. A lot of the Does
20 in these cases either are dismissed or are settled in these
21 cases, and we're talking --

22 THE COURT: Why are they dismissed when you
23 dismissed them?

24 MR. CABLE: For various reasons. A lot of times
25 it's because they settle, and a lot of times it's because we

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1 don't think we can prove anything with this Doe.

2 THE COURT: So when I see a dismissal, --

3 MR. CABLE: Uh-huh.

4 THE COURT: -- some of those dismissals are
5 because after you got the name and address, you and the Doe
6 subscriber had communications; and as a result of those
7 communications, you reached a settlement either with the
8 subscriber or with somebody else who might have infringed
9 through the subscriber's --

10 MR. CABLE: Right.

11 THE COURT: -- IP?

12 Have you ever reached a settlement with someone
13 other than the subscriber?

14 MR. CABLE: Uh, yes, we have.

15 THE COURT: Most of the settlements are with the
16 subscribers?

17 MR. CABLE: Most are. Sometimes they'll be a
18 subscriber that throws somebody under the bus, and we get an
19 affidavit or a declaration from that subscriber saying it
20 was, you know, XXX, that person; and that person will come
21 forward and either settle or choose to be the representative
22 of that downloading.

23 THE COURT: I see. And so a dismissal -- one
24 thing a dismissal could mean is a settlement.

25 MR. CABLE: It could, yes.

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1 THE COURT: Are there any dismissals that mean
2 something other than a settlement?

3 MR. CABLE: Yes. In fact, I've had that happen
4 with Booth Sweet. We can't prove that's this person.
5 There's just too much --

6 THE COURT: What makes you come to that
7 conclusion? Give me an example.

8 MR. CABLE: The big thing is wireless routers.
9 There's many times when there's this -- there would be too
10 much discovery, and the clients feel that there's no
11 possible way besides spending gobs of money to figure out
12 who this person is.

13 THE COURT: You mean -- so give me an actual
14 example of what kind of situation that would arise.

15 MR. CABLE: Let's say you are a subscriber, and
16 you have a wireless router, and you know nothing about
17 BitTorrent. You're not computer savvy at all. You hardly
18 use a computer besides Skyping your grandchildren or
19 emailing.

20 THE COURT: You're not entitled.

21 MR. CABLE: Okay. All right.

22 THE COURT: Okay. Go ahead.

23 MR. CABLE: If that were the case with a couple of
24 other factors, --

25 THE COURT: So you get the subscriber's name and

1 address. You communicate with the subscriber, and the
2 subscriber has said to you, "I have a wireless router. I
3 don't know what you're talking about when you say
4 'BitTorrent.' I don't know what you're talk about Anal
5 Couple Swappers..."

6 MR. CABLE: Right.

7 THE COURT: "... your movie, and all I know is I
8 use my computer to check my email, or I go on Boston
9 dot-com, or I maybe Skype with somebody in my family or
10 what-have-you --"

11 MR. CABLE: Right.

12 THE COURT: "-- and I don't know what you're
13 talking about, and there are any number of family members or
14 household members who also use the wireless router."

15 MR. CABLE: That's a factor that actually would go
16 the other way. If there are family members, then we tend to
17 ask, "Okay, do you have a son who is 21 years old and is
18 very computer savvy?" At that point --

19 THE COURT: So what -- give me an example of one
20 you gave up on. Don't tell me the name but what were the
21 facts and why.

22 MR. CABLE: Very similar to what you said, except
23 no family members in the house. Maybe an old lady who's
24 eighty years old that just has no clue what BitTorrent is
25 and just has a wireless router and --

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1 THE COURT: So your client concludes they don't
2 want to amend their complaint. What you know is that --
3 what you believe is that IP address there was infringing
4 activity.

5 MR. CABLE: Uh-huh.

6 THE COURT: You talk to this person. She says I'm
7 75 years old, I'm 80 years old. I'm a woman, and I don't
8 know what you're talking about, and I'm the only one who
9 lives here.

10 MR. CABLE: Right. And we even ask do you have
11 neighbors. Can you ask the neighbors if they might have --

12 THE COURT: Do you ask whether it's secured or
13 unsecured?

14 MR. CABLE: Every time, yes.

15 THE COURT: And so what if she says it's secured?

16 MR. CABLE: Then there's cause for concern.

17 People say, okay, my wireless device might be
18 hacked. I typically don't believe that story and don't find
19 that as a reason --

20 THE COURT: How many of dismissals are people were
21 non-settlements?

22 MR. CABLE: I don't know.

23 THE COURT: I mean as a percentage.

24 MR. CABLE: I hate to make up percentages. I
25 would say it's definitely in the minority, but there also

1 are settlements for zero dollars. I would say --

2 THE COURT: I mean, there can't be that many old
3 ladies who you've identified their IP addresses who live
4 alone with unsecured routers -- unsecured wireless routers
5 in apartment buildings.

6 MR. CABLE: Ten, fifteen percent I would say.

7 THE COURT: Other than the old lady example, is
8 there anyone else who you would dismiss without a
9 settlement?

10 MR. CABLE: I mean, it's -- anyone who had similar
11 categorical facts. It wouldn't be just an old lady.

12 THE COURT: So basically it's if on the set of
13 circumstances the subscriber tells you there seem to be a
14 plausible possibility that, in fact, somebody else used
15 their wireless router and was the infringing person as
16 opposed to this subscriber or someone in the subscriber's
17 household, and you would -- you might dismiss, because the
18 effort that would be entailed to figure it out which
19 neighbor --

20 MR. CABLE: Right.

21 THE COURT: -- and to get third party discovery of
22 those people to try to do forensic analysis will be too
23 difficult if you could get it and too expensive to do.

24 MR. CABLE: Right. I had a UMass college student
25 the other day whose attorney called, and he said that there

1 was about twenty or so football players that frequent that
2 place, and he swore up and down that he didn't do it. He
3 submitted an affidavit that he didn't do it. And my trying
4 to figure out which football player or whomever might have
5 been at the residence downloading or uploading that file --

6 THE COURT: At any given time.

7 MR. CABLE: -- would have been near impossible.

8 Yes.

9 THE COURT: I see. Okay.

10 All right. So the rest of the settlements, that's
11 the kind of situation that arises that might lead to a
12 dismissal.

13 And why are there zero-dollar-settlements?

14 MR. CABLE: Just so that they have --

15 THE COURT: Acknowledgement.

16 MR. CABLE: Yeah.

17 THE COURT: And that's just a question about
18 whether the --

19 So why -- come back to this. Why can't -- other
20 than the --

21 So the filing fee, I understand that. It makes it
22 more expensive.

23 MR. CABLE: Uh-huh.

24 THE COURT: But other than the filing fee, why
25 would -- what's the difference? I mean, these documents are

1 all --

2 I haven't looked at the complaints in the other
3 cases, but I don't imagine they're really -- I imagine what
4 varies is a few sentences in Exhibit A.

5 MR. CABLE: There's variances. I mean, you can
6 definitely get software to automate documents, but the
7 uploading process is substantial, too.

8 THE COURT: Okay. So it's more time consuming to
9 file the documents.

10 MR. CABLE: Right. Right. And those are the big
11 burdens, at least to me, that I know of.

12 THE COURT: Once you've filed all the documents,
13 you serve more subpoenas.

14 MR. CABLE: Uh-huh.

15 THE COURT: Right? Because instead of one
16 subpoena, you serve a subpoena per Doe.

17 MR. CABLE: Uh-huh.

18 THE COURT: But you could have your person serve
19 them all together. There's no reason your service person --

20 Who does the service for you?

21 MR. CABLE: It's part of my company, and sometimes
22 I do it, too. It's just simply sending out a fax.

23 THE COURT: All right. So send them out. If
24 you're sending out a fax, you could send out multiple faxes.

25 MR. CABLE: Right.

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1 THE COURT: A little more time consuming.

2 MR. CABLE: Well, and it also depends on each ISP.

3 Each ISP might have different protocols for how to handle --

4 They might treat one case different from multiple

5 cases that are all the same, so you might --

6 I might have an issue where they're saying, okay,

7 well -- and I'm just speculating.

8 I might have an issue where they say, okay, one

9 case is okay for us to do, but many cases is not; whereas,

10 and that one case is the same amount as many.

11 THE COURT: What right do the ISPs have to decline

12 if the Court ordered it?

13 MR. CABLE: None.

14 THE COURT: I mean, are they telling you they're

15 not going to honor the subpoena?

16 MR. CABLE: Yes. They do say, "Well, we're

17 overwhelmed right now," and I get that all the time from

18 ISPs saying, you know, "There's only so much we can do, and

19 we feel like complying with police thick criminal subpoenas

20 are more important." I get that all the time. And just --

21 I guess beyond that, too, the paperwork would be

22 immense. I don't know if ISPs would combine everything in

23 one envelope; but, you know, they may not. There might be

24 thirty or forty envelopes in all which need to be scanned,

25 which need to be invoiced, so it just multiplies everything

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1 -- It could multiply.

2 THE COURT: Right. All right. Anything else on
3 that?

4 MR. CABLE: Not now, but I'd like to reserve the
5 response --

6 THE COURT: Sure, I'll let you respond after they
7 tell me.

8 MR. CABLE: Okay.

9 THE COURT: You don't have to reserve on that.
10 All right. Let me see if I had any other
11 questions for you.

12 Oh, I do have another question.

13 You said with respect to Mr. Perkins' client
14 sometime ago -- I think in August in one of the -- I think
15 after he filed a motion to dismiss notwithstanding that I
16 had recommended that his client wasn't in the case, you
17 filed a response to that motion to dismiss.

18 MR. CABLE: Uh-huh.

19 THE COURT: And I think in that motion -- and you
20 attached some exhibits --

21 MR. CABLE: Correct.

22 THE COURT: -- with respect to both his client and
23 two other people in a different case that he had referred to
24 --

25 MR. CABLE: Uh-huh.

1 THE COURT: -- listing a variety of movies that
2 had been downloaded through those IP addresses and saying
3 that you were going to -- you were in the process of
4 amending the complaint -- filing individual actions, new
5 actions, individual actions -- against those three people.
6 Have you done that?

7 MR. CABLE: No. And I also have plans to do a lot
8 more than just that at least against individuals, and a lot
9 of it -- and I've spoken to counsel prior -- is that I'm
10 kind of waiting to see your response and the response of the
11 Court in terms of how to put protective measures into
12 protective of privacy and things like that considering it is
13 pornography.

14 For example, I'd like to be able to file under
15 seal if I'm going to be putting people's names on the record
16 or at least see how you feel about that, and so a lot of
17 these individual complaints I'm waiting to see the response
18 of the Court.

19 THE COURT: All right. So and is that why between
20 Mr. Booth or Mr. Sweet referred to a filing you made in one
21 of the other cases that you'll be filing new lawsuits
22 against individuals but they hadn't been filed? It's the
23 same thing?

24 MR. CABLE: Right. And there was actually some of
25 those individuals who I had planned on filing against who

1 then settled with me. I forget the exact number.

2 THE COURT: And why would you be filing new
3 lawsuits as opposed to amending the complaints in these
4 lawsuits to identify Doe 22 the infringer is actually
5 whomever and replace that and then proceed with the case
6 with respect to whomever's left?

7 MR. CABLE: Well, the fact --

8 Like you said earlier, the facts are different for
9 each case. So as more facts arise, we have more, you know,
10 reason to put this person in this box, put this person in
11 that box. So it's almost like we decide, okay, now --

12 THE COURT: Is that a very persuasive argument for
13 by joinders inappropriate?

14 MR. CABLE: Yes, it is.

15 THE COURT: So why should I not do what Judge
16 Stearns and Judge Young did?

17 MR. CABLE: Well, because at this juncture we're
18 all in it together; and we're, you know, trying to figure
19 out --

20 THE COURT: So I understand why it's more
21 efficient --

22 MR. CABLE: Right.

23 THE COURT: -- in some ways to do it together, but
24 --

25 And I appreciate that your clients have copyrights

1 --

2 MR. CABLE: Uh-huh.

3 THE COURT: -- and stand differently than some
4 cases where people sued and didn't have copyrights.

5 MR. CABLE: Uh-huh.

6 THE COURT: But they have copyrights, and they're
7 entitled -- and think they are entitled to enforce their
8 copyrights.

9 But I have to follow the rules of civil procedure,
10 and what you're really telling me is that all this case is
11 is a vehicle to obtain *pre ex parte* discovery to try to
12 figure out who to sue, and then you're going to file
13 separate lawsuits. Then why is joinder appropriate at all?

14 What you're really telling me is that given the
15 nature of these cases, what's going to happen is whose ever
16 left standing because either you didn't give up --

17 MR. CABLE: Uh-huh.

18 THE COURT: -- query the football player or the
19 old lady -- or they didn't settle in the course of this
20 process, whoever's going to litigate should be in separate
21 cases. And so you're going to file new actions in separate
22 cases.

23 Why doesn't that say I should just sever all
24 these?

25 MR. CABLE: Well, also the facts are extremely

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1 different with Perkins. His type of litigation style was
2 different from many others, and the clients have felt, you
3 know, let's have him in his own separate cases. So, you
4 know, that's --

5 THE COURT: You don't want everybody else getting
6 copies of Mr. Perkins files.

7 MR. CABLE: Well, I'm sorry. I will file judicial
8 notice, if necessary, to make sure there is an even playing
9 ground, but it was also a client's decision to do so.

10 THE COURT: I mean, I have to say it gave me great
11 pause to read that having identified -- well, as to Mr.
12 Perkins' client have you identified --

13 I mean, if you filed a separate lawsuit, are you
14 going to name? You don't have a person to name, do you?

15 MR. CABLE: Right. Right.

16 THE COURT: You're just going to -- well, why --
17 you're just going to file -- your intent is to file a
18 lawsuit against Doe 22, if you will.

19 MR. CABLE: Correct.

20 THE COURT: And one lawsuit.

21 MR. CABLE: Uh-huh.

22 THE COURT: I see. And then --

23 All right. That seems to me given the way your
24 proceeding to be wholly inefficient. If you're going to
25 proceed with these -- if your position is these questions

1 are common questions and they should be -- at least at this
2 initial --

3 MR. CABLE: Uh-huh.

4 THE COURT: -- discovery stage, and which we're
5 doing them together --

6 I'm not saying I agree with that, but if that's
7 your position, you shan't be carving out people --

8 You know, you can't be saying we're going to do
9 them all together unless we feel like we should do somebody
10 different because they're litigating alone.

11 MR. CABLE: Well, there was also something
12 interesting about Perkins' case. He had multiple -- his
13 client had multiple infringements which is not so much rare
14 but not common at all. A lot of these defendants that we do
15 see only have this one movie in common; but whereas, --

16 THE COURT: Had one movie, or had one movie in
17 common with the other people in the case?

18 MR. CABLE: One movie in common with other people
19 in the case.

20 THE COURT: Right. But you don't know that he and
21 his client -- that through his client's IP address conned
22 the movies. All you know is that through his client's IP
23 address more than movie was downloaded.

24 MR. CABLE: Correct.

25 THE COURT: Is it your position that most of the

1 people you sue only downloaded one infringing movie?

2 MR. CABLE: No. But also two --

3 THE COURT: So how does that distinguish his
4 client?

5 MR. CABLE: Well, also, too, the movies that were
6 downloaded were all from different production studios, so
7 the --

8 What's going to be filed against his client are
9 going to be fairly multiple plaintiffs in the case, so it's
10 not going to be --

11 There's not going to be one plaintiff like there
12 is here; there's going to be multiple plaintiffs.

13 THE COURT: When you file that and you fill out
14 the civil cover sheet, are you going to say it's a related
15 case to this case?

16 MR. CABLE: Yes.

17 THE COURT: Why wouldn't you just amend in this
18 case and those other plaintiffs seek to intervene?

19 MR. CABLE: I can if you'd like.

20 THE COURT: Well, you have to make the decision
21 first. I'm just --

22 MR. CABLE: Right.

23 THE COURT: -- trying to figure out what's going
24 on and why --

25 I'm not going to tell you how to litigate the

1 case, but I'm trying to figure out why you would be redoing
2 that.

3 All right. Anything else? I'll give you a chance
4 to respond to them, but anything else before I do?

5 MR. CABLE: No, that's fine. Thank you.

6 THE COURT: All right. Anything that any of you
7 wish to add?

8 MR. PERKINS: Thank you, Judge. So what Tony
9 Ulasewicz famously told Howard Baker and Sam Mervin, "Follow
10 the money."

11 THE COURT: Tony who?

12 MR. PERKINS: Tony Ulasewicz. Do you remember the
13 Watergate hearings?

14 THE COURT: Yes.

15 MR. PERKINS: Tony Ulasewicz. Maybe you're much
16 younger than me.

17 THE COURT: I remember the hearings, but I don't
18 remember his name.

19 MR. PERKINS: He said, "Follow the money."

20 My calculations are if you take the number of
21 settlements that Mr. Cable has done -- which is about 170
22 that he's announced to the Court -- and you subtract --

23 THE COURT: He has 170 dismissals?

24 MR. PERKINS: Yep. And you subtract the fifteen
25 percent he's talking about which were no dollar settlements,

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1 Mr. Cable if he's gotten his --

2 THE COURT: I think the fifteen percent were
3 people who he gave up on, not no dollar settlements.

4 MR. PERKINS: Right.

5 So even if you subtract 15 or 20 percent from the
6 settlements he's announced, Mr. Cable's collected over
7 \$500,000 on behalf of his clients.

8 THE COURT: You mean on the 2500 to 3500 hundred
9 dollar Web Act?

10 MR. PERKINS: Yeah, there's actually 3500 to 4500
11 is what he's been demanding.

12 In any event, what we're talking about is some
13 very big numbers for someone who has yet to name a single
14 human being in place of a Doe.

15 And I think that we have advanced the discussion a
16 great deal with your questions today, and as I listened, I
17 came to the following conclusions which I think probably
18 mirror yours given what your questions were.

19 Number one, Mr. Cable is suing a lot of people and
20 asking the Court to give him basically a playground, a group
21 of names that he can call up and talk -- chat with, as he
22 described, about is it a grandmother who has no clue about
23 the Internet, is it a son who actually happens to be using
24 the parent's connection to do downloading, is it a roommate
25 or whatever. And Mr. Cable with no supervision from the

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1 Court on an *ex parte* basis with no individuals named as
2 defendants is out there basically mining this field.

3 He's trying to get as much money as he can before
4 the service date runs out or before everybody is severed or
5 before there's a dismissal of these cases. And once that
6 field has been sown and reaped and you say, "I'm going to
7 sever or you run out of time to serve," then he's basically
8 going to give up.

9 And your questions illustrate exactly why he has
10 to give up. No matter how well-intentioned Mr. Cable is --

11 And frankly, I find him a fascinating and
12 paradoxical person, because I think he's a likable human
13 being and a nice guy.

14 But the stuff he does is completely self
15 contradictory to the principles he's espoused.

16 As you pointed out with your questions and as Mr.
17 Cable laid out for us in great detail today, he never is
18 going to be able to find out who to name as a defendant
19 given the soliloquy or given the discussion you and he had
20 on July 30.

21 His position in this Court with the cases that are
22 before this Court -- and there's 34 of them in the District
23 of Massachusetts right now. His position is I'm suing
24 infringers. Subscribers are only third party informants.
25 They're potential witnesses.

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1 And as you pointed out and as Mr. Cable has
2 acknowledged today, okay, let's walk down the road. I let
3 you talk to these people.

4 What does Mr. Cable say he's going to do? He
5 says, no, only very reluctantly would he ever do discovery.
6 What he really wants to do is to chat with them, and the
7 ones who he thinks that he can reach a settlement with, he
8 will get money from. And he's never going to bother with
9 the others, because your questions have pointed out the
10 obvious point which is this: When Mr. Cable gets the names
11 of the subscribers and he subpoenas them in for a
12 deposition, the cost of that alone in one or two cases is
13 impossible.

14 We all know as a practical matter that virtually
15 nobody is going to come in and say "I confess;" and if they
16 do, Mr. Cable may get some money from them but at a cost
17 which makes it completely impossible for him to sustain
18 these cases.

19 I mean, you talked about trying 79 cases together?
20 Mr. Cable is essentially a solo practitioner in Northampton.
21 There's no way in the world that he can do discovery and
22 actually proceed with these cases even to the point of
23 naming a defendant, much less getting to the point of trial.

24 So this entire enterprise is a sham. It all ends
25 with who he talks with on the phone, who he gets a

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1 settlement from, and then he moves on.

2 Now, there are some contextual facts which I think
3 you're well aware of but which we should put on the record,
4 because they haven't been discussed yet today; and that is,
5 that the 34 original cases that Mr. Cable brought are not
6 the only domain we're talking about.

7 As you pointed out, Mr. Cable has been promising
8 -- in my case for a month. It was September 10 where he
9 dismissed my client and said I'm going to file an individual
10 lawsuit --

11 THE COURT: But he dismissed --

12 MR. PERKINS: What?

13 THE COURT: Oh, he did file a notice of dismissal
14 of Doe 22.

15 MR. PERKINS: Doe 22. And then he said I'm going
16 to sue. I'm going to go after --

17 THE COURT: Your client is the subscriber.

18 MR. PERKINS: Yes.

19 THE COURT: He dismissed the infringer.

20 MR. PERKINS: No, no. He dismissed the case, and
21 the case is --

22 Right, it's a dismissal against the infringer.

23 But at the same time he said I am going to sue Doe
24 22 for downloading a dozen movies basically saying I know
25 Doe 22. I have enough information about Doe 22 to file a

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1 Rule 11 complaint -- Hash Rule 11, file a complaint against
2 Doe 22 --

3 THE COURT: Are you planning to name the
4 subscriber as the infringer with respect to Doe 22, or are
5 you going to name somebody else as the infringer of Doe 22,
6 or are you just going to proceed against Doe 22 seeking to
7 identify who the infringer is?

8 MR. CABLE: Well, all of the above, I would
9 presume.

10 THE COURT: No, but right now. If you were to
11 file an action -- a separate action today, is it going to be
12 against a person with a name, or is it going to be against
13 somebody identified as a John Doe?

14 MR. CABLE: It's going to be somebody identified
15 as a John Doe.

16 THE COURT: And you are going to want more
17 discovery in order to determine whether Mr. Perkins' client
18 who is the subscriber associated with Doe 22 is the
19 infringer or someone else.

20 MR. CABLE: Absolutely.

21 THE COURT: Okay.

22 MR. PERKINS: Interesting point here, Judge.
23 Because, in fact, what Mr. Cable says -- and this is your
24 own logic that I'm pursuing -- he says I am going to sue an
25 infringer. He says that today. "I'm going to sue an

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1 infringer who's downloaded twelve movies." In fact, what
2 he's saying is I have an ISP address through which twelve
3 movies have been downloaded.

4 In the case of one of the defendants I will tell
5 you of the three that he mentioned in his dismissal motion,
6 she is a grandmother, she is clueless, someone did steal her
7 Internet connection; and that's why because there's some kid
8 next door who presumably has been doing this downloading,
9 there could be a dozen kids from the high school football
10 team downloading using her account. Yet, Mr. Cable is
11 telling you with assurance in a filing in this court on
12 September 10 or 11, I'm going to be suing one individual who
13 is an infringer, and they used this IP address.

14 He doesn't know anything that would support a Rule
15 11 decision to sue, and that brings me to the most important
16 --

17 THE COURT: Well, he's got a basis to sue the
18 infringer; he just don't know who it is.

19 MR. PERKINS: Yep.

20 Now let me just get you in the rest of the context
21 which you're presumably aware of which is that while Mr.
22 Cable filed an original 34 cases between March and May of
23 this year and then filed no new cases against individuals or
24 otherwise, on September 16 he filed a whole new raft of
25 cases naming hundreds and hundreds of new defendants in

1 Massachusetts federal courts.

2 But there's a huge new characteristic to these
3 cases. Mr. Cable has done a 180 from what he told you on
4 July 30. Instead of saying I'm going to sue Does, and I'm
5 going to -- this is their -- he addresses the ISPs given
6 them. But I'm really just going after the infringers, not
7 the subscribers.

8 Now Mr. Cable says the opposite. In all the cases
9 he filed -- and there are five or six of them on September
10 16 -- Mr. Cable says there are theories of secondary
11 liability which will allow me -- which do allow me to sue
12 subscribers. And in fact, the Does that I am suing in the
13 cases he filed September 16 are the infringers in his view,
14 because his view is it doesn't matter whether they're the
15 person who ran BitTorrent on a computer linked to this modem
16 or not. If they are a parent whose child did it --

17 THE COURT: The theory is the subscriber's
18 responsible for everything that happened through that pipe.

19 MR. PERKINS: You got it. That is the theory he
20 specifically disavowed before you for the 34 cases that are
21 pending now.

22 THE COURT: Can you do that without a good-faith
23 basis of knowing whether or not the person knew about the
24 infringement?

25 MR. CABLE: I believe so. If there's constructive

1 knowledge that the person knew, there's also secondary
2 knowledge.

3 THE COURT: So let me ask you this. Suppose I'm
4 the subscriber on a land line telephone, and a guest comes
5 to my house and asks permission to use my land line phone to
6 make a call, --

7 MR. CABLE: Uh-huh.

8 THE COURT: -- and I say, "Go ahead." And I'm
9 then not in the room, or you don't have any information as
10 to whether or not I'm in the room, because I don't know who
11 -- you have no information as to whether or not, you know,
12 -- whether or not I know who they called or what they did on
13 the call.

14 And while they made the call -- when they made the
15 call, they took their iPod which had bootleg music on it.
16 Right? They played the music on their iPod, held it up to
17 the telephone, and on the other end of the telephone was
18 somebody who connected the phone to a speaker system in a
19 public venue or bar or restaurant.

20 That would be a copyright infringement of the
21 holder of that music. Right?

22 MR. CABLE: Right, yes.

23 THE COURT: Would I be -- would you be able to sue
24 me for secondary liability for infringement, because I'm the
25 subscriber on the phone line?

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1 MR. CABLE: Well, in that circumstance it would be
2 -- it would be tougher.

3 But we're talking about files that are very large
4 in nature. We're talking about files that about 2.5 gigs.
5 We're talking about not just one song. We're talking about
6 an entire --

7 THE COURT: What's the difference?

8 MR. CABLE: Well, the difference is that they say
9 you're a subscriber of that telephone line, and you had that
10 guest come over and play the iPod. They're playing an
11 entire concert. They're playing three hours of music.
12 There's no way that you would not suspect something's going
13 on in that other room.

14 THE COURT: You mean if they used my -- tied up my
15 phone for three hours? How I would I even know if they were
16 using the Internet for three hours?

17 MR. CABLE: I mean, there's different facts and
18 different circumstances for each --

19 THE COURT: Right, but you need to have --

20 Well, it's not these three cases. So I appreciate
21 the context, but at the moment at least at this hearing it's
22 not before me.

23 But it would seem to me that before you accuse
24 someone of copyright infringement, you'd need a basis to
25 believe they committed the -- some level of the requisite

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1 acts that give rise to the infringement or have some level
2 of knowledge about it. But that will be addressed in those
3 cases and those judges.

4 MR. PERKINS: So, Judge, I did not actually raise
5 this context simply to point out that Mr. Cable is doing
6 something different in the new case than he did with your
7 case.

8 There is an important lesson. You connect the
9 dots between the new approach and the old approach, and I
10 think we come to something that you were pointing out
11 earlier today. "Follow the money."

12 Mr. Cable, as you'll recall when he stood before
13 you on July 30, really resisted the idea that a subscriber
14 wouldn't be liable under some secondary liability theory,
15 and you walked him back from that just as you've done again
16 today through a Socratic exercise saying this is
17 preposterous. No one could believe that every subscriber is
18 secondarily liable no matter what the facts. And Mr. Cable
19 acknowledged back on July 30, and nothing has changed since
20 then.

21 But under Rule 11, as you pointed out, you can't
22 possibly sue subscribers until you know more.

23 But what Mr. Cable wants you to do is to let him
24 have access to subscribers, because what he's going to do is
25 to say to them, the people who are unsophisticated and

1 unlettered in the law, he's going to say, "I have a theory
2 of copyright liability which says you're liable. Pay me, or
3 else you're going to have to hire a lawyer. I'm going to
4 sue you."

5 THE COURT: So let me ask you both one quick
6 question, because then I do have some other hearings that I
7 have to get to.

8 I take it what your position is, Mr. Perkins, is
9 what I should do is deny, not allow any discovery. And I
10 understand why you would oppose that, and I don't need to
11 hear from either of you about a thing unless there's
12 something very salient that you have about that.

13 Alternatively, let me just throw out to you one
14 thing that I've been ruminating about, and you can tell me
15 your prompt reaction but not for too long; and that is, why
16 shouldn't I whether it's one case or multiple cases before
17 me -- well, there's one defendant and multiple Does in the
18 case -- say you get the following process. Plaintiff gets
19 to serve a subpoena on the ISPs. The ISPs are ordered to
20 preserve the information. They're ordered to serve on the
21 subscribers the subpoena and the Court's scheduling order.
22 Subscribers have a certain amount of time to object. During
23 that -- at the end of that objection period then I have a
24 hearing as to anybody who objects. During that period of
25 time no names are turned over whether or not somebody

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1 objects.

2 At the end after I resolve whatever objections
3 there are, then I order the ISPs to turn over the name and
4 address on a certain date to Mr. Cable. Mr. Cable then has
5 a brief period of time -- 21 days -- to take a one-hour
6 deposition of the subscriber. After the one-hour deposition
7 he has a prompt 21 days period of time, something like that,
8 to file a motion to amend this complaint substituting the
9 name of person or persons he thinks are infringers in lieu
10 of the Doe who's identified. And in any case, unless there
11 isn't such a motion filed, that Doe is the infringer -- that
12 Doe infringer is dismissed, because no discovery's
13 identified who the person is.

14 So my question is in that -- should I or should I
15 not do that scenario? Does that address the various issues?

16 And if I did that, Mr. Cable, whether I did it --
17 whether I sever all these cases and you have one defendant
18 in each of these; and if not, if you file others -- if they
19 were before me, then I'd probably do the same.

20 Is that something your client would do, and is
21 that something you're willing to do; or I shouldn't do that,
22 and then Mr. Perkins.

23 MR. CABLE: Yes. Umm, but beyond, we might learn
24 something at the deposition, too, that might mean that we
25 need more discovery like examining the digital devices at

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1 the home or residence or workplace, so there might be some
2 more discovery needed.

3 We're not trying to prove our case at the
4 beginning, but in terms of what we might -- we may not learn
5 anything at the deposition, so --

6 THE COURT: Well, if you wanted more discovery,
7 you'd have to file a motion for why there was good cause --

8 MR. CABLE: Right.

9 THE COURT: -- to establish specifically as to a
10 particular person, this is why, and this is what, and the
11 discovery's reasonable and focused on identifying who the
12 infringer is; not on the -- not on the merits.

13 MR. CABLE: Right. And also, too, I would request
14 that stuff be filed under seal until we're absolutely sure
15 who --

16 THE COURT: I probably were -- Given the Cable
17 Privacy Act that you'd have to -- you couldn't name the
18 person publicly until the Court approved the motion to
19 amend.

20 But the concern I have is sort of there's a
21 shifting sand throughout here about all of these cases and
22 what's going on. I mean, I certainly would not be allowing
23 you through the Court to send a letter of any type to these
24 people.

25 If you contact them on your own, that's on your

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1 own.

2 But the first letter was just unacceptable, the
3 one that I -- as a result of that quash. I would not
4 approve the letter I've seen. I'm not approving that
5 letter. I'm not going to allow you to send that letter.

6 If you send that letter, you send that on your
7 own. It's not going under -- it's not going with a
8 court-ordered subpoena.

9 And but there are people out here --
10 notwithstanding your various protestations at time -- who
11 claim they're innocent subscribers and who didn't do this,
12 and I've seen nothing to date to establish the second either
13 as a matter of law or a fact as to any person before me that
14 a subscriber is secondarily liable for the acts of people
15 using their Internet service, at least where there aren't
16 facts that establish that they know what the person was
17 doing with their Internet access.

18 Now that's just on what I've heard, but I don't
19 have to rule any more than what's before me.

20 And I do have some --

21 I mean, I'm hesitant to do what I think Mr.
22 Perkins and the other defense counsel want me to do, because
23 it essentially means your clients can't enforce their
24 copyrights as a practical matter.

25 But at the same time, you know, there are rules to

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1 be followed, and --

2 Anything you want to add, Mr. Perkins, or other
3 defense counsel?

4 MR. SWEET: Yeah, briefly, Judge.

5 THE COURT: One minute.

6 MR. SWEET: Your proposal is one that obviously
7 tries to take the copyright laws and the role of the United
8 States Court and make Mr. Cable follow those rules.

9 My concern is this. If, as everyone who does
10 these cases has been pointing out for years now, the goal of
11 the copyright holders is to have informal discussions with
12 the subscribers so they can convince them to pay them money
13 and settle the cases, then you're still allowing that window
14 to occur.

15 And what I'm concerned about is this. Mr. Cable
16 gets his list. He sends out his deposition notices and his
17 subpoenas to the subscribers who are witnesses. If he is
18 allowed then to have informal discussions with the
19 subscribers, we're essentially doing nothing more than what
20 he's already asking you to do, give me a subscriber list --

21 THE COURT: How can I prohibit --

22 I mean, in every case there's pre suit settlement
23 discussions, there's post suit settlement discussions.
24 You're essentially saying I should be prohibiting him from
25 engaging in that kind of informal resolution of cases.

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1 MR. SWEET: And that's an excellent point, because
2 of course basically plaintiffs should be entitled to consult
3 with defendants once they have their identity as potential
4 defendants and say do you want to settle this case instead
5 or not.

6 And I think the best answer I can give you is the
7 reason why the Court should monitor this and prevent Mr.
8 Cable from engaging in those kinds of informal discussions
9 is because there are now at least six years and pushing a
10 half a million cases where it's become clear that the goal
11 of copyright holders is to have these informal discussions
12 and to sucker people into paying.

13 And in fact, you've seen the evolution of Mr.
14 Cable in front of you. You know, July 30 he's telling you
15 Rule 11 says I can't possibly go after these people until I
16 know more. He's now filed. Hundreds and hundreds of
17 defendants are now being sued saying, "No matter what,
18 you're liable under a secondary liability theory."

19 And if the current Mr. Cable has the opportunity
20 to speak without court supervision with people he's
21 subpoenaed into depositions --

22 Who I can tell you we all know they're going to
23 call up and say, "Do I really need to come? Can't we work
24 something out?" Even if they're innocent, they're going to
25 do that. They don't want to come in and answer questions

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1 under oath in Mr. Cable's office.

2 Unless the Court is involved in supervising that,
3 you're basically without actually sending out a false notice
4 still participating in the scheme.

5 THE COURT: All right. Oh, one thing I want you
6 to do, Mr. Cable, by -- if you can do it within seven days,
7 by next Friday, I'd like you to give me a supplemental
8 filing about what the significance of a MAC address is. Why
9 you need it, what it would do, what does it go to, and is
10 there any -- and to the extent there's something other than
11 what you described today that you've already learned that
12 might -- that you learned in the process, what is it, and
13 how does that relate, if at all, to identifying the
14 infringer.

15 All right. We're adjourned. Thank you very much.
16 I'll take it under advisement.

17 THE CLERK: All rise.

18 (Court adjourned at 11:10:28 a.m.)

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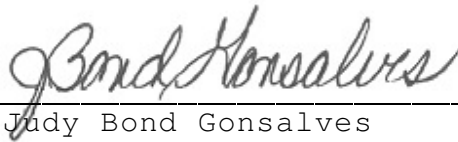
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CERTIFICATION

I, Judy Bond Gonsalves, a court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in
the above-entitled matter.



October 22, 2012

Judy Bond Gonsalves

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