

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ACHTE/NUENTE BOLL KINO	:	
BETEILIGUNGS GMBH & CO KG,	:	
	:	Docket No. CA 10-453 and
Plaintiff,	:	10-481
vs.	:	
	:	Washington, D.C.
DOES 1-4,577,	:	Wednesday, June 30, 2010
	:	2:25 p.m.
WEST BAY ONE INC.,	:	
	:	
vs.	:	
	:	
DOES 1-2,000,	:	
Defendants.	:	
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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE ROSEMARY M. COLLYER  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	NICHOLAS A. KURTZ, Esquire THOMAS M. DUNLAP, Esquire Dunlap Grubb Weaver 199 Liberty Street, SW Leesburg, VA 20175
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For Amicus Electronic Frontier Foundation:	CORYNNE MCSHERRY, Esquire 454 Shotwell Street San Francisco, CA 94110
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For Interested Party Time Warner Cable Inc.:	Alexander Maltas, Esquire Latham & Watkins LLP 555 Eleventh Street, NW Suite 1000 Washington, DC 20004
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Appearances continued:

Court Reporter: Crystal M. Pilgrim, RPR  
United States District Court  
District of Columbia  
333 Constitution Ave., NW  
Room 4704  
Washington, DC 20001

Proceedings recorded by machine shorthand, transcript produced  
by computer-aided transcription.

1 THE DEPUTY CLERK: Civil action number 10-453 and 10-481  
2 Achte/Nuente Boll Kino Beteiligungs GMBH & Co. versus Does  
3 1-4,577 and West Bay One Incorporated versus Does 1-2,000. For  
4 the plaintiff Nicholas Kurtz and Thomas Dunlap. The defendants  
5 are pro se. For the Amicus parties Alexander Maltas and Corynne  
6 McSherry.

7 THE COURT: Good afternoon everyone. This is -- wait  
8 a minute. Don't we have Turner broadcast, somebody?

9 MR. MALTAS: Time Warner.

10 THE COURT: Yes, right.

11 MR. MALTAS: Yes, Your Honor, we're the moving party  
12 here.

13 THE COURT: Right.

14 MR. MALTAS: Would you like us to go first?

15 THE COURT: Well yes, wait. Let me figure out who's  
16 who. Wait a minute, who are you two guys?

17 MR. DUNLAP: Tom Dunlap, Your Honor.

18 MR. KURTZ: And Nick Kurtz, both for the plaintiffs.

19 THE COURT: Okay, now that's why I'm confused because  
20 plaintiffs go here. You can stay where you are. But  
21 plaintiffs or prosecutors get to sit closest to the jury. So  
22 that's just a little heads up. Okay, that's why I was  
23 confused.

24 Okay, now tell me again who you are.

25 MR. MALTAS: Yes, Alexander Maltas. I represent Time

1 Warner Cable, we're the moving party here.

2 THE COURT: Yes.

3 MR. MALTAS: Your Honor, the two cases before the  
4 Court today are a part of a series of essentially identical  
5 cases filed in this judicial district, each alleging unlawful  
6 downloading of copyrighted material, each brought against  
7 several thousand plaintiffs -- defendants, as many as four or  
8 5,000 anonymous defendants in each case.

9 Time Warner Cable, my client, is not a party to any of  
10 these cases. We are a third party. We are here because we  
11 received multiple subpoenas seeking an enormous amount of  
12 information on a short time period. So we're asking the Court  
13 to quash or modify these subpoenas.

14 Now there have been many prior cases involving allegations  
15 of unlawful downloading of copyrighted material. They are  
16 cited in the briefs. You can see these cases have involved,  
17 for example, four or 10 or 20 defendants. These cases are  
18 involving four and 5,000 defendants, dramatically larger in  
19 scope.

20 So we are asking the Court to quash the subpoenas issued  
21 to Time Warner Cable for two reasons. First of all, in an  
22 effort to manage the burdens on Time Warner Cable we attempted  
23 to negotiate a solution with the plaintiffs that would minimize  
24 the burdens to a reasonable level. We reached an agreement  
25 with them that they would not serve on us more than 28 IP

1 addresses lookups per month and that's globally for all of  
2 their cases. That agreement applied to two cases before this  
3 Court.

4 The plaintiffs then in our view reneged on that agreement  
5 and served us with very large subpoenas including 809 IP  
6 address lookups. We are now facing a total of nearly 1500 IP  
7 address lookups.

8 That is in plain violation of the agreement Rule 29 and  
9 the Angel versus Shawmut Bank case that we cite. These  
10 authorities establish that courts will enforce agreements by  
11 parties to limit discovery and because these subpoenas are in  
12 violation of that agreement, we ask the Court to quash them.

13 In the alternative even if there's no agreements, the  
14 Court should quash the subpoenas because they would impose a  
15 very significant and undue burden on Time Warner Cable. We  
16 have a subpoena compliance team, we have described it in our  
17 affidavit. It is a team that is tasked with responding to  
18 process including subpoenas. On average, they receive  
19 approximately 550 IP address lookups per month total, the  
20 majority of which are for law enforcement. A lot of their work  
21 is serving law enforcement requests on some very serious issues  
22 including terrorism, child endangerment. This is what they  
23 spend most of their time doing.

24 So now we face 1500 requests for IP address lookups that  
25 would overwhelm the team. In effect, Your Honor, this is a

1 zero sum game. Either our team can set aside all of it's law  
2 enforcement work, set aside its business activities and devote  
3 several months of work to the plaintiff's subpoenas or if we  
4 are to continue with our current business activities and law  
5 enforcement activities, we can reasonably handle 28 IP address  
6 lookups per month for the plaintiffs.

7           Now I'm not aware of any cases that require a third  
8 party that is not a party to the case to alter its business  
9 operations or to change it's activities for a civil plaintiffs  
10 third party discovery. In fact, the cases we cite the Lender  
11 case from this District, Microsoft v. Cusumano, these  
12 authorities establish a couple of principals that I think are  
13 right on point.

14           First of all, that courts need to be particularly  
15 protective of third parties not being dragged into these  
16 disputes and subjected to undue burdens. But more  
17 significantly, the authorities made clear and I'll read even  
18 from the Lender case that they should not be subjected to  
19 subpoenas and the Court should quash subpoenas that would  
20 threaten the normal operations of the responding party or would  
21 require an inordinate amount of time and resources. That is  
22 unquestionably the case here, both of those prongs are  
23 satisfied here.

24           Your Honor has already raised the joinder issue, we will  
25 leave that to the Amici to address. But I do want to make one

1 point for the record just to clarify. The plaintiffs in their  
2 opposition brief have said that the entire basis for seeking  
3 all of their discovery is that they believe they could satisfy  
4 a motion to dismiss.

5           As for Time Warner Cable's subscribers I don't believe  
6 that's the case because to be clear, we don't have any  
7 subscribers in this jurisdiction. We have zero subscribers in  
8 the District of Columbia, we have zero subscribers in Maryland,  
9 we have zero subscribers in Northern Virginia. The closest our  
10 subscribers are in the far Southwest corner of Virginia several  
11 hundred miles from here and the plaintiffs are aware of that  
12 because the process that they have described for identifying  
13 the IP addresses and which internet service provider to direct  
14 the subpoenas to would tell them that the location of a  
15 subscriber, our Time Warner Cable subscribers are in places  
16 like Ohio, North Carolina, Texas, not in the District of  
17 Columbia.

18           So it's not clear to us why we're in this Court to begin  
19 with and certainly not clear to us that they would survive a  
20 motion to dismiss against any of our subscribers.

21           In terms of the remedies that we're seeking first and  
22 foremost we ask the Court to quash the subpoena because it's in  
23 violation of the agreements. And because it's in violation of  
24 Rule 45. Rule 45 on it's face requires a serving party, the  
25 plaintiff in this case, to take reasonable steps to reduce

1 undue burdens. And in light of the history of copyright cases  
2 against four or five, ten defendants at once, and in light of  
3 the fact that they were fully aware of our capability and our  
4 ability to handle only 28 IP address lookups at once, to then  
5 serve us with over 1400 IP address lookups is simply not  
6 reasonable and is contrary to Rule 45.

7           If the Court declines to quash we ask that at a minimum  
8 the Court implements several significant restrictions on the  
9 subpoena burdens that would minimize the burdens on Time Warner  
10 Cable. First of all, limiting our burdens to the 28 IP address  
11 lookups a month that we can handle.

12           Second of all, we request reimbursement of costs. I  
13 believe this Court's orders already contemplate reimbursement  
14 of costs and really the question is how much. The plaintiffs  
15 have said that they want to pay per subscriber. So if for  
16 example, Time Warner Cable looks up two IP addresses and they  
17 both resolve to the same subscriber they want to pay once for  
18 that subscriber, but Time Warner Cable incurs cost twice. We  
19 incur costs for each IP address that we look up and that should  
20 be the appropriate measure of costs here.

21           Finally, Your Honor, we would like the Court to end the  
22 plaintiff's practice of serving discovery that is far beyond  
23 this Court's orders. In several of these instances for  
24 example, in the Achte/Nuente case, the plaintiffs filed a  
25 complaint with a list of IP addresses.



1           There are I believe 426 or so that were corresponding to  
2 Time Warner Cable subscribers and they got an order from Your  
3 Honor permitting them to pursue discovery. They then served a  
4 subpoena on us seeking 809 IP address lookups. They doubled  
5 the discovery without informing the Court and they have been  
6 doing this repeatedly and we think that the only way to protect  
7 us from undue burdens and for the Court to manage the discovery  
8 process should actually seek an order from the Court relating  
9 to the particular IP addresses.

10           THE COURT: Thank you, sir.

11           MR. MALTAS: Thank you.

12           THE COURT: Why don't I hear from the Amici next and  
13 then the plaintiffs can argue it either each of you separately  
14 on separate issues or whatever.

15           MS. MCSHERRY: Thank you, Your Honor.

16           Corynne McSherry for the Electronic Frontier Foundation  
17 on behalf of the Amici.

18           First of all, thank you, Your Honor, for permitting us  
19 to be heard. I know that's somewhat unusual and we appreciate  
20 the opportunity.

21           THE COURT: Well, it is unusual, but given the fact  
22 that all of the plaintiffs are so far John Does, I actually  
23 welcomed your involvement.

24           MS. MCSHERRY: Thank you, Your Honor.

25           In fact, I do tend to think that I'm here on behalf of

1 Amici, but really we would like to think that we are here on  
2 behalf of all those thousands of John Does who we believe are  
3 not receiving individual justice in these cases so far. In  
4 fact, that is why we're here.

5 The principal issue that has already been raised I think  
6 is the issue of joinder and so I am going to make points about  
7 that and then if Your Honor would like to hear about the issues  
8 of jurisdiction and the First Amendment problems I would be  
9 happy to speak to those as well.

10 THE COURT: All right.

11 MS. MCSHERRY: Now, Your Honor, the purpose of  
12 joinder is two-fold: Fairness and judicial economy. Neither  
13 of those purpose are being accomplished as these cases are  
14 currently postured where we have thousands of defendants who  
15 are alleged to have infringed the same work but doubtless under  
16 different facts and circumstances subject to different defenses  
17 at different times, we know that based on the evidence that has  
18 been submitted to the Court, all of those defendants are being  
19 lumped in together.

20 I would point out right away that there's no also  
21 sensible limit based on the theories that have been presented  
22 on the number of defendants that could be lumped in together.  
23 Right now we started in the Achte/Nuente case with 2,000, and  
24 then it was 4500, it could be 10,000 based on the theories of  
25 joinder that are presented at this point.

1           What that means for defendants is a very unfair  
2 situation, it means there's a slanted playing field. Imagine  
3 that a defendant actually wants to defend themselves, they  
4 believe they have legitimate defenses to raise with legitimate  
5 facts and circumstances.

6           Well, they are looking at a very expensive proposition  
7 and a more expensive proposition than they normally would face.  
8 That's because they not only have to hire an attorney to  
9 represent them, probably because of the jurisdictional issues  
10 in a jurisdiction that they should not even properly have to  
11 be, but leaving that aside for a moment, they have to hire an  
12 attorney to not only represent, take care of their case but  
13 monitor thousands of other cases because that's effectively  
14 what it is. They have to monitor discovery motions, they have  
15 to monitor motions to strike answers, the responses from  
16 plaintiffs to those that are happening with respect to multiple  
17 other defendants because that's what a responsible attorney  
18 needs to do to make sure that there aren't mistakes or rulings  
19 anything that might adversely effect their own client. So  
20 that's a very expensive proposition and that's what a defendant  
21 is looking at if they want to defend themselves.

22           So what that creates -- I'm sorry, one other point.

23           Should even some fraction of these cases ever go to  
24 trial, let's say ten percent in the Achte/Nuente cases, that's  
25 450 defendants. Jury confusion is virtually inevitable and we

1 can see that right now. So that means that defendants are  
2 going to be under an enormous amount of pressure to simply  
3 settle the cases because they won't be able to defend  
4 themselves, and that's not fair.

5 Now sometimes settlement is appropriate but defendants  
6 should be able to make that decision based on the merits of  
7 their situation and not just because it's going to be too  
8 expensive to defend themselves inevitably.

9 In addition, I would point out there's a related problem  
10 which is there is going to be no judicial economy being  
11 accomplished here. Normally when we think of joinder and  
12 judicial economy one of the things it does is it facilitates  
13 fact finding with respect to liability. Well, that's not going  
14 to happen here and that's because the key issues in all of  
15 these cases are the facts and circumstances that pertain to the  
16 specific defendants and the defenses that can be raised by the  
17 specific defendants.

18 And all of those, all of those defendants have the right  
19 to raise them individually. So joinder is not going to help  
20 the Court in addressing those issues and in fact, may make it  
21 more difficult. And that's why --

22 THE COURT: What kinds of defenses would you  
23 anticipate?

24 MS. MCSHERRY: Well, according to the Tanenbaum case  
25 that recently came out of the Massachusetts District Court one

1 Judge has found that there is a legitimate fair use defense to  
2 be raised depending on the facts and circumstances of the  
3 downloading. So that's one issue that may be raised.

4 In addition, what we have seen in the file sharing cases  
5 is people will raise things like I was misidentified and they  
6 will be able to establish that. They may suggest that a minor  
7 child did the actual downloading unbeknownst to them. They may  
8 suggest that they share an IP address with several other people  
9 and they are not the people who should be identified and they  
10 are not the people who have done the harm. So there will be a  
11 variety of facts and circumstances that could be raised.

12 Again, defendants should have the right to do that.

13 And that's why as a practical matter, Your Honor, right  
14 now you have thousands of law suits before you. We just have a  
15 legal fiction here that it is just two. But in fact, that's  
16 not I believe how it's going to play out.

17 THE COURT: Don't you think I should get credit for  
18 that?

19 MS. MCSHERRY: I think you should get credit for  
20 that.

21 THE COURT: Don't you think I should send up some  
22 sort of balloon somewhere and say hey, hey, somebody is  
23 drowning. That's me.

24 MS. MCSHERRY: I think you and several other Judges  
25 in this District should be able to do that.

1 THE COURT: Apparently the other cases don't have  
2 quite the numbers that these two do.

3 MS. MCSHERRY: That's true, but there are some high  
4 numbers. I believe in the Heartlocker case it's 5,000  
5 defendants.

6 THE COURT: That's a pretty high number.

7 MS. MCSHERRY: That's a pretty high number. You have  
8 got over 7,000 so there you are, I believe.

9 So we have got a situation there it is going to be  
10 extremely difficult for everybody involved. There's no  
11 judicial economy being accomplished here, we have got  
12 fundamental unfairness to the defendants. That's not  
13 appropriate, it's not right.

14 Now related to this we have a problem with jurisdiction.  
15 Based on the evidence that plaintiffs have themselves submitted  
16 and based on our expert's analysis of it, it appears that the  
17 Does are located all over the country. Time Warner Cable has  
18 just confirmed that with respect to their subscribers they are  
19 not located in this jurisdiction. So there is no appropriate  
20 reason to bring those defendants here and to hear these cases  
21 here. And plaintiffs have suggested in their filings that  
22 their principal theory of jurisdiction is to try to get around  
23 this potential problem is that they contract with an ISP that  
24 does business here.

25 Now again, I'm not sure that that agency even works for

1 Time Warner Cable but let's assume that it might work for some  
2 other ISP. Well, on that theory, essentially if you are using  
3 the internet you are subject to universal jurisdiction. I use  
4 AT&T, so whether I think I have done something illegal via the  
5 internet, I don't think that means I can be sued in Alaska or  
6 Florida or somewhere else that I have no relationship to.

7 THE COURT: Okay.

8 MS. MCSHERRY: And the reason that it's important to  
9 pay attention to this is really typical of joinder which is  
10 that currently we have a situation where you might have a  
11 defendant who is located in as far away as Hawaii and they're  
12 being sued here in the District of Columbia.

13 Now they have to retain local counsel or they should  
14 retain local counsel if they are really going to prosecute  
15 their defense carefully because different Courts have different  
16 procedures and they need to master those procedures.

17 That's going to again to make it more expensive for them  
18 to defend their case and it helps tilt the playing field  
19 against the defendants in a way that it's just not fair and it  
20 doesn't comport with our basic principals of due process.

21 THE COURT: So if you were a client here, I don't  
22 even remember which movies we're talking about, so let's just  
23 talk about the client. You pronounced their name better than I  
24 do.

25 MS. MCSHERRY: I could be completely wrong.

1 THE COURT: But you are doing a wonderful job of  
2 pronouncing it and they're not here personally, right? Right.  
3 So it's okay. We're not insulting them.

4 But you, they have a problem. They have thousands of  
5 people who have downloaded their copyrighted material and they  
6 would like to in an efficient cost effective way stop that  
7 behavior, how would they do that properly?

8 MS. MCSHERRY: Well, the way they do it properly is  
9 by following the same rules that everybody else has to follow.  
10 And that means --

11 THE COURT: No, no, but if you don't know who  
12 somebody is, how do you know where and how to sue him or her?

13 MS. MCSHERRY: Well, what they can do is what the  
14 record companies ended up doing in the previous file sharing  
15 cases which is that you take the information that you have and  
16 you can use that to help you determine the appropriate  
17 jurisdiction. At the very least, we can solve that problem.  
18 Now we're still going to have a problem with joinder, Your  
19 Honor, because I think it's simply inefficient to sue thousands  
20 of people at once. Again, keep in mind there's no upper limit.

21 THE COURT: I understand that and what I'm really  
22 talking here is the practicalities of it from both --

23 MS. MCSHERRY: Sure.

24 THE COURT: -- both the individual defendants and the  
25 allegedly injured plaintiff. And for these purposes, we'll



1 assume people have downloaded their movies and not -- in  
2 violating the copyright laws. So how do they do that?

3 Let's assume that they only ask for 28 names from Time  
4 Warner Cable and so they could do that in a month, and in a  
5 month Time Warner Cable gave them 28 names and they were at  
6 different places. You have to go to different places for  
7 different lawsuits then.

8 MS. MCSHERRY: Yes, Your Honor.

9 THE COURT: If they gave them 28 names and they were  
10 all here in the District of Columbia, could they sue all 28 in  
11 a single lawsuit?

12 MS. MCSHERRY: Well, that might help resolve the  
13 jurisdictional issues but I think you would still have a  
14 joinder problem.

15 THE COURT: Well, that's why I am talking to you.

16 MS. MCSHERRY: I'm afraid, Your Honor, I can't solve  
17 that joinder problem for the plaintiffs.

18 There are some inefficiencies that are built into our  
19 court system, but they are inefficiencies that are built in, in  
20 order to assure fundamental fairness to defendants. And those  
21 are important interests as well.

22 THE COURT: So would you then ultimately leave the  
23 plaintiff in a situation where under your analysis they would  
24 be literally filing 5,000 lawsuits here or assuming for this  
25 purpose that they all live in D.C. which I know they don't, but

1 if there were 5,000 D.C. residents who engaged in this conduct,  
2 you would say they have to file 5,000 lawsuits?

3 MS. MCSHERRY: I think so, Your Honor, but I would  
4 point out to you they already have filed 5,000 lawsuits. We're  
5 just pretending that they're not 5,000 lawsuits.

6 THE COURT: No, I understand. I'm just trying to get  
7 to the bottom logic of the argument.

8 MS. MCSHERRY: Of course.

9 THE COURT: That to do it properly, even if they all  
10 lived in D.C. so the venue and all of that, I have personal  
11 jurisdiction over them, that was all taken care of, you would  
12 say they still couldn't be joined because they're separate  
13 persons with separate activities and the fact that each of them  
14 engaged in something that is allegedly violating the copyright  
15 rights with the plaintiff does not allow them to be joined?

16 MS. MCSHERRY: That's correct.

17 Now it may be that over the course of discovery and in  
18 any case they may find out that there is a sufficient basis for  
19 joinder but it's their burden to establish it and they haven't.

20 THE COURT: Okay. Very clear anyway.

21 MS. MCSHERRY: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MS. MCSHERRY: If I may just address one last issue.

24 THE COURT: Yes.

25 MS. MCSHERRY: The First Amendment issue that is also

1 we believe quite important. The plaintiff has suggested that  
2 there isn't really a First Amendment problem here. And I would  
3 submit to you that that's simply incorrect under numerous  
4 decisions.

5 Those cases are noted in our brief.

6 THE COURT: I'm curious about this. The First  
7 Amendment protects speech and I know that speech is not a  
8 limited term. But is it speech to go and take something? It's  
9 speech if I send out a message and I say I found this cool site  
10 where you can download movies quicker than you can imagine and  
11 get them for free. That might be speech. It might be  
12 insighting people to unlawful activity but it's speech.

13 But if I just go out and find a site and push a button  
14 and take something, how is that my speech?

15 MS. MCSHERRY: Well, Your Honor, Courts have  
16 struggled with this very issue.

17 THE COURT: That's nice to know.

18 MS. MCSHERRY: You're not the first one. In fact,  
19 Courts in this District in the Verizon case struggled with this  
20 very issue. The conclusion has been that it's a thin speech  
21 right. But the right to speak anonymously is important enough  
22 that we're going to protect it because you're communicating  
23 your choices.

24 THE COURT: But I'm more than happy to communicating  
25 to my choices because of the movie that I chose to steal. I

1 would have to work on that one a little bit but, okay.

2 MS. MCSHERRY: Okay, Your Honor, thank you.

3 All we're asking to be clear, Your Honor, is we believe  
4 at a minimum the Court should consider the procedures that were  
5 set out in the Eastern District of Pennsylvania case. We have  
6 submitted that order to you and those are the kinds of  
7 procedures that might help protect the rights of these  
8 defendants.

9 THE COURT: Thank you. I really appreciate your  
10 participation.

11 MS. MCSHERRY: Thank you, Your Honor.

12 THE COURT: Okay, who's going to talk first and what  
13 are you going to talk about?

14 MR. DUNLAP: Well, Your Honor, I figured that we  
15 would go in reverse order since you just heard about joinder, I  
16 thought I'd talk about joinder first.

17 THE COURT: And you're Mr. Dunlap?

18 MR. DUNLAP: Yes, Your Honor.

19 Just to start off, it's our belief, understanding that  
20 the First Amendment issues and the personal jurisdiction issues  
21 weren't before the Court today, but I will say that we feel the  
22 Court hasn't struggled with the First Amendment issues. If you  
23 steal, if your speech is to determine what movie you're  
24 stealing that's never protected. The fact that you're  
25 infringing on copyright I think there's a recent case in

1 California that talked about that. We'd be happy to brief it,  
2 Your Honor.

3 We don't think it's before the Court and we don't think  
4 that this Court or any other Court has really struggled with  
5 the issue of whether or not downloading copyright protected  
6 material is free speech.

7 I agree that perhaps if you were to tell somebody that  
8 there was a neat site to go to and they should go check it out,  
9 as long as there wasn't infringing copyright materials, there's  
10 a neat site for oh, you know, comments on the Constitution or  
11 comments on how the Federal District Court of District of  
12 Columbia operates, I think that's free speech, but I don't  
13 think downloading movies that are copyright protected is free  
14 speech.

15 With respect to the jurisdictional issue, we have not  
16 entered into the discovery phase. I don't think it's proper to  
17 investigate personal jurisdiction until we have found out where  
18 the defendants are. I want to talk about the backdrop of  
19 BitTorrent, Your Honor. I think that will answer your next  
20 question.

21 THE COURT: No, no, I read your brief about  
22 BitTorrent actually, and was fascinated with the technology  
23 that gives you an argument that all of these people are  
24 associated and related.

25 But before we get there what about the fact that Time

1 Warner Cable says well, wherever they are none of our  
2 subscribers are in the District of Columbia, they say that.

3 And two, they say by looking at the information you do  
4 have you would know that Time Warner Cable subscribers are in  
5 Ohio, the very southern tip of Virginia, Texas and wherever  
6 else he said.

7 MR. DUNLAP: There are two pieces to that, Your  
8 Honor. I think the first piece is by looking at the  
9 information we would know where they are.

10 There's a case in the Southern District of New York that  
11 is very clear. That looking at an IP address and figuring out  
12 where that subscriber is jurisdictionally is guesswork. In  
13 fact, we took the EFF's technical advisor's brief of all the IP  
14 addresses, and I think Your Honor saw this, of all of the IP  
15 addresses he compared and said it's in this jurisdiction, it's  
16 in this jurisdiction.

17 We subscribed to a different service, ran the same  
18 search and by state, outside of the state that the EFF found,  
19 38 percent of the ones we found were in a different state than  
20 the EFF found. So it's not a reliable service and the Southern  
21 District of New York is clear that it is just guesswork. So  
22 that's that piece of it.

23 The second piece is it may be true that Time Warner  
24 Cable doesn't have anybody that has signed a contract with them  
25 that lives in the District or that lives in Virginia or that

1 lives in Maryland, but Time Warner may have someone who lives  
2 in Ohio who hit a button and downloaded a swarm torrent, a  
3 thousand pieces of a file from somebody in D.C., from somebody  
4 in Virginia, from somebody in Maryland. In fact, based on the  
5 size of this, the sheer size of it, it lends itself to the more  
6 likely than not standard that in fact, somebody in Ohio if it's  
7 a Time Warner subscriber probably did download a piece of that  
8 file from D.C.

9           It's interesting because BitTorrent is not a direct I'm  
10 downloading it from your computer over here or I'm downloading  
11 it from this server. You are getting in a swarm so that each  
12 computer, so that each person downloading a film no longer has  
13 to wait on that computer speed and your computer speed of one  
14 file, you are getting a thousand pieces at once you are  
15 assembling on your computer. At least that's my understanding.  
16 Again, I'm a lay person. But --

17           THE COURT: Now come on, you are the one that is  
18 suppose to know all about this. You can't stand up and say I'm  
19 a lay person.

20           MR. DUNLAP: I read my expert's declarations and I  
21 talk with them and I, you know, read as much as I can about it,  
22 but that's my understanding of how torrents work.

23           THE COURT: So let me pursue that a little bit.  
24 That's kind of my understanding what I got from your brief too.

25           So let's assume that there is a Time Warner subscriber

1 in Ohio who downloaded some movie belonging to your client and  
2 some one or more of the bits came from somebody in Washington,  
3 D.C.

4 Why even if so would that expose the person in Ohio to a  
5 lawsuit in Washington, D.C.?

6 MR. DUNLAP: Let me also be clear on this, Your  
7 Honor. Since we can't determine where they are, right now we  
8 have Doe defendants, that's all we know. So we don't know  
9 where these defendants are by looking at their IP addresses.  
10 It is as the Southern District of New York case said guesswork.

11 But assuming we found the person was in Ohio, I assume  
12 there would be a personal jurisdiction matter and that  
13 defendant would have the right to assert that here. We would  
14 have to dismiss and go after them in Ohio, there's no question.

15 On the other hand, it's possible that that defendant in  
16 Ohio has pcanewhere or gotomypc.com. BitTorrent is a program  
17 that you have to put on your computer. It actually requires  
18 some technical expertise, I tried doing it myself, some  
19 technical expertise to put a BitTorrent file sharing software  
20 onto your computer.

21 If you travel with a laptop to Washington D.C. for  
22 business and you need to download a film while you are away,  
23 just kind of like you would log into Direct TV and download a  
24 Direct TV movie while you're away from your TV, you can do that  
25 from Washington, D.C. using pcanewhere, gotomypc. We don't



1 know.

2           The fact that it's possible a defendant very well could  
3 have remoted into their computer, their home computer that is  
4 fast and hooked up to a high speed line to initiate a  
5 BitTorrent download in Ohio through a Time Warner account, but  
6 we don't know until we find out who that defendant is, where  
7 they are and the facts and circumstances of their individual  
8 defense. That's the crux of that kind of potential  
9 jurisdictional issue. Again, I don't think that we have  
10 reached it yet.

11           I think the real issue here is whether or not -- I guess  
12 the question you have raised, Your Honor, is the joinder  
13 question. I think this is kind of, I think that the EFF is  
14 right. I think it's part and parcel of the joinder question.  
15 It helps us solve the joinder question, it shows the  
16 relatedness of the parties.

17           The EFF cites a case, the BMG case which I thought was  
18 interesting. I don't know if Your Honor is familiar with the  
19 BMG case. But it's kind of the first case they cite in the  
20 joinder section.

21           The BMG Music versus Does 1-230 says -- this is a quote  
22 from the Judge's opinion -- each claim involves different  
23 property, different facts and different defenses. Rest of the  
24 quote from the Court. John Doe 104 for example is alleged to  
25 have infringed nine works held by five plaintiffs. John Doe

1 113 is to alleged to have infringed ten works owned by a  
2 different sometimes overlapping group of plaintiffs with only  
3 one copyright identical to John Doe 104. John Doe 199  
4 meanwhile is alleged to have infringed seven works none of the  
5 same as John Doe 58.

6 The Court concludes in other words, in addition to the  
7 individual acts of infringement encompassing separate  
8 transactions and occurrences the actual property at issue is  
9 different for each defendant.

10 Here we have one piece of property, we have one plaintiff,  
11 and we have a different type of software. We have a BitTorrent  
12 software. There are common questions of law and fact. There  
13 is a series of transactions or occurrences that are common to  
14 the defendants at least from our view the way we have pled it  
15 which all we have to do is meet Rule 8 A and the Twombly  
16 standard. All we have to do is give them notice pleading as to  
17 what we think, and we have done that.

18 We have said this is how BitTorrent works. These are how  
19 the transactions are related and this is why we believe we need  
20 to find out who these people are first. So I am not saying  
21 that severance is wrong. What I'm saying is that severance is  
22 wrong until we know where the people are, who they are and what  
23 their defenses are.

24 So we ask at this time, Your Honor, that you would enter an  
25 order essentially dismissing your own show cause order.

1 THE COURT: Well, I will dismiss the show cause order  
2 because you have certainly discharged that.

3 MR. DUNLAP: Thank you.

4 THE COURT: So that's going to be dismissed. The  
5 issue now whether or not you've actually shown cause may be a  
6 different issue.

7 MR. DUNLAP: I understand, Your Honor.

8 I will finally just add this because I think it was  
9 interesting that in the BMG case in the footnote the Court  
10 mentions that even in the event that these cases or say in  
11 seven of these cases, even in the event that they're all filed  
12 again I couldn't take these cases under our local Rule 40.1 is  
13 the same as our local Rule here 40.5 C which talks about  
14 related cases. Under our local Rule here I firmly believe and  
15 I think that anyone would agree that if we file these cases  
16 individually one Judge is still going to get them all because  
17 it's the same piece of property, same plaintiff, same  
18 transactions, we're going to allege the same thing, it's a  
19 BitTorrent network.

20 So I don't think that dismissing or severing these  
21 defendants now before we know who they are, we're filing 5,000  
22 Doe cases just ends up being a penalty, \$350 per case penalty.  
23 So it's a penalty on the clerks for having to deal with that  
24 many cases because we don't know who they are. We don't know  
25 if we should file in Ohio or if we should file in Florida. All

1 we know is that we have Doe defendants and we need to find out  
2 where they are.

3 THE COURT: So tell me do you think then on your  
4 theories that you could make it 10,000 defendants?

5 MR. DUNLAP: In one case. I mean, administratively,  
6 Your Honor, I don't see why we couldn't. It's the same as long  
7 as it's, you know, one piece of report it's one plaintiff and  
8 they're sharing the file. These files aren't, when we look at  
9 these BitTorrent files, it's not 10,000 files. It ends up  
10 being 10,000 files but it starts with one burned file and it  
11 gets shared and shared and shared. It's not 10,000 people  
12 downloading or taking a disk from Red Box and reburning it.  
13 It's one file. So we are seeing the exact same file name over  
14 and over again. So we know it's bouncing from person to person  
15 to person. Theoretically, yeah, I think it's possible.

16 THE COURT: Okay. Thank you.

17 MR. DUNLAP: Thank you, Your Honor.

18 Mr. Kurtz is going to argue the Time Warner piece.

19 MR. KURTZ: Good afternoon, Your Honor.

20 THE COURT: Good afternoon, sir.

21 MR. KURTZ: I'm not going to rehash too much of the  
22 briefs. I think you have got more than enough briefing than  
23 you probably could even hope for in these couple of issues.

24 THE COURT: But I read them all very well.

25 MR. KURTZ: I'm sure you did, Your Honor.

1           Just a couple of points brought up by Time Warner in the  
2 hearing today. One was the supposed agreement between counsel.  
3 They keep arguing that it somehow applied to future cases  
4 without seemingly any limitation meaning that somehow we would  
5 bind clients we didn't even have yet or cases we haven't even  
6 filed yet. Cases that we have filed and hadn't gotten  
7 discovery orders on yet.

8           THE COURT: But they have the same practical problem  
9 whether you're filing one case against 5,000 people, 5,000  
10 cases against one person each, one client representation or 15  
11 clients. They still can only process so much at a time.

12           So what would you have them do? I mean, practically,  
13 putting aside the legal argument for the moment, how would you  
14 have them respond?

15           MR. KURTZ: Well, and I agree, Your Honor.

16           And part of that is in the papers wherein we see that we  
17 have been trying to work with them in an arrangement.  
18 Obviously, we feel on our side that we have been trying to  
19 accommodate, trying to do everything we should do under Rule  
20 45, but now especially at this point, we are getting varied  
21 stories and no specific proof, evidence or substantiation on  
22 what they can do.

23           As we have shown they keep talking about only being able  
24 to do 28 a month. Then later on after they filed the motions  
25 to quash and we continue to try and work with them they say

1 they can do 45 a month.

2           And in conjunction with the motion they filed this  
3 declaration that gives us no real insight into what it actually  
4 takes to look up an IP address and do the due diligence on  
5 their part how long it takes, who does it. All we have is  
6 basically the average number of lookups they get in a year or a  
7 month, the people's salaries who work on those, and their math  
8 then dividing those numbers and saying how much it cost them  
9 per look up. It doesn't tell us their capability. They say  
10 that's the amount of lookups they receive and consequently,  
11 obviously that's the amount they do. But they never said they  
12 could do more. If so, they just seem to kind of dance around  
13 the issue and that's, you know, one of our --

14           THE COURT: The only way that they could come close  
15 to doing a hundred a month for you would be to hire some other  
16 people.

17           Now do you think that that's, can you legitimately  
18 demand that from an uninvolved third party?

19           MR. KURTZ: Your Honor, I know in discussing this  
20 with them and touching briefly on the cost issue, we've never  
21 been opposed to reimbursing Time Warner for, you know,  
22 reasonable costs.

23           One issue we have had that came up in the motion is  
24 possibly advancing costs. That's not something we agreed with.  
25 But we've never been opposed to reimbursing them for costs.

1           And in discussing this issue I believe we have discussed  
2 if they were to hire a person that were to work even solely on  
3 our requests we would reimburse them for that person. Thereby  
4 they would obviously not incur any additional costs out of  
5 their pocket if we're basically paying for them. Obviously  
6 back and forth we've had some -- that has not obviously worked  
7 out.

8           THE COURT: Doesn't it take, as I understood it,  
9 there are two physical locations where work must be done to  
10 identify some, the real name and address associated with one of  
11 these internet protocol things. So it would really take two  
12 people.

13           MR. KURTZ: Well again, Your Honor, the only thing  
14 we've seen in this declaration and, you know, inferred through  
15 the cost study is that it's a quote unquote multi step process  
16 I believe they say that does at a central location and at a  
17 local location. Again, we don't know exactly what the  
18 centralized person does. We don't know exactly what the local  
19 person does.

20           THE COURT: Maybe they don't want you to know that  
21 much about their business.

22           MR. KURTZ: And I understand.

23           THE COURT: They're only a third party, they don't  
24 have to lay out their entire business structure for you.

25           MR. KURTZ: And I understand that to an extent, Your

1 Honor, but their burden on a motion to quash is they have to  
2 provide legitimate proof of the actual undue burden or  
3 significant expense that would be incurred.

4 THE COURT: Well, I think they've actually met that.  
5 I think they've met that burden. I mean, they may not have met  
6 it with the specificity that if you were sitting where I am you  
7 would require.

8 MR. KURTZ: I appreciate that.

9 THE COURT: Yes, but they've met it sufficiently for  
10 my purposes that the requests are sort of overwhelming. I have  
11 to say that I looked at the request and I thought oh, my Lord.  
12 Actually, I thought something more colorful than that, but we  
13 won't say what. I think it is overwhelming.

14 So I'm trying to figure out not only a legal answer here  
15 but the practical answer. Your client has alleged that  
16 thousands of people have violated its copyright rights by  
17 stealing its intellectual property is which you have alleged.

18 MR. KURTZ: Sure.

19 THE COURT: And I also understand from your papers I  
20 believe that you really don't want to go after all of these  
21 presumably mostly young people for scads of money, you want to  
22 get them to stop. So you want them to say okay, okay, we won't  
23 do it again and we'll pay you a little money.

24 Isn't that what you want?

25 MR. KURTZ: That is definitely one of the goals of



1 the litigation, Your Honor.

2 But just briefly even though the cases are against  
3 thousands; obviously they're not all against Time Warner and I  
4 understand your arguments in a vacuum, but when we look at some  
5 of the other ISPs we have been dealing with now over 20 ISPs  
6 that we have dealt with in these cases and similar cases and  
7 one example I submitted to the Court is Verizon another which I  
8 will submit somewhat of an equal size as Time Warner, maybe not  
9 quite as big but when we have dealt with these other ISPs we  
10 have either been able to work out arrangements where they have  
11 not been nearly as quote unquote overwhelmed as Time Warner.

12 Verizon for example, one of the cases we gave them was  
13 over 300 IP lookups just for them and within the same time  
14 frame, within a month. And they were able to turn that around  
15 within that months time. We reimbursed them for their costs.  
16 It turned out to be less than \$15 a search. So that's just one  
17 example and again, there's more than 20 other examples that are  
18 similar.

19 When I look at Time Warner and they say they can only do  
20 20 a month as compared to over 300 for a seemingly a smaller  
21 internet provider and it costs them \$45 a month as opposed to  
22 \$15 a month. It's just not as similar and something, some  
23 doubt has come into our minds of, you know, what exactly are  
24 their burdens, what exactly would their increased burdens be  
25 and truly what are their costs because I appreciate they don't

1 want to give out their business model even though we are by no  
2 means a competitor.

3 THE COURT: No, but you understand.

4 MR. KURTZ: Sure. But they're, you know, there are  
5 ways to accomplish I think our goals together.

6 THE COURT: Well, let me ask you this. Maybe this is  
7 actually a question I should have asked Mr. Dunlap, but you can  
8 answer it, I'm sure.

9 Time Warner represents to me today that they have no  
10 subscribers in the District of Columbia. So couldn't I  
11 legitimately conclude that my authorization of the subpoena to  
12 Time Warner was improvident and that I should quash the  
13 subpoena from this Court anyway because I don't have any  
14 jurisdiction?

15 MR. KURTZ: Well, as Mr. Dunlap stated, just because  
16 Time Warner might not have a signed contract within the  
17 District of Columbia with a certain subscriber does not mean at  
18 this point we can tell that you, Your Honor, do not have  
19 personal jurisdiction over any one of these defendants.

20 As stated by Mr. Dunlap there's a host of possibilities  
21 that exist. Frankly, we don't know at this point because we  
22 have not identified the subscribers. It could be an Ohio  
23 defendant signed up with Time Warner who specifically joined a  
24 swarm with multiple D.C. residents and purposely availed  
25 themselves of D.C. jurisdiction. It could be a, somebody that

1 lives in Ohio but does business every month in D.C. and comes  
2 here and works on their laptop and while they're doing that in  
3 D.C. they're able to use their Time Warner account and plug  
4 into their BitTorrent service and download a movie.

5           You know, with the joinder issue, with the personal  
6 jurisdiction, I think one of the overarching arguments  
7 obviously from our end is that it's just too premature to tell.  
8 A lot of defendants, some defendants who might not even have,  
9 you might not even have jurisdiction over technically might  
10 waive that. If they're sued in D.C. they could possibly even  
11 waive that. I mean, we just don't know.

12           THE COURT: They could waive that. I have a much  
13 greater concern that they would inadvertently waive it because  
14 they didn't know that it was even an issue because they're not  
15 lawyers.

16           MR. KURTZ: Well, Your Honor, EFF is here now to  
17 represent --

18           THE COURT: Wait, wait, I'm sorry. I don't have a  
19 good voice because I had neck surgery and I lost half of my  
20 vocal cords. They don't operate so I don't have a very good  
21 voice. So I know that I'm sometimes hard to hear and easy to  
22 talk over, so you have to bear with me in your eager advocacy.

23           Where was I going? I was going to the people who don't  
24 know that there's an issue of personal jurisdiction. And I did  
25 not know before this dust up about how Courts had handled

1 notice to alleged downloaders in music cases, but I think that  
2 giving notice to people that don't, you know, that they might  
3 have an objection to jurisdiction, if we had done that, that  
4 would have been very comforting to some of the people whose  
5 names were subpoenaed, some of whom are quite upset that your  
6 client has asked for their names.

7           So I'm feeling a little bit like I was terribly naive to  
8 be perfectly frank when you filed this and I just blithely  
9 signed the subpoena and headed you off into the wilderness.  
10 And I think I did that wrong.

11           I think we need to rethink how you're going to go about  
12 this. I don't want to stand in the way of your clients  
13 defending its legitimate rights, but I do have to be more  
14 careful than I was in watching out for the defendants' rights.

15           It's clear to me that not all the named people are  
16 actually sitting at the computer downloading. Somebody  
17 probably did at their computer but not all of the persons whose  
18 names and addresses are come rolling in. So I have to be more  
19 careful about that.

20           So what do you propose? What's happening with your  
21 other ISPs? Are they all just turning names over to you, no  
22 harm, no foul?

23           MR. KURTZ: Just a quick point on that, Your Honor.  
24 I believe in this case the orders that you did sign and the  
25 orders in the other cases do require at least pursuant to the

1 order that the ISPs do give some kind of notice to the  
2 subscribers.

3 THE COURT: It's only notice though as I recall that  
4 their addresses were sought, not notice that they could object  
5 about whether there was personal jurisdiction and stuff like  
6 that.

7 MR. KURTZ: And Your Honor, frankly, I have not seen  
8 obviously all of the notices going out from the ISPs, but from  
9 what I hear obviously the notices are varied and the ISPs it  
10 seems have a different understanding of even what their  
11 responsibilities under other laws may be to give notice to  
12 their subscribers.

13 As the EFF mentioned, the Court in the Eastern District  
14 of Pennsylvania took that into consideration in fashioning a  
15 more specific order which it sounds like you're considering in  
16 which it lays out these issues that the subscriber should be  
17 noticed about.

18 I can only reiterate --

19 THE COURT: Wait, wait. Are we too far down the path  
20 for that to happen in these two cases because you've already  
21 served all of your subpoenas?

22 MR. KURTZ: We have served the subpoenas but  
23 obviously, we have not gotten production on all of the  
24 subpoenas, Time Warner being one of them.

25 THE COURT: Well, that's okay, Time Warner at least

1 stood up and filed a motion to quash.

2 MR. KURTZ: Sure.

3 THE COURT: The question is, is everybody else  
4 responding or are they just sitting on their hands neither  
5 filing motions nor responding?

6 MR. KURTZ: To be honest with you, Your Honor, some  
7 subpoenas have already been responded to by a certain number of  
8 internet service providers.

9 In these two cases I can tell you that some of the ISPs  
10 that we have been dealing with we have agreed to postpone any  
11 production pending basically this hearing.

12 THE COURT: Oh!

13 MR. KURTZ: So I can represent to you that by no  
14 means have all of the subpoenas we have served been responded  
15 to and we have not served subpoenas on all of the ISPs that we  
16 potentially could.

17 THE COURT: Well then, before you serve any more  
18 subpoenas on anybody, I would like you to file with me a  
19 proposed Rule order or something that would give notice and  
20 what the notice might say to the end user that the ISP should  
21 inform its end users.

22 Do ISPs inform their end users by e-mail?

23 MR. DUNLAP: By letter.

24 THE COURT: So you spend the 45 cents or whatever  
25 mail costs these days?

1 MR. KURTZ: Some ISPs actually do FedEx certified  
2 mail. Some kind of confirmation that the correspondence  
3 actually gets to the customer.

4 THE COURT: Wow! And do they then bill you for that?

5 MR. KURTZ: Yes, ma'am.

6 THE COURT: Okay.

7 MR. KURTZ: And just one last quick point.

8 There was an issue that Time Warner brought up in this,  
9 in these two cases and their characterization is that we have  
10 repeatedly sent out subpoenas that were overly broad and did  
11 not comply with the orders because they included more IP  
12 addresses than were stated in the complaint even though we  
13 filed a first amended complaint.

14 The day after Time Warner filed their reply in these  
15 cases it just so happened that one of your learned Judges next  
16 door in a similar case ruled on a motion to quash asserting  
17 this same sort of argument and denied the argument basically  
18 and basically saying that quashing the subpoena merely because  
19 it was served prior to the filing of the amended complaint  
20 would be an exercise and pointless formalism and that is Judge  
21 Kolar Cottaley.

22 THE COURT: Kollar-Kotelly.

23 MR. KURTZ: Oh, I was not even close.  
24 Kollar-Kotelly.

25 THE COURT: Could you pronounce your client's name?

1 MR. KURTZ: Achte Niente Kino Boll ...

2 THE COURT: Oh, boy.

3 MR. KURTZ: And West Bay One, Your Honor.

4 THE COURT: Okay, thank you.

5 Could Time Warner come back and talk to me about \$45 and  
6 28 a month.

7 MR. MALTAS: Yes. Couple of points, Your Honor.

8 First of all, as you know we did submit an affidavit  
9 that is evidence of our burdens. The one thing that they've  
10 commented is well, Verizon has produced much more.

11 Verizon is larger than all cable operators combined. It  
12 is dramatically larger. I think all it really establishes is  
13 that different companies may be differently situated. The way  
14 that our company is set up and it is in our affidavit, we have  
15 a decentralized structure. There are 15 regional offices,  
16 there's also a corporate headquarters.

17 The process of looking up an IP address involves some  
18 activities at both, both at the central office and in each  
19 individual regional office where the subscriber is located. If  
20 you think about the significance of making sure that these  
21 lookups are really accurate as I say, you know, the people  
22 whose names we turn over may get their doors knocked down by  
23 law enforcement in a law enforcement request. They may get  
24 served with a lawsuit. It is very important that we get the  
25 lookups accurate and get them correct.



1           So the process is a multi step process of doing it at  
2 the corporate office and at each regional office. So it may  
3 well be that different ISPs have a different physical structure  
4 and the burdens on them may be different. The issue before the  
5 Court here is the burdens on Time Warner Cable, and it is in  
6 fact the case that this is what our capabilities are.

7           We have described we have an internal team that handles  
8 this. They have been at capacity and that's described in the,  
9 in the affidavit. In fact, have already brought on a temporary  
10 employee to assist the team even just for the existing law  
11 enforcement requests.

12           So, you know, although they've raised the issue of  
13 paying for another employee, it's really not feasible because  
14 first of all, it would have to be something like 15 or 20  
15 employees at the various regional offices to do all of this  
16 work.

17           Second of all, if you just compare the numbers of our  
18 capabilities, you know, currently we can handle about 28 IP  
19 addresses for all of their cases, they want 1400 plus. There  
20 will be more cases coming. We are talking about an awful lot  
21 of employees. It just simply is beyond our capacity to be able  
22 to do anything like this.

23           As I described, there is no case law that I'm aware of  
24 that requires us to go out and hire more people to handle this.  
25 It's unfortunate for the fact that they want to prosecute a

1 case against 5,000 people, but this is what our capacity is,  
2 this is what our capabilities are and we are a third party and  
3 Rule 45 goes out of its way to say that we're not, the Courts  
4 are suppose to protect third parties from having to incur these  
5 types of burdens to bring on additional employees.

6           The cost I imagine are different for each ISP. I  
7 imagine they span a range. These are the costs that Time  
8 Warner Cable has to bear to produce ISPs and we have laid this  
9 out in an affidavit and provided the evidence that these are  
10 the capabilities of Time Warner Cable and this is what the  
11 costs are.

12           THE COURT: In terms of 28 a month. You have said  
13 three things, 28 a month, 45 a month, 35 a month. Something  
14 like that.

15           What's a real number?

16           MR. MALTAS: Two things. So what we said was a  
17 reasonable burden that would keep the burdens to a reasonable  
18 level is 28.

19           We filed our motion, we have been seeking to, you know,  
20 attempts to resolve this without judicial intervention. It's  
21 always a goal to resolve things just among the parties. We did  
22 propose as a mode of compromise that we would go as high as 45.  
23 We clarified this in, at my reply brief I put it as an exhibit.

24           The statement says we can view up to 45, but I want to  
25 make clear that that would be quite a substantial burden on

1 Time Warner Cable. So we have been willing as a mode of  
2 compromise to try to resolve this that we could go as high as  
3 45, but it is clear that that in itself would in fact cause a  
4 burden on Time Warner Cable. We offered that as a compromise  
5 for resolution, but that doesn't minimize the burden.

6 For keeping it at a reasonable level 28 IP addresses a  
7 month is what we can reasonably handle.

8 THE COURT: All right.

9 MR. MALTAS: One final point if I might, Your Honor.

10 Just on the question of agreements, Mr. Kurtz said that  
11 the agreement cannot apply to the two cases before the Courts.  
12 At the exhibit to our motion the e-mail from plaintiff's  
13 counsel says that this agreement applies we have just filed two  
14 more cases. That is in their statement so we certainly took  
15 that as applying to these cases because they told us it did.

16 So for that reason we ask the Court to quash the  
17 subpoenas or in the alternative to keep it to a minimum level  
18 for us.

19 Thank you.

20 THE COURT: All right.

21 What I'm going to do is recognize, there are a number of  
22 things to recognize. One is that we don't know who the John  
23 Does are, but many of them if not most are not going to be in  
24 the jurisdiction of this Court. And when that becomes known,  
25 those persons would have to be dismissed from this lawsuit.

1 And if the plaintiff wishes to sue them elsewhere plaintiff  
2 can, but cannot sue them here unless they're in this Court's  
3 jurisdiction.

4 Number two, the burden on Time Warner to comply with the  
5 subpoena as issued by the plaintiff has been demonstrated to  
6 the Court's satisfaction and so at a minimum, we have to amend  
7 the terms of the subpoena if not quash.

8 Number three, the plaintiff has a very legitimate  
9 interest in protecting its copyrighted materials, and although  
10 the litigation is at this point somewhat clumsy, it cannot be  
11 said that it's frivolous or anything. And so the Court has to  
12 also take into account protecting the legal rights of the  
13 plaintiff, plaintiffs.

14 Assuming for present purposes that these really  
15 represent 5,000 or 6,000 different lawsuits as was described by  
16 Ms. McSherry, we would and this Court probably put them all  
17 together for purpose of discovery anyway just because you don't  
18 want 15 Judges in this courthouse tearing their hair out at the  
19 same time, you might as well just have one Judge go bald.

20 So the cases that are split up among different Judges  
21 will stay split up. I'm just responding to the argument that  
22 these are really separate lawsuits.

23 When I balance all of those things out, the interest of  
24 the John Does, the interest of the plaintiff, the interest of  
25 the third party ISPs, I think you should modify the subpoena to

1 limit production by Time Warner to 28 names a month, but not  
2 quash the subpoena because we don't know who the end users are  
3 and even though I trust the representation that none of those  
4 persons is in the District of Columbia as a residence, we don't  
5 know where their actions were taken that were offensive to the  
6 copyright interest of the plaintiff. So for the moment I'm not  
7 going to totally quash the subpoena.

8           On the other hand, I want counsel for the plaintiffs to  
9 propose to me the terminology of a notice to all John Does that  
10 the ISPs could send that say we have been asked for your name  
11 and address for this purpose and if you want to object, you do  
12 it in this way. And you have a right to object if you want to.

13           I think we need to be sure that any further production  
14 of names and addresses that are sought by subpoena are done in  
15 a little less perhaps little less efficient but more cognizant  
16 way for protecting the rights of the John Does, so I want this  
17 to be a balanced process whereby the rights of the John Does  
18 and the rights of the plaintiff who has its own legal damages  
19 are both protected.

20           Is there anything else I need to address?

21           Yes, ma'am. Could you just come to the microphone? We  
22 get a much better record that way.

23           MS. MCSHERRY: Your Honor, we would request the  
24 opportunity to look at that proposed order and weigh in on it.

25           THE COURT: You can because I'm going to let you do

1 that.

2 MR. DUNLAP: Judge, I already agreed to talk to her.  
3 We agreed to talk before the hearing.

4 MS. MCSHERRY: Thank you, Your Honor.

5 MR. MALTAS: Just one point, Your Honor.

6 THE COURT: Yes, sir.

7 MR. MALTAS: From an ISP standpoint before we can  
8 look up IP addresses and inform our subscribers, we need to  
9 have a court order.

10 Now they filed an amended complaint that post dates this  
11 Court's order so before we can proceed, we would ask that this  
12 be resolved through some sort of formal court order.

13 THE COURT: Yes. I don't actually want you to  
14 proceed yet. Because I want to work out with essentially all  
15 of you whatever that notice will be, that will go along with  
16 the subpoena, your notice -- not the subpoena -- your notice to  
17 your subscribers.

18 Do you call them subscribers?

19 MR. MALTAS: Subscribers of Time Warner Cable  
20 services. We will await a further order.

21 THE COURT: Yes, you will await a further order. So  
22 for the moment you don't have to respond to the subpoena  
23 because we don't have a notice for you to send to your  
24 subscribers.

25 MR. MALTAS: Thank you, Your Honor.

1 THE COURT: But I'm assuming that Mr. Dunlap and  
2 Mr. Kurtz will jump right on it.

3 MR. DUNLAP: Your Honor, we'll get you a notice  
4 before the end of the week which is tomorrow.

5 THE COURT: Wow! Ms. McSherry, you got your work cut  
6 out for you too.

7 MS. MCSHERRY: Not if we're going to be weighing in  
8 on this.

9 THE COURT: All right. Send it on and you can file  
10 it on ECF if you want to do it that way or you can just send it  
11 around until you reach agreement.

12 If for any reason you don't reach agreement, I can't  
13 imagine why that would be, but if you don't reach agreement, I  
14 am actually out of the jurisdiction next week. I could be  
15 reached not as readily as the week after, so if we need to, we  
16 could convene by telephone conference call the week after next  
17 to resolve any issues as to what that notice should say.

18 MR. DUNLAP: Judge, I have one last question.

19 With respect to time Warner's costs.

20 THE COURT: Yes.

21 MR. DUNLAP: I was wondering if the Court is going to  
22 enter an order. Our primary issue is not necessarily the  
23 amount of the cost but more to the point whether or not we have  
24 to pay them in advance. It's not required by Rule 45. We have  
25 been paying them all of the other ISPs, but that seems like

1 it's kind of an extra request.

2 THE COURT: Did you want to address that?

3 MR. MALTAS: Two things. As to the cost issue if  
4 they're under a court order that they will be paying cost  
5 within say net 30 days, I think we can handle that.

6 The other issue is in terms of the notice to our  
7 subscribers there are obviously First Amendment rights held by  
8 the ISPs. So to the extent that there's notice, it may be  
9 appropriate for the plaintiffs to send notice, I mean ordering  
10 us to submit certain language to our subscribers that we're not  
11 a part of raises some concerns for me. I understand there are  
12 notices that need to be sent but they may be sent by the  
13 plaintiff as opposed to by the ISP.

14 MR. DUNLAP: Your Honor, it's my understanding that  
15 is part of the Court order that they attach to their notice.

16 THE COURT: That's what I thought. You see, the  
17 advantage is that they, some of your subscribers do not want  
18 the plaintiffs to know their names and addresses. And once  
19 they have their names and addresses, then it's moot.

20 MR. MALTAS: If it's from the Court, I think we can  
21 live with that but it has, the question is, is it being  
22 directed that Time Warner speak essentially?

23 THE COURT: No, it's an order, it will be an order  
24 from the Court.

25 You would be responding to an order from me to be sure



1 to notify your subscribers X.

2 MR. MALTAS: Okay. I think that will be just fine if  
3 we could just see what the order says.

4 THE COURT: You are going to have every right to  
5 participate in the formulation of the order.

6 MR. MALTAS: Okay, thank you.

7 THE COURT: And it's really just a notice. The order  
8 is a separate thing. It will order that this notice be sent to  
9 all subscribers so they will be alerted to their equal rights.

10 MR. MALTAS: If we can review and participate.

11 THE COURT: And you can clearly review and  
12 participate. Again if it doesn't get cleared up happily among  
13 you all, then we'll set up a telephone conference call.

14 So are you here in town everybody or not?

15 MS. MCSHERRY: I'm in San Francisco, Your Honor, but  
16 if we do it by phone.

17 THE COURT: San Francisco isn't quite town, so okay.

18 MR. MALTAS: Thank you, Your Honor.

19 THE COURT: You are most welcome. Thank you.

20 MS. MCSHERRY: Thank you, Your Honor.

21 THE COURT: Thank you everybody for coming.

22 MR. DUNLAP: Thank you, Your Honor.

23 THE COURT: Thank you. It's nice to meet you.

24 MR. KURTZ: You too.

25 (Hearing concluded @ 3:30 p.m.)

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## CERTIFICATE

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the stenographic notes provided to me by the United States District Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

\_\_\_\_\_  
/S/ Crystal M. Pilgrim, RPR

\_\_\_\_\_  
Date: July 26, 2010

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