

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

3

4 AF Holdings, L.L.C., a St. Kitts )  
and Nevis limited liability )  
5 company, )  
)  
6 Plaintiff, ) No. CV 12-2144-PHX-GMS  
)  
7 vs. ) Phoenix, Arizona  
) July 19, 2013  
8 David Harris, ) 11:21 a.m.  
)  
9 Defendant. )  
)

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10 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
11 BEFORE THE HONORABLE G. MURRAY SNOW  
12 (Show Cause Hearing)

12 Appearances:

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25 Proceedings taken by stenographic court reporter  
Transcript prepared by computer-aided transcription

P R O C E E D I N G S

1  
2  
3 THE COURT: Please be seated.

4 THE CLERK: This is CV 12-2144, AF Holdings v. Harris,  
5 on for show cause hearing. Counsel, please announce. 11:21:44

6 MR. GOODHUE: Your Honor, Steve Goodhue on behalf of  
7 AF Holdings. Sitting with me is Mark Lutz, manager of  
8 AF Holdings, L.L.C.

9 THE COURT: All right. Is Mr. Harris present?

10 Mr. Harris is not present. This hearing has been duly 11:21:58  
11 noticed and we will proceed with it.

12 Mr. Goodhue, I've indicated questions that I wanted  
13 answered. You filed some pleadings with some information, and  
14 I have some questions with regard to that information as well.

15 Do you want to proceed? 11:22:17

16 MR. GOODHUE: I'm willing to proceed, Your Honor.

17 I would just like to mention to the Court I just came  
18 in last night, and the weather here has not made me feel all  
19 that great, so if I'd be allowed to sit rather than stand, it  
20 would help me a great deal. 11:22:37

21 THE COURT: All right. That will be fine. I want to  
22 you pull the microphone over and get as close to it as you can  
23 so that we can hear everything.

24 MR. GOODHUE: Thank you.

25 THE COURT: All right. Mr. Ticen, are you here for 11:23:00

1 those who are seeking to intervene?

2 MR. TICEN: (Nodding).

3 THE COURT: Please come -- you can come take your  
4 seat.

5 All right. You've signed a pleading, Mr. Goodhue, 11:23:12  
6 with respect to Raymond Rogers and Alan Cooper. I guess I  
7 adequately know your position with that.

8 Saltmarsh is a trustee whose trust is Mr. Lutz?

9 MR. GOODHUE: Mr. Lutz is --

10 THE COURT: I mean a trust whose trustee is Mr. Lutz? 11:23:35

11 MR. GOODHUE: Mr. Lutz is trustee of the Saltmarsh  
12 trust, which is a member of AF Holdings, as I understand it.

13 The trust, I guess, has gone through a name change.  
14 It's now the AF Trust.

15 THE COURT: Are there any other members of 11:24:01

16 AF Holdings?

17 MR. GOODHUE: No, Your Honor.

18 THE COURT: So what's the new name of the trust?

19 AF Trust?

20 MR. GOODHUE: AF Trust, Your Honor. 11:24:10

21 THE COURT: AF Trust is the sole --

22 MR. TICEN: Beneficiary.

23 THE COURT: Well, AF -- AF Trust is the sole member of  
24 AF Holdings? Is that correct?

25 MR. TICEN: Yes. 11:24:25

1 THE COURT: And is there any other entity that has any  
2 interest in AF Holdings?

3 MR. TICEN: No.

4 THE COURT: And the only beneficiaries of AF Trust  
5 are -- has present nonexistent persons?

11:24:35

6 MR. TICEN: Yes.

7 THE COURT: And did you receive Exhibit B from  
8 Mr. Lutz? Exhibit B to the complaint?

9 MR. GOODHUE: I received Exhibit B through an attorney  
10 for Mr. Lutz.

11:24:53

11 THE COURT: Are you aware if Mr. Lutz or any of his  
12 business associates used the screen name Sharkmp4?

13 MR. GOODHUE: I'm not aware with -- aware of Sharkmp4  
14 at all.

15 THE COURT: All right. To the extent that the  
16 previous -- the plaintiff previously sought and received the  
17 discovery of the identities of the persons involved in the  
18 Internet swarm in the district court action that was brought in  
19 the District of Columbia, why should I reauthorize that here?

11:25:17

20 MR. GOODHUE: Like I stated in our -- in our  
21 memorandum, Your Honor, it's seeking --

11:25:36

22 THE COURT: Well, when you file a memorandum five  
23 minutes before a hearing, don't expect me to be able to read it  
24 before the hearing.

25 MR. GOODHUE: I understand, sir.

11:25:48

1           It's seeking different discovery of different  
2 infringers.

3           THE COURT: How do I know that? There isn't anything  
4 in your request that indicates that you are seeking different  
5 discovery of different infringers. 11:25:59

6           MR. GOODHUE: Well, I think in the motion for  
7 authorization it does speak to that as to what we were seeking.

8           THE COURT: And it does not specify who you're seeking  
9 it as to.

10           MR. GOODHUE: Well, we cannot -- you mean in terms of 11:26:16  
11 an identity?

12           THE COURT: That's correct.

13           MR. GOODHUE: Well, that's what we're seeking is the  
14 identity --

15           THE COURT: No, it just says: Plaintiff, AF Holdings, 11:26:25  
16 through its undersigned counsel, hereby moves this Court for an  
17 authorizing issuance of subpoenas granting limited discovery to  
18 identify defendant David Harris' co-conspirators. That's all  
19 you say.

20           MR. GOODHUE: I think there was a little more to it, 11:26:44  
21 Your Honor.

22           THE COURT: Well, that's true, there is more to it,  
23 but where do you identify in it specific --

24           MR. GOODHUE: You mean the specific IP --

25           THE COURT: -- IP addresses that you want the 11:26:57

1 identities for? Or ISP addresses.

2 And where is it that you inform me how and why it  
3 isn't duplicative of discovery that you already sought and  
4 obtained of the same Internet swarm in a different action?

5 MR. GOODHUE: It maybe isn't clear in -- in 11:27:13  
6 distinguishing between the D.C. case and this case.

7 THE COURT: And so it would authorize duplicative  
8 discovery that you've already obtained.

9 MR. GOODHUE: Well, it certainly wasn't the intent to  
10 seek duplicative discovery, sir. 11:27:30

11 THE COURT: Um-hum. To the extent that the plaintiff  
12 has now reasserted the same claims resulting from the same  
13 swarm in a different court, where those previous settlements  
14 have caused plaintiff to forfeit or otherwise affect  
15 plaintiff's current claims in this case, certainly as it 11:27:56  
16 pertains to seeking statutory special -- or statutory damages?

17 MR. GOODHUE: Your Honor, I believe we're seeking  
18 different individuals than were in the District of Columbia  
19 case --

20 THE COURT: Well, that doesn't matter, does it? The 11:28:16  
21 statute, I have it here in front of me, the statute refers to,  
22 as it pertains to statutory damages: The copyright owner may  
23 elect at any time before final judgment is rendered to recover,  
24 instead of actual damages and profits, an award of statutory  
25 damages for all infringements involved in the action with 11:28:37

1 respect to any one work for which any one infringer is liable  
2 individually or for which any two or more infringers are liable  
3 jointly and severally. And that's -- that's telling me that's  
4 a limit for everyone involved in that swarm.

5 So you've gone out and settled your case with certain 11:29:00  
6 persons who were involved in that swarm. You can't seek  
7 statutory damages any more, can you?

8 MR. GOODHUE: I don't -- I don't believe that the  
9 statute speaks to limiting damages within a swarm. I believe  
10 it limits damages within a particular case, and -- 11:29:17

11 THE COURT: That doesn't -- well, what difference does  
12 that make? In this case, you're seeking to recover damages  
13 against Mr. Harris for multiple infringements in the same  
14 swarm.

15 MR. GOODHUE: Well, it wasn't the same -- it's not the 11:29:32  
16 same swarm in the Harris case as it is in the D.C. case.

17 THE COURT: You know, that's baloney. I looked this  
18 morning at Mr. Harris as being identified in the D.C. case with  
19 the very same swarm at the very same time that you're seeking  
20 to recover against him in this case. 11:29:51

21 MR. GOODHUE: Mr. Harris what?

22 THE COURT: How in the world can you tell me that's a  
23 different swarm by any definition?

24 MR. GOODHUE: Because I admit that Mr. Harris was  
25 identified in the D.C. case, but the -- 11:30:02

1 THE COURT: And for participation in the same swarm,  
2 in this swarm.

3 MR. GOODHUE: Well, the swarm is a growing entity --

4 THE COURT: Okay.

5 MR. GOODHUE: -- and the discovery is --

11:30:14

6 THE COURT: It doesn't matter, though, because you  
7 pled joint and several liability to everyone involved in the  
8 swarm.

9 MR. GOODHUE: Well, we -- we haven't elected whether  
10 it's statutory damages or actual damages --

11:30:24

11 THE COURT: I understand that. And my question: Is  
12 because you've already settled this case with some of the  
13 participants in the same swarm, how can you now get anything  
14 other than actual damages from Mr. Harris?

15 MR. GOODHUE: Well, I think the -- the Lime Wire case  
16 speaks directly to that, and that --

11:30:40

17 THE COURT: Which case is that?

18 MR. GOODHUE: It's the case out of the Southern  
19 District of New York --

20 THE COURT: Oh, the Kimba Wood case that you --

11:30:48

21 MR. GOODHUE: Yes, sir.

22 THE COURT: -- referred to? I didn't get through your  
23 whole pleading, but I saw that.

24 Well, that doesn't provide any precedent to me  
25 whatsoever. I am of the same authority as Judge Wood, am I

11:30:58



1 not?

2 MR. GOODHUE: I understand, but it speaks directly to  
3 this, in my view, that we're not -- we're not speaking to a  
4 settlement in the swarm, we're speaking to a settlement within  
5 a case, and --

11:31:10

6 THE COURT: Well, you are speaking -- you made a  
7 settlement with individuals who -- who infringed your copyright  
8 as a result of their participation in the same swarm in which  
9 Mr. Harris participated, is that not correct?

10 MR. GOODHUE: He was identi --

11:31:27

11 THE COURT: Just yes or no, is that not correct?

12 MR. GOODHUE: I don't have personal knowledge of that.  
13 I understand --

14 THE COURT: Is it your understanding that you have --  
15 that your client, AF Holdings, has settled claims for  
16 infringements that resulted from the same swarm in which  
17 Mr. Harris participated?

11:31:39

18 MR. GOODHUE: Yes, Your Honor.

19 THE COURT: All right. So why is it, again, your  
20 position that you're not -- your position more or less relies  
21 on the Judge -- Judge Wood's case out of the Southern District  
22 of New York?

11:32:05

23 MR. GOODHUE: Yes, Your Honor.

24 THE COURT: And so what are you saying you have a  
25 right to do? Elect statutory damages with respect to some

11:32:16

1 individuals and actual damages with respect to others involved  
2 in the same swarm, even though you're asserting joint and  
3 several liability against all participants in the swarm?

4 MR. GOODHUE: No. Under the interpretation by  
5 Judge Wood of 504 in speaking about a case, it's a particular  
6 case, and it's not speaking to the swarm, and --

11:32:32

7 THE COURT: How can that be, when you have pled joint  
8 and several liability against Mr. Harris for all other  
9 participants in that swarm and you have settled your claim  
10 against other participants in that swarm?

11:32:53

11 MR. GOODHUE: Well, we've pled alternatively actual  
12 damages, and it's --

13 THE COURT: Well, that's my question. Why haven't  
14 your settlements resulted in the fact that you now must pursue  
15 Mr. Harris for actual damages only?

11:33:11

16 MR. GOODHUE: Well, again, as I understand it, Your  
17 Honor, the issue of settlements can be taken into account at  
18 the time of -- by the trier-of-fact at the time of an award of  
19 damages.

20 THE COURT: Well, okay, I appreciate that, and that  
21 seems to make logic to me. But why can't I take it into  
22 account now when you've previously done this discovery, at  
23 least to some extent, in the district -- action that you filed  
24 in District of Columbia, and other actions, perhaps, that I  
25 don't know about --

11:33:26

11:33:43

1 Sir, who are you?

2 MR. HARRIS: I'm David Harris for the defense.

3 THE COURT: Please take your seat. You need to be  
4 here on time, Mr. Harris.

5 MR. HARRIS: I'm sorry. Sorry I'm late. 11:33:52

6 THE COURT: All right. Where were we?

7 MR. GOODHUE: I'm sorry, Your Honor.

8 THE COURT: All right. Here's where we're at.

9 You indicated that I could take that into account once  
10 we got to the damages phase, and I'm asking you why is it that 11:34:06

11 I can't take it into account now, when you're seeking to get

12 all kinds of discovery related to those who may have

13 participated with Mr. Harris in a -- in what you allege he is

14 joint and severally liable for when you've already settled some

15 of those claims? 11:34:25

16 And so doesn't that make irrelevant the extent to

17 which there may have been other participants in those claims?

18 MR. GOODHUE: I certainly see the Court's point, but I  
19 would respectfully disagree that it's --

20 THE COURT: Well, I understand that, too. But you're 11:34:43

21 asking me to authorize subpoenas to go out to, as far as I

22 know, thousands and thousands of individuals that are ongoing,

23 many of which you've already discovered, in a -- on a basis for

24 which that may be completely irrelevant. And as you yourself

25 have acknowledged, that is disruptive both to the providers and 11:34:58

1 to the individuals.

2 So I'm expecting some resolution or some position from  
3 you that would justify that kind of discovery in this case, and  
4 that would not limit your case against Mr. Harris to only the  
5 actual damages that he may have caused you due to his  
6 infringement. 11:35:18

7 MR. GOODHUE: Well, I guess from a practical  
8 standpoint, Your Honor, at this point trying to subpoena those  
9 records would be a fruitless exercise, since the information  
10 has probably been destroyed by the ISPs. It's my understanding 11:35:34  
11 that they keep this information for maybe six months, and after  
12 that it's no longer available.

13 THE COURT: All right. But my point -- let me go back  
14 to my point. Your client, and as I -- I've indicated, I'm  
15 aware of a number of actions that they filed in various 11:35:52  
16 jurisdictions. It seems to me that they can file one action,  
17 and to the extent they have subpoenas that involve other ISP  
18 providers in other jurisdictions, they can do what everybody  
19 else does when they subpoena information against other ISP  
20 providers, and they can subpoena that information in a 11:36:10  
21 miscellaneous action in the appropriate jurisdiction.

22 If then the swarm is ongoing, it isn't shut down, it  
23 seems to me they can renew those subpoenas. You've already had  
24 that opportunity at least once in your Washington action. I  
25 don't know how many other actions you may have filed involving 11:36:23

1 this same Internet swarm. But you've settled those cases, or  
2 at least it's your understanding that you've settled those  
3 cases, and it's my understanding, based on pleadings that you  
4 filed both here and that your client filed in the D.C. court,  
5 that you settled some of those cases with individual providers. 11:36:38

6 Now you want discovery of that same information  
7 because you're alleging that they're joint and severally liable  
8 with Mr. Harris and you can discover them. But I -- I guess  
9 before I'm going to give you that information you have to  
10 persuade me that there is some basis on which your client 11:36:54  
11 hasn't already precluded themselves from seeking anything other  
12 than actual damages against Mr. Harris because of their  
13 previous settlements of same persons in this same Internet  
14 swarm that were involved in the same action.

15 And I guess what it comes down to is you're telling me 11:37:10  
16 that the -- the relevant authority that you provided me that I  
17 should review is Judge Wood's order in the Southern District of  
18 New York.

19 MR. GOODHUE: Yes, Your Honor, and I think it --

20 THE COURT: And -- and so if I agree with Judge Wood, 11:37:24  
21 then let's -- let's go down this decision tree, since you're  
22 here. I'm not saying that I will agree with Judge Wood, and I  
23 think, as you can tell, I have some skepticism that I will,  
24 but -- but I'm not saying I won't. I have to consider  
25 carefully what she's written. Or he's written; I'm not sure 11:37:41

1 whether Kimba's a man or a woman, I apologize.

2 MR. GOODHUE: It's a woman, Your Honor. She was the  
3 Clinton appointee for --

4 THE COURT: Yeah.

5 MR. GOODHUE: -- attorney general. 11:37:51

6 THE COURT: I thought she was a woman, but in any case  
7 wasn't positive. Okay. So I'll read carefully what she's  
8 written. If I disagree, then you would agree with me that  
9 you're not getting the subpoenas unless and until you can  
10 reverse my decision on appeal. 11:38:04

11 If I agree with her, why should I authorize  
12 information that you've already received in the D.C. action,  
13 and how can you -- and how would you specify to me those  
14 persons, or those entities, those ISP addresses that you didn't  
15 already receive in the D.C. action? 11:38:23

16 And it seems to me if you're going to do these things  
17 efficiently, you do this discovery once. And if you need to  
18 renew it, you renew it in the same action for -- for additional  
19 participants. But that's going to require that you elect  
20 between statutory and actual damages before you settle a claim, 11:38:37  
21 isn't it?

22 MR. GOODHUE: That may be, Your Honor. I guess you  
23 have to look at this from a practical standpoint, and sort of  
24 the --

25 THE COURT: I agree. And I don't think that it's 11:38:49

1 unfair -- I mean, I don't think it's unfair to consider the  
2 fact that your client does have some sort of copyright  
3 infringement claim. But if we're talking about fairness, I  
4 think we also have to consider the extent to which your client  
5 may be taking what is at best an extremely aggressive stance 11:39:05  
6 vis-a-vis persons who are unaware of their legal rights, and at  
7 worst it may be extortion if they go out and represent that  
8 they still have a right to recover \$150,000 against individuals  
9 they no longer have such a right to recover against.

10 Do you understand what I'm saying? 11:39:28

11 MR. GOODHUE: I understand that completely, Your  
12 Honor, and I guess I look at it as when the D.C. case was  
13 filed, I think there were estimated to be 10,000 participants  
14 in the swarm, and to try to do discovery on 10,000 ISPs, or IP  
15 addresses, is a huge burden on everyone. What they did, it 11:39:52  
16 seems to me, they took, you know, a tenth of that.

17 You look at today, I understand the Game of Thrones  
18 had a -- had a swarm population of 10 million within a week. I  
19 mean, I don't really know the answer to how to handle those  
20 types of cases under a Copyright Act that had had no 11:40:13  
21 understanding or no anticipation that you could have these  
22 types of copyright infringements.

23 THE COURT: Well, you're not asking me to rewrite the  
24 legislation.

25 MR. GOODHUE: No, Your Honor. I'm just saying from a 11:40:28

1 practical standpoint, I'm not sure how else you can do this,  
2 other than to sort of take it down in parts. And I understand  
3 you don't want to do duplicative discovery; I understand you  
4 don't want to collect damages where you are barred for  
5 statutory damages, at least, under the Copyright Act.

11:40:48

6 But at the same time, I think Judge Wood's opinion  
7 gives a pretty good perspective on how that -- how the  
8 Copyright Act and Section 504 should be interpreted.

9 THE COURT: Well, did you provide a copy of your  
10 pleading to Mr. Harris so that he can respond?

11:41:08

11 MR. GOODHUE: I haven't. I provided it to Mr. Ticen,  
12 but I have a copy with me.

13 THE COURT: All right.

14 So basically, whether or not -- there is no question  
15 about whether the action against Mr. Harris proceeds, and you  
16 seem to want to proceed against it. Let me ask one other  
17 question: To the extent that there are actual damages that  
18 you're -- that you have to proceed against Mr. Harris under an  
19 actual damage basis, as opposed to a statutory damage basis, is  
20 there any basis on which you could claim that those with whom  
21 he participated in the BitTorrent swarm have any relevance to  
22 the actual damages he caused your client?

11:41:23

11:41:42

23 MR. GOODHUE: I don't believe so, no, Your Honor.

24 THE COURT: All right. So really, this is a question  
25 we're going to have to resolve first.

11:42:01



1 MR. GOODHUE: And Your Honor, like I said, from a  
2 practical -- I hate to just keep repeating myself -- from a  
3 practical matter, getting the discovery, that time has probably  
4 passed. Pursuing Mr. Harris --

5 THE COURT: So do you wish to then continue to urge 11:42:16  
6 this? You can let Mr. Ticen's clients out of the case right  
7 now if as a practical matter it makes no difference, and you  
8 can pursue your claim for actual damages against Mr. Harris.  
9 And I suppose that he wants to conduct discovery to determine  
10 whether or not your client actually uploaded this, was the 11:42:33  
11 person that upload -- at least I've read -- what I've read is  
12 that your client was the person who uploaded this movie in the  
13 BitTorrent swarm in the first place, which would have some  
14 effect on his actual damages.

15 But we can proceed -- if you want to let Mr. Ticen's 11:42:49  
16 clients out and drop your request for the subpoena, we can  
17 proceed on your actual damages claim against Mr. Harris.

18 MR. GOODHUE: That would certainly be our position. I  
19 think -- the opportunity to pursue Mr. Ticen's clients or  
20 people in similar positions is really no longer available. 11:43:06

21 THE COURT: All right. So you're dismiss --

22 MR. GOODHUE: And he was -- they were never joined.  
23 I'm not exactly sure what his clients --

24 THE COURT: I think they're only here because you  
25 sought the subpoenas against them. 11:43:19

1 Is that correct, Mr. Ticen?

2 MR. TICEN: Yes, Your Honor.

3 THE COURT: All right. So if the subpoena request is  
4 dropped, is there any reason for your further participation in  
5 this case? 11:43:32

6 MR. TICEN: Yes, Your Honor, because it's our position  
7 that the subpoena was issued in bad faith.

8 THE COURT: That the what?

9 MR. TICEN: Subpoena was issued in bad faith.

10 THE COURT: And so what would you want? 11:43:40

11 MR. TICEN: Our attorneys' fees.

12 THE COURT: Okay. So basically, what would be left  
13 would be your attorneys' fees claim?

14 MR. TICEN: Correct.

15 THE COURT: But you're not then claiming any right to  
16 participate in the substance -- substantive resolution for the  
17 resolution of this case? 11:43:48

18 MR. TICEN: No, Your Honor.

19 MR. HARRIS: Your Honor, could I ask for a little  
20 clarification? 11:44:02

21 THE COURT: You know, Mr. Harris, let me tell you, you  
22 certainly can, and you're a party to this suit. I have allowed  
23 Mr. Goodhue to remain seated. I shouldn't have allowed  
24 Mr. Ticen to remain seated --

25 MR. HARRIS: I apologize, Your Honor. 11:44:11

1 THE COURT: -- and ask them to come to the podium.

2 And I'll just tell you, Mr. Harris, Mr. Goodhue asked  
3 to remain seated because, as you are at least vaguely aware, he  
4 has had some health issues, which has resulted in the  
5 resumption of this hearing. He apparently lives in Colorado 11:44:22  
6 and the heat's a little much for him, which is understandable.

7 So Mr. Ticen, Mr. Goodhue, without any prejudice to  
8 you, if you're going to address me and I recognize you, I'm  
9 going to ask you to come to the podium and speak in the  
10 microphone. 11:44:36

11 So Mr. Ticen, do you have anything further to say?

12 And then Mr. Harris, we'll hear from you.

13 MR. TICEN: As far as the attorneys' fee issue, do you  
14 want us to address that in motion form and --

15 THE COURT: Well, first, I guess what I want to know 11:44:47  
16 is: In light of the fact that you are going to seek your  
17 attorneys' fees, Mr. Goodhue, I take it that doesn't  
18 necessarily change your position that you no longer seek to  
19 subpoena the third parties?

20 MR. GOODHUE: No, Your Honor. 11:44:59

21 THE COURT: Okay. So you still don't want to subpoena  
22 the third parties and you drop that request.

23 MR. GOODHUE: Correct, Your Honor.

24 THE COURT: Which in any case, I think I've denied  
25 without prejudice, but you're not going to be renewing it. 11:45:06

1 MR. GOODHUE: Correct, Your Honor.

2 THE COURT: All right. So Mr. Ticen.

3 MR. TICEN: Yes, Your Honor.

4 THE COURT: Now, what were you going to ask me?

5 MR. TICEN: As far as the request for attorneys' fees, 11:45:14  
6 I'm assuming that you want that by motion and --

7 THE COURT: Yes.

8 MR. TICEN: -- if so, do you want a -- is a deadline  
9 going to be set, either right now or -- or by order?

10 THE COURT: How long is it going to take you to file 11:45:29  
11 such a motion?

12 MR. TICEN: I would think at least 14 days --

13 THE COURT: All right.

14 MR. TICEN: -- 21 days.

15 THE COURT: I'll give you 14 days to file such a 11:45:38  
16 motion. You might look to the local Rules of Civil  
17 Procedure -- I think it's 54.2; it's in the 54s -- about what  
18 you're going to need to do to request your attorneys' fees,  
19 including the form of the affidavit and other matters. All  
20 right? I'll ask you to follow that. 11:45:54

21 MR. TICEN: Okay, Your Honor. Thank you.

22 THE COURT: Anything else that you want to take up at  
23 this time, Mr. Ticen?

24 MR. TICEN: There is nothing else, no. No, Your  
25 Honor. 11:45:59

1 THE COURT: All right. Thank you.

2 Mr. Harris, please come forward.

3 MR. HARRIS: I have a -- I'd like clarity on the --  
4 Mr. Ticen? Mr. Ticen, his clients and -- and the subpoena for  
5 him. His -- his clients are part of -- were not part of the 11:46:22  
6 original D.C. case, correct?

7 THE COURT: I have no idea.

8 MR. HARRIS: Well, if you check the dates on the --  
9 the subpoena, which were issued to the ISPs, the dates were  
10 late last year-early this year. 11:46:37

11 THE COURT: All right. So it's possible.

12 MR. HARRIS: Okay.

13 THE COURT: I don't -- I just simply don't know.

14 MR. HARRIS: I just want to bring it to the Court's  
15 attention that of -- of those 308, I have already been 11:46:46  
16 approached by one of these co-conspirators. They called me on  
17 the telephone. I guess my name is on the subpoenas.

18 THE COURT: Yes, your name's on the subpoenas because  
19 the case is titled in your name.

20 MR. HARRIS: Okay. I just want it on the record of 11:47:02  
21 the inherent danger I've been put in, due to these subpoenas  
22 that -- I believe the Court didn't give him leave to  
23 actually -- he filed before he actually filed a motion for --

24 THE COURT: Right, but he has -- but those subpoenas  
25 are now quashed, unless you have an objection, Mr. Goodhue. 11:47:21

1 MR. GOODHUE: No, Your Honor.

2 THE COURT: Okay. I'm going to enter an order  
3 quashing all of those subpoenas to the extent they're still  
4 outstanding.

5 Are they still outstanding? Mr. Ticen? 11:47:30

6 MR. TICEN: The last I heard from the ISPs, they are  
7 waiting for an actual further court order on what to do.

8 THE COURT: All right. Thank you. So in the absence  
9 of any objection by Mr. Goodhue, I'm going to issue an order  
10 quashing all of those subpoenas, so they are -- those subpoenas 11:47:51  
11 are canceled --

12 MR. HARRIS: Okay.

13 THE COURT: -- for all practical purposes, Mr. Harris.

14 MR. HARRIS: I would also like to address the  
15 perception of -- of my incivility in this court -- 11:48:01

16 THE COURT: All right.

17 MR. HARRIS: -- which I have been sanctioned for, but  
18 I would like to wait until the end of this hearing for --

19 THE COURT: All right.

20 MR. HARRIS: -- to do that. 11:48:12

21 THE COURT: Well, I think the hearing is, for all  
22 practical purposes, over, except for I want to explain to you  
23 how the case now stands as I understand it, based on my  
24 conversation with Mr. Goodhue, and you were only here for part  
25 of it. 11:48:27

1 Mr. Goodhue is now -- Mr. Goodhue and his client are  
2 now only pursuing you -- they're not pursuing you for the  
3 statutory damage option under the statute; they are suing you  
4 for the actual damages that your infringement costs them.

5 Is that a correct understanding, Mr. Goodhue?

11:48:42

6 MR. GOODHUE: Yes, Your Honor.

7 THE COURT: All right. And it's also my understanding  
8 from my conversation with Mr. Goodhue that they do not any  
9 longer take the position in this lawsuit that you -- your  
10 actual dam -- that the extent to which others participated in  
11 the same BitTorrent swarm in which you may have participated  
12 has any bearing on the actual damages that you cost their  
13 client.

11:49:03

14 Is that also correct, Mr. Goodhue?

15 MR. GOODHUE: Yes, Your Honor.

11:49:18

16 THE COURT: All right. So what that means is they're  
17 seeking to recover damages as -- from you, the actual damages  
18 that they allege they suffered due to the fact that they allege  
19 that you downloaded a copy of their copyrighted movie.

20 So what is going to be relevant going on is whether in  
21 fact you did download a copy of their copyrighted movie, what  
22 in fact you may have done with that copyrighted movie in the  
23 future, and then I take it from the previous pleadings that you  
24 filed you have -- you may wish to conduct discovery into  
25 whether or not they, that meaning AF Holdings or their agent,

11:49:35

11:49:54

1 was actually the party that uploaded a copy of the movie on the  
2 BitTorrent program in the first place. Those all may have  
3 bearing on the extent to which you actually caused AF Holdings  
4 damage.

5 Do you understand what I'm saying? 11:50:16

6 MR. HARRIS: Yeah, your --

7 THE COURT: Do you have --

8 MR. HARRIS: So they --

9 THE COURT: Do you feel --

10 MR. HARRIS: -- at some point they'll -- they will 11:50:20  
11 offer some evidence, other than --

12 THE COURT: Well, let me explain part of this.

13 MR. HARRIS: -- an IP address.

14 THE COURT: I don't mean to suggest that you're not a  
15 smart person, it seems to me that you are, but there is a whole 11:50:32  
16 process that goes on in federal court here, and there is a  
17 process now of this lawsuit that remains against you personally  
18 in which we will schedule a period called "discovery."

19 Discovery is a period in which under the federal rules  
20 they are allowed to ask you questions and you're required to 11:50:53  
21 answer. They can even notice up what's called your deposition,  
22 and then you have to go and under oath answer certain  
23 questions. They can request documents from you. They can also  
24 request, if they can demonstrate to me that it's relevant,  
25 looking at your computer to trace what you may have done 11:51:11



1 with -- whether or not their copyrighted program existed --  
2 exists or existed on your computer, and what you would have  
3 done with it.

4 MR. HARRIS: Yeah, well, I must object to that.

5 THE COURT: Well, you'll have the right --

11:51:24

6 MR. HARRIS: It's a process, but --

7 THE COURT: You'll have the right to object when --

8 MR. HARRIS: It's a matter of dirty hands with -- you  
9 know, these --

10 THE COURT: I don't mean to shut you --

11:51:34

11 MR. HARRIS: It's a matter of record and --

12 THE COURT: You can say -- you can say what you wish,  
13 Mr. Harris, but let me tell you that you may allege that they  
14 have dirty hands, but while they're doing discovery against  
15 you, you also have the right to do discovery against them to  
16 demonstrate that it is a matter of dirty hands.

11:51:48

17 But I am not, in the discovery period, going to make  
18 the determination whether AF Holdings has dirty hands or not,  
19 because they have a -- what discovery does is allows them to  
20 collect evidence against you to make their case, and at the  
21 same time it allows you to conduct discovery against them to  
22 make yours.

11:52:05

23 When you all have your evidence and put it in front of  
24 me, then I can make a determination as to whether or not they  
25 do have dirty hands, but I have to let them conduct their

11:52:20

1 discovery to determine whether they do.

2 I would also be, I think, remiss, though, in fairness  
3 both to you and to AF Holdings, not to observe that unless  
4 you've done something -- unless in fact you are responsible and  
5 have done something with their copyrighted film to allow others 11:52:36  
6 to reproduce it, I think that the actual damages you would have  
7 cost them, I mean, the case law suggests that we start out with  
8 the actual market value of that film. So what we're talking  
9 about here is a very limited amount of money, an extremely  
10 limited amount of money, which may not merit them going forward 11:52:55  
11 or you going forward. But that's a decision that you're  
12 allowed to make and that they're allowed to make.

13 MR. HARRIS: Okay.

14 THE COURT: All right.

15 MR. HARRIS: I guess at this time, in response to 11:53:07  
16 that, I'd like to bring up a case where they -- a default  
17 judgment was found against a -- one of the original 1140 in the  
18 D.C. case. That was here in Arizona, case  
19 number CV 12-0213-PHX-GMS, a Brian Trottier. He got a default  
20 judgment, it's been satisfied, for \$7500. And that was in the 11:53:34  
21 court of Judge Murray Snow.

22 THE COURT: Yes.

23 MR. HARRIS: So -- so that would sort of offset  
24 whatever a -- the cost of a smut film costs.

25 THE COURT: Okay. 11:53:49

1 MR. HARRIS: That is my understanding of what you just  
2 said what I --

3 THE COURT: Well, if you go back and look at the  
4 statute you'll see a couple of things. One is they have a --  
5 they have a right -- it's part of the discussion that I was 11:54:03  
6 just having with Mr. Goodhue. AF Holdings has a right to  
7 pursue claims for their copyright infringement against everyone  
8 who has infringed their copyright, and -- and you've just  
9 listed someone who they at least claimed infringed their  
10 copyright. 11:54:24

11 When they bring a copyright action, they have the  
12 right to elect, in many circumstances, at least, if they  
13 haven't otherwise forfeited it, they have a right to elect  
14 whether or not they will seek statutory damages or whether  
15 they'll seek actual damages. 11:54:41

16 When they settled their previous claim against that  
17 person they had not yet made such an election, he had merely  
18 allowed them to take a default judgment, and then they sought  
19 statu -- you know, they sought an award based on the potential  
20 that they could receive under statutory damages. So an award 11:54:57  
21 was made.

22 MR. HARRIS: But was --

23 THE COURT: I will tell you that in your case --

24 MR. HARRIS: I was part of --

25 THE COURT: You need to wait, Mr. Harris, especially 11:55:06

1 when I'm talking, because even though you don't wish to be  
2 impolite, I get to talk first and then you can talk, too. And  
3 I'll let you talk, I promise.

4 They no longer have the right to seek statutory  
5 damages against you, so the ceiling is no longer the statutory 11:55:20  
6 limit set forth in the statute of \$150,000 or even \$30,000; it  
7 is what they can prove they lost because you copied their  
8 movie.

9 And as I said, if you didn't do anything with the  
10 movie, it doesn't seem likely, although I can't say for sure, 11:55:40  
11 it doesn't seem likely that we're talking any kind -- you know,  
12 that kind of a range of money.

13 But any party has the right to settle a suit early,  
14 and they can settle for more dollars than they would have  
15 otherwise received in a claim. And if they don't defend the 11:56:00  
16 suit -- as you are now doing, you're defending the suit -- but  
17 if somebody doesn't defend the suit, then they end up getting  
18 an award because somebody didn't defend the suit.

19 But that suit in this setting doesn't really any  
20 longer have much relation to your suit because, as you've heard 11:56:17  
21 Mr. Goodhue say, they're no longer arguing that you're  
22 responsible for what anybody else did or for any other  
23 infringements that occurred in the same swarm that -- in which  
24 you allegedly participated.

25 You understand what I'm saying? 11:56:36

1 MR. HARRIS: I -- yes, I -- I understand. I've --  
2 doesn't make sense to me, but I understand.

3 THE COURT: Yeah. And I realize that you may feel  
4 like you're striking out for justice more than just your own --  
5 in your own cause, but I will tell you, regrettably, that the 11:56:54  
6 only case that is before me now, whether or not you believe and  
7 whether or not in fact I made mistakes in previous cases, the  
8 only case that is before me now is your case, and I will do my  
9 best to be fair to both sides.

10 MR. HARRIS: Okay. And there's -- okay. There's 11:57:12  
11 quite a few things I could still -- quite a few ducks I could  
12 get in a row as well as, you know, as far as still actually  
13 being the first one to upload --

14 THE COURT: Well, let me --

15 MR. HARRIS: Or -- or, you know, evidence of it. 11:57:28

16 THE COURT: Yes.

17 MR. HARRIS: But that was before he owned the  
18 copyright, so --

19 THE COURT: And all of those things --

20 MR. HARRIS: -- secured the copyright, so I imagine 11:57:36  
21 that's okay.

22 THE COURT: Mr. Harris, all of those things may be  
23 relevant to your case, but you're going to have to discover  
24 them in a way that they can be admitted in my case.

25 MR. HARRIS: Well, they are -- they've been admitted 11:57:47

1 in your case, and they were discovered and admitted as -- and  
2 cited as documents and findings in other court cases.

3 THE COURT: All right. Let me just --

4 MR. HARRIS: And that -- that's admissible evidence,  
5 right? Findings of other courts? 11:58:02

6 THE COURT: Well, when you said it's complex, it is  
7 complex. Occasionally, rulings by other courts are dispositive  
8 of what happens in --

9 MR. HARRIS: Or --

10 THE COURT: -- this court. 11:58:16

11 MR. HARRIS: Or evidence that has been submitted in  
12 other courts.

13 THE COURT: Evidence that has been submitted in other  
14 courts is not necessarily admissible in this court. Sometimes  
15 judgments are preclusive in this court, but evidence is not  
16 necessarily admissible in this court. 11:58:27

17 There are rules of civil procedure, there are rules of  
18 evidence, and those govern what is admissible in this court.  
19 And simply because something was admitted in another court in  
20 another case does not make it admissible in this case. 11:58:41

21 That doesn't prevent you from being aware of it, and  
22 as long as you're being sued by AF Holdings, from requiring  
23 them to disclose it to you in a way that will be admissible in  
24 this court, and -- but you have to follow the rules.

25 So one of the things that you might want to consider, 11:59:00

1 you might even confer with Mr. Ticen about an appropriate  
2 attorney for you to hire if you wish to pursue this case. It  
3 will be beneficial to you. It's also expensive, I understand  
4 that.

5 But you need to understand, and please do so, and 11:59:13  
6 we'll talk about your civility in a second, I understand that  
7 there's a common Internet phrase calling people "trolls" that  
8 do what you believe AF Holdings is doing. But as I think you  
9 understand, I'm not going to let you call AF Holdings and I'm  
10 not going to let you call Mr. Goodhue trolls in this court. 11:59:33  
11 And nor am I going to let you address me in a tone that isn't  
12 respectful.

13 Now, I realize that you may think that's egotistical  
14 and unfair, and maybe it is. But I do promise you that I'm  
15 going to try to be as fair to you as I can be, and I'm also 11:59:45  
16 going to require that -- and I'm going to try to be as fair to  
17 AF Holdings as I can be, but I'm going to require that we deal  
18 in these proceedings in a civil manner.

19 Do you understand what I'm saying?

20 MR. HARRIS: Yeah, I'll -- I'll do my best. 12:00:00

21 THE COURT: I appreciate it. I realize that this is a  
22 matter that you feel strongly about. I suspect AF Holdings  
23 feels no less strongly.

24 Now, you indicated you wanted to address that, the  
25 issue of your civility, and I think you should be allowed to. 12:00:12

1 MR. HARRIS: I'm going to hold off on it, Your Honor.  
2 Because I can make my point as it stands now, as the case  
3 stands now. After the -- the initial claim has been settled  
4 and -- and I feel I can address it.

5 As far as getting an attorney, I would -- I would 12:00:37  
6 really like to have one in this part of the -- I will have one  
7 when it comes to the counterclaim, I will have an attorney.  
8 I'm sure I'd able to find one --

9 THE COURT: All right.

10 MR. HARRIS: -- that will work on a contingency -- 12:00:52

11 THE COURT: Well --

12 MR. HARRIS: -- you know.

13 THE COURT: -- my advice would be, and I don't know if  
14 he's willing to talk to you, but Mr. Ticen has indicated in  
15 other pleadings that he's had dealings with Mr. Goodhue in 12:01:01  
16 other cases. So I'm not recommending Mr. Ticen to you  
17 necessarily, but I suspect that he's someone who might have an  
18 idea, if he's willing to talk to you, that could give you the  
19 realities of a lawyer and what this case is about, if you  
20 haven't understood what I've said, so you can evaluate all 12:01:18  
21 that.

22 But I would tell you, just because an attorney is  
23 familiar with the rules and how things go here, it could be  
24 beneficial to you. That doesn't mean that if you can't hire an  
25 attorney that I won't listen to you, because I will. And I'll 12:01:31



1 give you a chance to be heard and participate but you have to  
2 follow the rules. And if you don't follow the rules, then you  
3 suffer the consequences.

4 Do you understand what I'm saying?

5 MR. HARRIS: Yes, there was -- there was one point in 12:01:44  
6 these -- in all the motions that I -- I did mention that I was  
7 not guilty of this charge, and that -- that motion had been  
8 struck.

9 THE COURT: Well --

10 MR. HARRIS: I mean, the full -- the whole motion for 12:01:54  
11 the lack of civility. Okay. There's plenty of motions out  
12 there that haven't been filed yet, and --

13 THE COURT: That's all right. You have --

14 MR. HARRIS: I'll work on that.

15 THE COURT: -- been treated by me throughout as if -- 12:02:06  
16 with the presumption that you're not yet guilty, because  
17 AF Holdings has the burden of proving their case, as you will  
18 have the burden of proving any counterclaims. They haven't yet  
19 proved their case. And so I'm presuming that, you know, I'm  
20 presuming, until they demonstrate otherwise, that you're not 12:02:23  
21 responsible.

22 MR. HARRIS: I -- I don't have the computer that I had  
23 in the -- the middle of 2011.

24 THE COURT: Well --

25 MR. HARRIS: And -- you know, I wish I did. 12:02:39

1 THE COURT: Well --

2 MR. HARRIS: It crashed on me. It was a  
3 compound crash.

4 THE COURT: You know, that's a matter --

5 MR. HARRIS: Everything went --

12:02:47

6 THE COURT: -- that's going to be the -- probably the  
7 topic of discovery if this case goes forward, and perhaps  
8 requests by AF Holdings to draw adverse inferences and other  
9 things that I'll consider at the time.

10 But I'll tell you what's going to happen next. I did  
11 notice in the file that you have filed your initial disclosure  
12 statement.

12:03:05

13 MR. HARRIS: Yes, sir.

14 THE COURT: And I believe -- have you answered the  
15 complaint?

12:03:13

16 MR. HARRIS: Have I answered the complaint? Yes.  
17 Yes, sir.

18 THE COURT: All right. So what's going to happen now  
19 is we're going to set a discovery conference.

20 Have you cooperated with Mr. Goodhue in filing the --

12:03:22

21 Mr. Goodhue, we don't have a discovery schedule here,  
22 do we?

23 MR. GOODHUE: Your Honor, there was a case management  
24 order issued. It did not include the participation of  
25 Mr. Harris.

12:03:40

1 THE COURT: I recall that now.

2 Mr. Harris, you didn't participate and so I entered  
3 the order as Mr. Goodhue requested. That has time limits in it  
4 in which you conduct what I have referred to as discovery.

5 Discovery is described in the Federal Rules of Civil 12:03:53  
6 Procedure. You can obtain those either on this Court's website  
7 as well as the local rules that supplement those rules, or you  
8 can find them at your local library. But those describe what  
9 I've told you about depositions, about written questions, about  
10 document production requests and other requests. 12:04:11

11 Mr. Goodhue then is entitled to file them against you,  
12 you're entitled to file them against him, during the period set  
13 forth in the complaint -- or in the case management order, but  
14 you're not allowed to do those after the case management order  
15 expires. 12:04:26

16 MR. HARRIS: Do you know offhand when that expires?

17 THE COURT: I don't, but it's on the case docket and I  
18 filed the pleading. If you wish, I can run off a copy of the  
19 case management order and --

20 MR. HARRIS: I -- 12:04:36

21 THE COURT: -- have it sent out to you.

22 MR. HARRIS: I've got a cop -- I don't have it with  
23 me, but --

24 THE COURT: If you have a copy you need to read it  
25 carefully, because it is an order of this Court, and I do try 12:04:42

1 my very best, and most often succeed, in following my own  
2 orders.

3 All right? Is there anything further that you wish to  
4 take up at this time?

5 MR. HARRIS: No. 12:04:56

6 THE COURT: Mr. Goodhue, anything further that you  
7 wish to take up at this time?

8 MR. GOODHUE: No. Thank you, Your Honor.

9 THE COURT: All right. Mr. Ticen, anything else?

10 MR. TICEN: No, Your Honor. 12:05:04

11 THE COURT: All right. I thank all three of you.  
12 Have a nice weekend.

13 MR. GOODHUE: Oh, excuse me, Your Honor. You had  
14 mentioned a shark 49?

15 THE COURT: Yes. 12:05:13

16 MR. GOODHUE: Is that what it was called, shark 49?

17 THE COURT: It's just a screen name that came up in  
18 one of the mo -- one of the pleadings filed by Mr. Harris.

19 MR. GOODHUE: Okay.

20 THE COURT: Essentially, the pleading in which  
21 Mr. Harris suggested that Mr. Steele was uploading the --

22 MR. GOODHUE: The honeypot.

23 THE COURT: I'm sorry?

24 MR. GOODHUE: The honeypot.

25 THE COURT: Right. 12:05:34

1 (Off-the-record discussion between the Court and the  
2 clerk.)

3 THE COURT: I'm just going to put on the record,  
4 unless you have an objection, Mr. Goodhue, I'm going to print  
5 off a copy of the scheduling order and have a copy given to  
6 Mr. Harris right now. 12:05:44

7 MR. GOODHUE: That's fine, or I can provide him one as  
8 well. Whatever the Court wants to do I'm --

9 THE COURT: We'll just provide him a copy now, and  
10 that way, the record will reflect that he received a copy of  
11 the scheduling order. 12:05:54

12 MR. GOODHUE: Okay. Thank you, Your Honor.

13 THE COURT: Thank you all.

14 MR. TICEN: Thank you.

15 (Proceedings concluded at 12:06 p.m.)  
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C E R T I F I C A T E

I, GARY MOLL, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 25th day of November, 2013.

s/Gary Moll